IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KENNY HOFFECKER,	)	
	)	
Claimant Below- Appellant,	)	
	)	C.A. No. N10A-08-010 MMJ
v.	)	
	)	
LEXUS OF WILMINGTON,	)	
	)	
Employer Below- Appellee.	)	

Submitted: June 27, 2011
Decided: September 14, 2011

On Appeal from a Decision of the Industrial Accident Board

AFFIRMED

MEMORANDUM OPINION

Walt F. Schmttinger, Esquire, Kristi N. Vitola, Esquire, Schmittinger and Rodriguez, P.A., Dover, Delaware, Attorneys for Claimant Below-Appellant

Andrew J. Carmine, Esquire, Elzufon Austin Reardon Tarlov & Mondell, Wilmington, Delaware, Attorneys for Employer Below-Appellee

JOHNSTON, J.

Kenny Hoffecker ("Claimant") has appealed the July 26, 2010 decision of the Industrial Accident Board ("Board"). After a March 8, 2010 hearing, the Board denied Claimant's Petition to Determine Compensation Due. The Board found that Claimant did not establish by a preponderance of the evidence that his injury was caused by his employment at Lexus of Wilmington ("Lexus").

Claimant contends that the Board's decision was not supported by substantial evidence.

FACTUAL AND PROCEDURAL CONTEXT

Claimant is forty-six years old. He worked for Lexus for sixteen years as a mechanic. For the eleven years prior to that, Claimant worked as a mechanic for Newark Toyota. Claimant worked ten to twelve hours a day, four days a week. As a mechanic, Claimant explained that he often bends over and lifts thirty to seventy pounds at a time. Claimant also enjoys working on cars in his spare time. Claimant experiences muscle pain when he works on cars.

Claimant first noticed low back pain in 2003. In 2004, for roughly six weeks, Dr. Ali Kalamchi, and orthopedic surgeon, treated Claimant. Claimant did not report to Dr. Kalamchi—and Dr. Kalamchi did not find—that his low back pain was causally related to his employment at Lexus.

From 2005 to 2008, Claimant did not seek additional medical treatment for his low back pain.

Claimant testified that April 27, 2009 was the first day he missed work due to low back pain. Claimant did not inform Lexus about his low back pain. Claimant was aware of his duty to report his injury to Lexus.

A May 13, 2009 MRI revealed multiple abnormalities in Claimant's spine. On May 27, 2009, Claimant treated with Dr. Downing, a pain management specialist. Claimant did not complain of a specific trauma, but reported that he had experienced ongoing pain. Claimant did not inform Dr. Downing that his low back pain was due to his employment at Lexus. On July 9, 2009, Dr. Downing completed a short-term disability income form on behalf of Claimant. Dr. Downing wrote that Claimant's low back injury is not related to his employment at Lexus. Claimant has not worked since July 2009.

On November 18, 2009, Claimant complained to Dr. Downing of increasing low back and radicular pain. At this time, Claimant had not worked for approximately seven months. Dr. Downing believed that Claimant's condition improved since May 2009.

Dr. Downing testified that Claimant's low back condition is a result of his employment at Lexus. Dr. Downing explained that it was likely caused

by years of bending over and performing heavy lifting. Dr. Downing testified that Claimant is too young to experience degeneration to the extent present in the May 13, 2009 MRI. Nonetheless, Dr. Downing acknowledged the possibility that Claimant's condition could be chronic and unrelated to his employment at Lexus.

James Ritter, the director of parts and service at Lexus, testified that eight to ten years ago, Claimant complained of low back pain as a result of installing a kitchen floor. Ritter explained that Claimant never attributed his low back pain to his work at Lexus. Ritter testified that in July 2009, Claimant stated that he no longer wanted to be employed by Lexus because he hated working there.

Dr. Bruce Grossinger, a neurologist and pain management specialist, examined Claimant on February 18, 2010 and reviewed Claimant's medical records. Dr. Grossinger noted that when Claimant treated with Dr. Kalamchi, he did not attribute his low back pain to his employment at Lexus. After examination, Dr. Grossinger found that Claimant's neurological, musculoskeletal, and orthopedic functions were normal. Dr. Grossinger also noted that Dr. Downing did not perform an EMG to support his finding that Claimant suffers from lumbar radiculopathy. Dr. Grossinger concluded that Claimant has a degenerative condition in his spine, opining that Claimant's

low back condition is representative of a forty-six year old person who performed labor for twenty-seven years.

The Board's Decision

The Board delivered its decision on July 26, 2010. The Board found Dr. Downing's testimony unpersuasive. The Board emphasized that Dr. Downing did not relate Claimant's lumbar condition to his employment at Lexus. Dr. Downing acknowledged that Claimant's condition could be chronic and unrelated to his employment at Lexus. The Board also noted that Dr. Downing was unfamiliar with Claimant's non-work-related activities, which could have significantly contributed to Claimant's lumbar condition.

The Board also found Claimant's testimony unpersuasive. Claimant did not report to Lexus that he was experiencing low back pain and did not report to Dr. Downing that his low back pain was a result of his employment at Lexus. Further, the Board believed that the timing of Claimant's lumbar condition was "curious." In July 2009, Claimant stated that he no longer wanted to be employed by Lexus because he hated working there. Finally, in November 2009, Claimant reported to Dr. Downing that his condition had worsened after not working for seven months. The Board believed that Claimant's condition should have improved after time off.

For these reasons, the Board concluded that Claimant failed to establish by a preponderance of the evidence that his lumbar condition is causally related to his employment at Lexus.

