

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

DAVID MOSLEY,

Appellant,

v.

GATEWAY HOUSE INC.,

Appellee.

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C.A. No. N10A-08-012 (MJB)

Submitted: June 17, 2011
Decided: September 13, 2011
Upon Consideration of Appellant's Appeal

REVERSED AND REMANDED.

OPINION AND ORDER

Lawrance Spiller Kimmel, Esquire, Newark, Delaware, Attorney for Appellant.

H. Garrett Baker, Esquire, Wilmington, Delaware, Attorney for Appellee.

BRADY, J.

INTRODUCTION

This is an appeal from the Industrial Accident Board's ("IAB" or "Board") decision to deny David Mosley ("Appellant") compensation after he suffered complete disability as a result of a motor vehicle accident. During the IAB hearing, several individuals testified regarding Appellant's employment, discharge of duties, and credibility. On August 11, 2010, the IAB denied Appellant's claim upon concluding that he suffered his injuries while outside the course and scope of his employment at Gateway House, Inc. ("Gateway House" or "Appellee"). Thereafter, Appellant appealed the IAB's decision to this Court.

There are two issues before the Court: (1) whether the IAB committed an abuse of discretion, or legal error, in admitting certain evidence, and (2) whether the IAB's conclusion that Appellant was not within the course and scope of his employment when the motor vehicle accident occurred is supported by substantial evidence.

Upon review of the record, the Court finds that legal error was committed when the Board admitted, and considered, highly prejudicial evidence of little probative value in determining whether Appellant was in the course and scope of employment at the time of his accident. Therefore, it is unnecessary to determine whether the IAB's decision was supported by substantial evidence. As a result, the IAB's decision is **REVERSED AND REMANDED**.

FACTS & PROCEDURAL HISTORY

On July 3, 2009, Appellant was involved in a motor vehicle accident after leaving Ginn's Tavern and Restaurant ("Ginn's"). Appellant was severely injured. Prior to his accident, Appellant served as the Executive Director of Gateway House, an organization that provided

services for homeless men. Appellant was responsible for supervising all staff members, and the day-to-day operations of the agency.

Disabled, and unable to work, Appellant filed a Petition to Determine Compensation Due with the IAB on November 13, 2009. On March 17, 2010, the IAB held a hearing to determine whether the accident was a compensable work injury.¹ The parties have stipulated that the issue before the IAB was whether Appellant was outside the scope of his employment when he was injured.

According to Appellant, on July 3, 2009, Lillian Walker, whom he hired to perform various tasks, met him at Ginn's to discuss, among other things, a new grant that had been awarded to the Gateway House.² Appellee presented evidence to the IAB to support its position that Ms. Walker was not an employee of Gateway House, that the meeting was outside the scope of Appellant's employment, and to assail Appellant's and Ms. Walker's credibility.

Appellant testified that he hired Lillian Walker in February 2008 to write correspondence and handle case management. Walker testified that she filled out an application, however, she never received a letter of engagement confirming her hire. Appellant also acknowledged that there was no official documentation of Ms. Walker's employment. Ms Walker worked for Appellant for a period of 16 months, approximately 15-22 hours per week until the accident occurred. She considered herself an employee of Gateway House and presented a W-2 for her 2008 employment as well as pay stubs from various months. She discussed her duties, including preparing correspondence related to grants, writing notice letters to the residents of Gateway House, and entering data in the agency's Homeless Management Information System ("HMIS"). In entering this data, Ms. Walker testified that she logged into the system regularly, however,

¹ The second day of this hearing was held April 13, 2010.

² Ms. Walker was unable to testify about the specifics of the grant.

occasionally her login did not work, and she used a co-worker's name instead.³ Ms. Walker testified that she usually performed these duties at home, although she also occasionally worked at the Gateway House office. She initially went to the office to deliver/receive work and meet with Appellant to discuss her assignments. In-person meetings were necessary as there were only hard copies of some documents. Eventually, Ms. Walker began to meet Appellant at a more mutually convenient location to exchange work, Ginn's.

Ronald Beard, a director of field research operations at the University of Delaware, and consultant for Gateway House, testified that he and Appellant discussed personnel, and that he saw Ms. Walker in the offices of Gateway House often prior to the accident.

Lisa Murphy, the claims adjuster for Gateway House's insurance carrier, Skidbold Associates, testified that she recalled an interview with Appellant by telephone on October 2, 2009, regarding his worker's compensation claim. Appellant informed Ms. Murphy that he went to Ginn's on July 3, 2009, for the sole purpose of meeting Ms. Walker to discuss work. Appellant described Ms. Walker as a caseworker that drafted correspondence, performed grant-related work, and prepared reports. Appellant further explained to Ms. Murphy that he and Ms. Walker met several times to exchange work outside Gateway House offices. He also informed Ms. Murphy that his wallet was stolen at the scene of the accident.

