IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DAVID DAVIS,	)
	) C.A. No. K10A-06-012 JTV
Claimant Below-Appellant,	)
	)
v.	)
	)
MARK IV TRANSPORTATION,	)
	)
Employer Below-Appellee.	)

Submitted: March 25, 2011
Decided: June 30, 2011

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Appellant.

Kimberly A. Harrison, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of the Appellant's
Appeal From Decision of The Industrial Accident Board
AFFIRMED

VAUGHN, President Judge

Davis v. Mark IV Transportation
C.A. No. K10A-06-012 JTV
June 30, 2011

ORDER

Upon consideration of the briefs of both parties and the record of the case, it appears that:

1. This is an appeal from a decision of the Industrial Accident Board. Prior to the decision in question, the claimant, David Davis, had been receiving total disability benefits. In the decision being appealed, the Board concluded that the claimant was no longer totally disabled. It did, however, find that he remained partially disabled. On appeal the claimant contends that the Board's decision must be reversed and remanded because it rests upon findings which are not based on facts in the record.

2. The scope of review for an appeal from the IAB is limited to an examination of the record for errors of law, and a determination of whether substantial evidence is present to support the IAB's findings of fact and conclusions of law.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] When the issue raised on appeal is exclusively a question of the proper application of the law, the review by the court is *de novo*.[3]

3. I will set forth the facts only as needed to address the issue raised on appeal. The claimant suffered a low back, left leg, and foot injury in an industrial

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[1] *Porter v. Insignia Mgmt. Group*, 2003 WL 22453316, at *3 (Del. Super. 2003) (citing *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993)).

[2] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

[3] *Porter*, 2003 WL at *3.

accident. He was determined to be totally disabled and received total disability benefits. The employer initiated the present proceeding by filing a petition to terminate benefits. The witnesses pertinent to this appeal on the claimant's side were the claimant, his doctor, Dr. Katz, an orthopedic surgeon, and his psychiatrist, Dr. Villabona. The witnesses pertinent on the employer's side were Dr. Stephens, an orthopedic surgeon, Dr. Gladys Fenichel, a psychiatrist, and Barbara Stevenson, a labor market expert. Ms. Stevenson had prepared a labor market survey.

4. Dr. Katz's opinion was that the claimant was capable of working in a sedentary to light duty position for two hours a day, three days a week. Dr. Stephens' opinion was that the claimant was capable of working four hours per day, five days per week, with restrictions that he do no lifting of more than ten pounds and that he be able to change positions during work activities. The Board accepted Dr. Stephens' opinions over the opinions of Dr. Katz. Its reasons for doing so are adequately explained in its decision.

5. The appellant's claim of legal error arises from the following paragraph from the Board's decision:

> The Board finds that the restrictions set forth by Dr. Stephens are appropriate for Claimant. Claimant testified that he drives his car and the RV for up to an hour at a time, he goes grocery shopping and pushes the shopping cart around the store, and he babysits his grandsons and even puts the baby into the crib for his nap. If he is able to lift and carry his infant grandson, then he is capable of lifting and carrying up to ten pounds occasionally at work within his restrictions. The activities that Claimant would do at a job such as the ones listed on the labor market survey are not any more strenuous than the activities that

he does at home and with his grandchildren.

6. The claimant contends that the evidence does not establish that he "drives his. . . RV for up to an hour at a time," which suggests that he may do so often, but rather that he drives his RV on an occasional weekend for an hour. He further contends that he testified only that he helps his daughter with his grandchild, and explained this by testifying that he goes to her house and "sits on the sofa and kind of puts the child to sleep." He contends that there was no evidence whatsoever that he babysits his grandchild or that he lifts or carries the child or puts the child in a crib. Since there was no evidence that he lifts or carries his grandchild or puts the grandchild in a crib, the claimant contends, the Board committed error by finding that he was able to lift and carry his grandchild and was therefore able to lift and carry up to ten pounds occasionally, and that the activities in relevant jobs are not more strenuous than activities he does at home and with his grandchild.