STANDARD OF REVIEW

On appeal from the Industrial Accident Board, the Superior Court must determine if the Board's factual findings are supported by substantial evidence in the record.[1] "Substantial evidence" is less than a preponderance of the evidence but is more than a "mere scintilla."[2] It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] The Court must review the record to determine if the evidence is legally adequate to support the Board's factual findings. The Court does not "weigh evidence, determine questions of credibility or make its own factual findings."[4] If the record lacks satisfactory proof in support of the Board's finding or decision, the Court may overturn the Board's decision. On appeal, the Superior Court reviews legal issues *de novo*.[5]

PARTIES' CONTENTIONS

Claimant argues that the Board "defied common sense" by finding that Claimant's non-work-related activities could have caused his lumbar

---

[1] *Histed v. E.I. DuPont deNemours & Co.*, 621 A.2d 340, 342 (Del. 1993).
[2] *Richardson v. Perales*, 402 U.S. 389, 401 (1971).
[3] *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[4] *Olney*, 425 A.2d at 614.
[5] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

condition, but Claimant's employment at Lexus did not cause his lumbar condition. Claimant contends that the Board misinterpreted the facts by finding that: Dr. Downing testified that it is possible that Claimant's condition is chronic and unrelated to his employment at Lexus; and Claimant reported to Dr. Downing that his lumbar condition had worsened in November 2009.

Lexus responds that the Board did not state that Claimant's injuries were caused by his non-work-related activities. Further, Lexus asserts that the Board did not misinterpret any facts. Lexus contends that the Board's decision was supported by substantial evidence.

DISCUSSION

To receive workers' compensation, an employee must suffer an injury that arises out of or is in the course of employment.[6] Claimant has the burden to prove by a preponderance of the evidence that the injury was caused by the work accident.[7] Claimant must prove that "the injury would not have occurred but for" his employment at Lexus.[8]

---

[6] 19 *Del. C.* § 2304.
[7] *Goicuria v. Kauffman's Furniture*, 1997 WL 817889, at *2 (Del. Super.), *aff'd*, 706 A.2d 26 (Del. 1998).
[8] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

The Court defers to the Board's "experience and specialized competence" in its findings of fact.[9] Upon review of the record, the Court finds that the Board properly found that: Dr. Downing testified that it is possible that Claimant's condition is chronic and unrelated to his employment at Lexus; and Claimant reported to Dr. Downing that his lumbar condition had worsened in November 2009.

Dr. Downing stated that Claimant's lumbar condition "was still an acute problem and; therefore, he would be under the lumbar treatment guidelines therapeutic injections. You can make an argument that it's chronic, but I believe the best choice would be acute." Therefore, the Court finds that the evidence is adequate for the Board to conclude that Dr. Downing testified that it is possible that Claimant's lumbar condition is chronic and unrelated to his employment at Lexus.

The Board wrote that "[a]fter having shown improvement and in light of the time that elapsed since Claimant ceased performing his job responsibilities and Claimant reported his condition started to worsen, casts additional doubt to the notion that Claimant's worsened condition would be causally related to his employment." The record reflects that Dr. Downing

---

[9] 29 *Del. C.* § 10142(d) (2009) ("The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.")

testified that Claimant "described gradually increasing axial low back pain and left lower extremity radicular pain" when Dr. Downing examined Claimant in November 2009. Therefore, the Court finds that the evidence is adequate for the Board to conclude that Claimant reported to Dr. Downing that his lumbar condition had worsened in November 2009.

Claimant's argument—that the Board "defied common sense" by finding that Claimant's non-work-related activities could have caused his lumbar condition, but Claimant's employment at Lexus did not cause his lumbar condition—is misguided. The Board did not conclude this. Rather, the Board stated:

> Dr. Grossinger opined that claimant's condition while moderate is age-related and is not causally related to Claimant's employment. It is true that Claimant's job responsibilities of twenty-seven years were laborious. While it is unclear exactly what Claimant's non-work related activities were it is also true that some of Claimant's non-work-related activities were similarly laborious. Claimant testified that he was handy and worked on cars during his personal time prior to April 2009.

The Board did not conclude that Claimant's non-work-related activities caused his lumbar condition.

The Board need not ascertain the precise cause of Claimant's lumbar condition. That is Claimant's burden of proof. Under these circumstances, it was only necessary that the Board determine whether Claimant met his burden of proof. The Board determined that Claimant did not.

The Board is free to accept one opinion, while rejecting another.[10] The record reflects that the Board carefully considered the testimony of Claimant, Dr. Downing, Ritter, and Dr. Grossinger. The Board found certain testimony more persuasive than other testimony. The Board concluded that Dr. Downing's testimony was "not sufficiently convincing . . . to prove that there is a causal relation of Claimant's lumbar spine condition to Claimant's employment as a result of a cumulative detrimental effect." In contrast, the Board found convincing Dr. Grossinger's testimony that Claimant's condition is not causally related to employment. The Court finds that the Board's decision to deny Claimant's Petition to Determine Compensation Due was supported by substantial evidence.

CONCLUSION

The Board's decision to deny Claimant's Petition to Determine Compensation due is supported by substantial evidence and free from legal error.

---

[10] *Standard Distrib. v. Hall*, 897 A.2d 155, 158 (Del. 2006).

Therefore, the Court hereby **AFFIRMS** the Industrial Accident Board's decision in its entirety.

IT IS SO ORDERED.

____
The Honorable Mary M. Johnston