Regina Cooper, the bookkeeper for Gateway House who was responsible for the budget and payroll, testified that she was aware of Ms. Walker's employment with Gateway House and confirmed Ms. Walker's receipt of pay checks on a regular basis from Gateway House. Ms. Cooper was also responsible for providing a monthly summary of the agency's finances, which included Ms. Walker as a paid employee. Ms. Cooper further stated that Gateway's Board of

³ The record indicates that Ms. Walker logged into her own name on three dates in February 2008. She explained this by stating she usually logged in under her co-worker Yvonne Dennis's name.

Directors should have been aware that Ms. Walker was an employee as they received notice every month in these summaries.

Gloria Johnson, a former member of the Gateway House Board of Directors, testified that she received and reviewed these monthly financial summaries submitted by Ms. Cooper, but she paid no attention to specific names of employees. She confirmed that Appellant had the authority to hire and fire employees without approval from the Board, and that Appellant was responsible for determining the duties of these employees. Ms. Johnson further stated that she only frequented Gateway House offices, on average, once a week. Although Appellant testified that Ms. Johnson suggested Ms. Walker complete her work off-site due to unexplained tensions between staff-members, Ms. Johnson denied giving such an instruction or ever having met Ms. Walker.

Jeffrey Baker, a digital forensics analyst at O'Rourke Investigative Associates, testified that he obtained a copy of the hard drive from one of the Gateway House computers on January 21, 2010. He was unable to identify a user profile or login for Ms. Walker. However, Mr. Baker also testified that he did not examine the hard drive for evidence of remote access. Appellant testified that Ms. Walker's work product was difficult to identify because he signed all letters she drafted and she only contributed to portions of grant applications. Appellant further testified that Ms. Walker's work product was average overall, acknowledging several errors on the various letters she wrote.

Ulysses R. "Bob" Ginn, Jr. ("Mr. Ginn"), the owner of Ginn's, recalled seeing Appellant in the back of the restaurant on July 3, 2009. However, Mr. Ginn spent the majority of his time that night outside of the dining area, cooking. Moreover, Mr. Ginn stated he never listens to his customers' conversations in the restaurant. Mr. Ginn further recalled seeing Appellant with

several different individuals; including a young woman Appellant spoke to as he left Ginn's for the evening. Mr. Ginn then witnessed the motor vehicle accident and called 911. Mr. Ginn testified that he found Appellant's wallet at the scene of the accident, which he promptly gave to the authorities on the scene.

Eugene Rutter, a current Board member of Gateway House, testified that he learned of the accident involving Appellant on July 5, 2009. The following day, Mr. Rutter asked Sherry Johnson to stand as the acting Executive Director of Gateway House until Appellant was able to return to work. At this time, the Board of Directors began examining Gateway House operations more closely, at which time concern was raised over four part-time employees including Ms. Walker. On September 11, 2009, the Board met with Appellant to discuss its concerns regarding these employees. There is a dispute of fact whether Appellant satisfactorily explained the role that the four staff members played in Gateway House's operations.⁴ Mr. Rutter immediately discontinued paychecks to these various part-time employees. None expressed concern after the paychecks were discontinued. Ms. Walker testified that she stopped working at Gateway House because she was too distraught by Appellant's accident to continue.

Mr. Rutter then testified regarding various discrepancies in the Gateway House accounts. The Board of Directors questioned a roof repair bill for which a contractor was twice paid for the same work. The Delaware State Housing Authority committed funds to Gateway House to pay for these roofing repairs. Mr. Rutter was unable to explain why Appellant paid the roofer with reserve funds in the Gateway House accounts rather than the appropriated money from the housing authority. Mr. Rutter claimed he assumed the roofer had completed the repair job and had approved both payments of money. Further, the Board of Directors expressed concern over a

⁴ In the Reply Brief, Opposing counsel claims he was unable to satisfactorily explain same.

\$1400 debit charge on Appellant's Gateway House account three weeks after the accident. No purchase was identified for this charge. Appellant's significant other, Ms. Naylor, called to inform Mr. Rutter that the card had been canceled given Appellant's claim that the wallet was stolen. However, the charge was incurred after this phone call. The bank refunded the money.