7. The employer contends that a review of the record shows that the IAB's decision was based on evidence presented at the hearing and the inferences that can be logically drawn from that evidence. It contends that a reasonable person would infer from the claimant's testimony that he engaged in activities as found by the Board. It contends that the Board was reasonable in inferring that putting a child to sleep involves lifting the child and placing him or her in a bed. The employer further contends that even if the findings in question are factually incorrect, there is sufficient competent other evidence to support the decision. It contends that the Board addressed additional evidence and did not rely solely on the alleged misstatements.

8. The transcript of the claimant's testimony shows that what he actually

said concerning his RV was that he drove his RV on occasional weekends. The deposition testimony of Dr. Stephens indicates that the claimant told him that he drove a vehicle and estimated his driving limit at about an hour. Based upon this evidence, I conclude that the Board's finding that he drove his car and RV for up to an hour at a time is supported by substantial evidence.

9. The transcript of the claimant's testimony shows that what he actually said concerning his grandchild was "Help my daughter with my last grandchild that was born and when I say help I just go up and sit on the sofa and kind of put the child to sleep." Nothing more concerning the grandchild was said. It is true, as the claimant contends, that he did not say that he babysits with the grandchild, or puts the grandchild in a crib, or lifts and carries the grandchild.

10. I agree with the claimant that the Board's findings that the claimant babysits with his grandchild, puts his grandchild in a crib, and lifts and carries his grandchild exceed what can reasonably be inferred from the claimant's aforementioned brief comment about his grandchild. Accordingly, I find that the Board's findings concerning the grandchild are not supported by substantial evidence.

11. As mentioned, the claimant's contention is that the Board based the complained of findings and its decision on facts not in evidence. In its response, the employer cites three cases in which the Board relied upon or took into account facts which, although real facts, or at least real perceptions, were not part of the record.[4] All three involved Board members taking into account their own observations and

[4] *Freebairn v. Voshell Builders*, 2006 WL 2906142 (Del. Super. Sept. 7, 2006); *Wyrick v. Leaseway Auto Carriers*, 2002 WL 537591 (Del. Super. 2002); *Trader v. L.D. Caulk*, 1992 WL 148094 (Del. Super. 1992).

perceptions of a claimant, which were revealed in the Board's decision, but not mentioned or made a part of the record of the hearing itself. I find this case to be somewhat different than those cases. Here, my conclusion is that there is not evidence, inside or outside the record, or at least not substantial evidence, that the claimant lifted and carried his grandchild and put the grandchild in a crib. From that conclusion, I further conclude that the Board simply drew inferences about the claimant's activities with his grandchild which are not supported by his testimony, and are, therefore, factual findings made in error.

12. I also conclude, however, that the Board's error concerning the claimant's activities with his grandchild is harmless. Dr. Stephens' opinions provide substantial evidence to support the Board's findings and conclusions concerning the claimant's ability to work, and the restrictions on that work, including the restriction that lifting be limited to 10 pounds. Dr. Stephens testified that the claimant was fit for sedentary levels of work activity of four hours per day with no lifting more than ten pounds and the ability to change positions during work activities, as well as doing work involving dexterity tasks with both upper extremities. His opinions were based upon his review of the claimant's medical records, a functional capacity exam, his own examination of the claimant, and the information he obtained from the claimant. The claimant informed Dr. Stephens that he did some supermarket shopping and pushed his grocery cart. He also informed Dr. Stephens that he was able to do some limited grass-cutting on his riding mower. He did not mention his grandchildren to Dr. Stephens, and therefore any understandings or misunderstandings regarding his activities with his grandchildren did not play, it would appear, a role in Dr. Stephens'

opinions.

13. After considering the Board's decision, I am satisfied that the Board would have rendered the same decision it did based upon Dr. Stephens' testimony, with or without its comments concerning the claimant's activities with his grandchild. I am satisfied that the comments concerning the grandchild were included to buttress or support a decision it was reaching based upon its evaluation of Dr. Stephens' testimony. Even if the claimant's testimony at the hearing concerning his activities with his grandchild, and his driving of his RV for that matter, are removed from consideration, substantial evidence exists to support the Board's decision. A Board's decision may be upheld if it rests upon substantial evidence after objectionable evidence is removed from consideration.[5]

14. For the foregoing reasons, the Board's decision is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[5] *Wyrick*, 2006 WL at *3; *see also Med. Ctr. of Del. v. Quinn*, 1994 WL 380990 (Del. Super. 1994).