The Gateway House escrow account and residence security deposit accounts were discovered to have missing funds. Mr. Rutter testified that he knew Appellant had access to those accounts, but he was unsure if anyone else might have access. As to each of these concerns, Mr. Rutter testified that no criminal charges were pursued.

In response to the concerns raised by Mr. Rutter, Appellant testified that he paid a portion of the money to the roofer from a different account, as there was a delay with the approved funding from the housing authority. He then properly returned the money upon receiving the approved funding. Furthermore, he had no knowledge of the \$1400 debit charge on his Gateway House account. Appellant testified that his wallet was stolen at the scene of the accident, and moreover, he was in the hospital recovering from amputee surgery at the time of the charge. Appellant also produced an account statement indicating that Appellant deposited money into various Gateway House accounts. Appellant insisted in his testimony that he was innocent of stealing money and that he was never charged with a crime.

Sherry Johnson, the acting Executive Director of Gateway House, testified regarding the financial concerns of Gateway House. Ms. Johnson alleged that Appellant was improperly writing checks from the Gateway House accounts. She further alleged that Appellant improperly funded cellular phones for both Ms. Walker and Ms. Naylor. She went on to claim that the deposit account, currently containing less than \$100 dollars, should contain substantially more money.

Ms. Johnson also testified regarding Ms. Walker's employment with Gateway House. Ms. Johnson did not regularly see Ms. Walker in the office; however, she regularly left work at 3:30 PM, before the time Ms. Walker usually arrived. Ms. Johnson was introduced to Ms. Walker, and after reviewing Ms. Walker's personnel file, was able to confirm W-4 and I-9 documents were in the file. However, there was no application or performance reviews found in Ms. Walker's file. Ms. Johnson explained that performance reviews were not routinely performed at Gateway House, nor are employees required to fill out applications. Ms. Johnson personally stamped Ms. Walker's paychecks, and, as the administrator of HMIS, was able to verify that Ms. Walker logged into the system successfully on multiple occasions. Ms. Johnson never worked directly with Ms. Walker and was unable to identify the work Ms. Walker performed for Gateway House. Ms. Johnson acknowledged that some of her family members worked for Gateway House and that this was a violation of the anti-nepotism policy.

Ms. Johnson, Ms. Walker, and Appellant attended a three day trip to California as Gateway House employees for leadership training. Ms. Johnson testified that she only saw Ms. Walker once at the conference sessions. She further stated that a Board member contacted her expressing concern that Appellant never received approval from the Board to attend the conference. Ms. Walker testified that she attended only one session during the three day conference and spent the rest of her time sightseeing.

The IAB entered a decision on August 11, 2010, ruling that Appellant was not within the course and scope of his employment at Gateway House when he suffered his injuries. Appellant has now appealed to this Court alleging that the IAB committed a reversible error by admitting prejudicial evidence of no probative value in the Board hearing, and further, that the IAB's decision was not supported by substantial evidence.

PARTIES' CONTENTIONS

Appellant contends that the Board admitted highly prejudicial evidence with no relevancy to the issue before the IAB. Specifically, Appellant argues that the testimony regarding the conference that Appellant and Lillian Walker attended in California as Gateway House employees, testimony related to room assignments, and how many sessions Ms. Walker attended while at the conference, implied an intimate relationship between Ms. Walker and Appellant. Appellant contends that there is no proof of an intimate relationship, and the existence of such is irrelevant to the scope of the Board's determination of whether Appellant was in the course and scope of employment when he was injured on July 3, 2009.

Further, Appellant contends that the IAB erred in admitting testimony that Appellant hired Donna Naylor (described as Appellant's "significant other"), in violation of Gateway House's anti-nepotism policy. Appellant claims these facts have no bearing on the issue presented to the IAB. Appellant alleges that this testimony is merely an attack on his character.

Appellant also contends that testimony regarding allegations of misappropriation of funds is highly prejudicial and irrelevant to the issue of whether Appellant was in the course and scope of employment on July 3, 2009.

Moreover, Appellant contends that such prejudicial evidence influenced the IAB's decision in that it found the Appellant not credible as a result of this evidence. Appellant argues that although the evidentiary rules of IAB hearings are more relaxed than court proceedings, the IAB committed an abuse of discretion in allowing such testimony, and erroneously relied on that prejudicial evidence to reach a determination.

Finally, Appellant alleges that the IAB's ruling that the motor vehicle accident occurred outside the scope of his employment is not supported by substantial evidence. Appellant claims that the testimony demonstrates that meetings between Ms. Walker and Appellant were regularly held at Ginn's to discuss and exchange work due to Ginn's convenient location. Further, Appellant claims there is significant evidence that Ms. Walker was an employee for Gateway House including her application for employment, her pay stubs, a W-2 for her 2008 earnings from Gateway House, and W-4 and I-9 documents in her employment file. Testimony confirmed that Appellant had the authority to hire employees without Gateway House Board of Directors' approval and that the Board of Directors should have been aware of Ms. Walker's employment based on their review of the 2009 budget and the monthly summary of the agency's finances.

In response, Gateway House contends that the evidence submitted to the IAB was neither prejudicial nor irrelevant, rather, the evidence presented addressed the credibility of both Appellant and Ms. Walker. Gateway House asserts that the credibility of those two witnesses are central to the question of whether Appellant was in the course and scope of employment because they were the only two witnesses present at Ginn's on the date of the incident. Gateway House further argues that testimony regarding the trip to California, Ms. Walker and Appellant attended as employees is relevant in that it was originally introduced by Ms. Walker as further evidence of her status as a Gateway House employee. However, during cross-examination, Ms. Walker then conceded that her participation in the conference was minimal. Gateway House claims that this evidence is directly related to Ms. Walker's credibility. Gateway House argues that if Ms. Walker were an employee of Gateway House, she would have been expected to attend much more of the conference itself, and further, that if she was not an employee of Gateway House,

there is no explanation for her presence at the California Conference at Gateway House's expense.

Gateway House further contends that Ms. Walker's work product is relevant to the issue of whether Ms. Walker was an employee of Gateway House. Although Ms. Walker testified she worked 15-22 hours per week for Gateway House, she produced only thirty notice letters as her work product. Gateway House states that the Board of Directors did not find it credible that Ms. Walker produced so little work after such an extensive time of employment. Moreover, Gateway House questions the validity of these letters as genuine work products. The letters that Ms. Walker testified she wrote based on the July 3, 2009 meeting were addressed to residents that no longer resided at Gateway House at the time of the curfew violations cited in the letters. Gateway House contends this information is relevant when addressing the issue of whether Appellant was in the course and scope of his employment on July 3, 2009, when evidence suggests that the work products presented as a result of the meeting are not, in fact, genuine work products.

Gateway House also contends that the testimony regarding the employment of Ms. Donna Naylor was initiated by Appellant's own counsel and thus Appellant cannot contend the information was irrelevant to the proceedings. Ms. Naylor was named as an intended witness at the hearing for Appellant, although she did not attend. Furthermore, Gateway House argues this evidence is relevant in determining the employment status of Ms. Walker. Gateway House contends that Ms. Naylor and Ms. Walker were hired under similar circumstances and produced similarly minimal work product. Gateway House argues such information reflects on Appellant's credibility, particularly when there is a question as to whether Appellant abused his hiring authority. Gateway House further alleges that this evidence is relevant in gauging Appellant's

candor due to his assertion that Ms. Walker was hired with full knowledge and acceptance by the Board when conflicting testimony from Board members indicates otherwise.

Moreover, Gateway House claims that all evidence surrounding the financial concerns of the Board of Directors is relevant for the purposes of Appellant's credibility. Gateway House contends that it is impossible for a \$1400 debit charge to appear on a credit card previously reported stolen and then cancelled. Further, the depleted accounts were offered into evidence to show that Appellant's areas of responsibility as Executive Director were being neglected while in Appellant's care. Gateway House alleges that this indicates Appellant was not properly executing his duties, including the hire of part-time employees with no valuable work product. Similarly, the payment of the roofing repair job is also relevant in asserting that Appellant was improperly executing his duties. Rather than using money that was already reserved, Appellant utilized funds from other accounts. Gateway House contends that the Board allowed Appellant full opportunity to rebut this evidence during the hearing, thus it was properly admitted. All contested evidence relates directly to Ms. Walker and Appellant's credibility or to Appellant's performance of his duties while at Gateway House.

Finally, Gateway House argues that the Board possessed overwhelming evidence to conclude that Appellant was not within the course and scope of his employment when he was involved in a motor vehicle accident on July 3, 2009. Ms. Walker's lack of familiarity with personnel and policies at Gateway House, her minimal work product and the question of its genuineness all indicate she was not a bona fide employee. Furthermore, her inability to testify as to the specifics of the grant that was allegedly the topic of conversation on the evening of July 3, all reflect on whether Appellant did, in fact, go to Ginn's to discuss work. Finally, Gateway House contends that the Board's decision does not indicate it considered the contested evidence

in reaching its decision. If such substantial evidence aside from that which is contested exists to support the Board's conclusion, then the admission of the contested evidence is irrelevant.

LEGAL STANDARD

Pursuant to 29 Del. C §10142(a), any party against whom a case decision has been decided may appeal such decision to the Court. The Court must determine only whether the IAB's decision is supported by substantial competent evidence and whether its decision is free from legal error.⁵ When factual determinations are at issue, the Court shall take due account of the experience and specialized competence of the agency, and of the purposes under which the agency has acted.⁶ Abuse of discretion occurs when a tribunal has "exceeded the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."⁷

Moreover, absent fraud, the agency's decision will not be disturbed where there is substantial evidence to support its conclusions.⁸ Substantial evidence can be defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁹ Upon meeting those requirements, the Court must uphold the findings of the IAB.¹⁰

ANALYSIS

A. The Industrial Accident Board abused its discretion when it admitted and considered testimony argued to be highly prejudicial and irrelevant.

⁵ *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985).

⁶ 29 Del. C. §10142(d).

⁷ *Harper v. State*, 970 A.2d 199, 201 (Del. 2009)(citing *Culp v. State*, 766 A.2d 586, 489. (Del. 2001)).

⁸ *DiSabatino Bros., Inc. v. Wortman*, 453, A.2d 102, 105-06 (Del. 1982).

⁹ *Breeding v. Contractors-One-Inc.*, Del. Supr., 549 A.2d 1102, 1104 (1988).

¹⁰ *DiSabatino Bros., Inc. v. Wortman*, 453, A.2d 102, 105-06 (Del. 1982).

Pursuant to D.R.E. 403, all relevant evidence is admissible unless its probative value is “substantially outweighed” by its potential to produce prejudice.¹¹ Although IAB proceedings have latitude in following the rules of evidence, the object of these rules is to admit that which is pertinent to the issue at hand and to exclude all that is irrelevant or prejudicial.¹²

The parties in this case stipulated that the only issue before the Board was whether Appellant was within the course and scope of his employment when he suffered injuries from a motor vehicle accident on July 3, 2009.

The Court disagrees with Appellant that testimony related to the California trip with Ms. Walker, or evidence related to any personal relationship between the two is irrelevant and highly prejudicial. That evidence is highly probative of whether or not the meeting on July 3, 2009, was personal in nature or within the scope of Appellant’s employment. Similarly, if, and how often, Ms. Walker worked is relevant and probative.

However, the IAB was also presented evidence regarding allegations that Appellant was not a good employee and may have mismanaged funds. This evidence is highly prejudicial and has little, if any, bearing the issue in this case. In *Dorsey*, the court reversed and remanded the IAB’s decision, finding that evidence the employer introduced regarding the claimant’s alleged illegal activities was highly prejudicial and irrelevant to the issue before the hearing.

The financial concerns of Mr. Rutter and Gateway House’s Board of Directors are also irrelevant and highly prejudicial. Regardless of Appellant’s duties, allegations of misappropriation of funds have no bearing on whether Appellant was within the course and scope of his employment on July 3, 2009. Such allegations merely distract the Board from the central issue of the hearing and have no probative value beyond questioning the veracity of

¹¹ D.R.E. 403.

¹² *Dorsey v. Chrysler Motors Corp.*, 1993 WL 189455 *3 (Del. Super. Ct. Apr. 19, 1993).

Appellant. While the credibility of a witness is paramount to the issues before the IAB, presenting testimony merely to impeach one's credibility through references to previous conduct is too collateral a method to be sustained.¹³

Moreover, the Court held in *Dorsey* that, even in a record consisting of over two hundred pages, any cite to prejudicial evidence, no matter how slight, in the IAB's decision, is part of the record considered by the Board in its decision.¹⁴ In this matter, the IAB listed the evidence this Court finds to be both highly prejudicial and irrelevant in the Statement of Facts. Clearly, the Board considered the prejudicial evidence admitted into the record in determining its decision.

The IAB abused its discretion in admitting and considering such prejudicial and irrelevant evidence in determining Appellant's case. Thus, the decision must be REVERSED and REMANDED.

CONCLUSION

The IAB committed legal error in admitting and considering highly prejudicial and irrelevant evidence into the Board hearing. As such the Industrial Accident Board ruling is **REVERSED AND REMANDED**. Because the consideration of this information requires reversal, the Court does not address whether the decision was supported by substantial evidence.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

¹³ See *Williams v. Warren Brothers Construction Company*, 412 A.2d 334 (Del. 1980).

¹⁴ *Dorsey v. Chrysler Motors Corp.*, 1993 WL 189455 *3 (Del. Super. Ct. Apr. 19, 1993).