

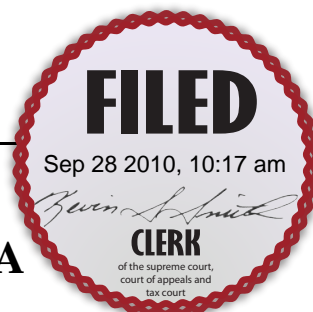
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**IN THE
COURT OF APPEALS OF INDIANA**

CHRISTINE STARBUCK,

Appellant,

vs.

VIGO COUNTY PUBLIC LIBRARY,

Appellee.

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No. 93A02-1001-EX-67

APPEAL FROM THE FULL WORKER'S COMPENSATION BOARD
The Honorable Linda Hamilton, Chairman
Cause No. C-178919

September 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Christine Starbuck appeals from an order of the Full Indiana Worker's Compensation Board (the "Board") denying her application for adjustment of claim. Starbuck raises one issue, which we restate as whether the Board erred when it affirmed the decision of a single hearing member denying Starbuck's application for adjustment of claim. We affirm.

The relevant facts follow. Starbuck became employed by the Vigo County Public Library (the "Library") in late 1998 and began to work as an assistant librarian in the young people's section of the Library in late 2000. Starbuck's activities at the Library included among other tasks lifting and moving furniture during a renovation during the year 2002 and a portion of the years 2001 and 2003. In 2001, Starbuck began to work as a puppeteer in a program for children entitled "Kids on the Block." Hearing Transcript at 9. Starbuck performed puppet shows in the years 2002, 2003, and 2004.

As a puppeteer, Starbuck was required to hold a puppet "the size of a child in the second or third grade" and which weighed "anywhere from five to twenty pounds" up high and out in front of her for "long, long periods of time" which involved "constant, constant, constant stretching." *Id.* at 10-11. During a year, Starbuck would practice for approximately one month and then present two or three puppet shows each week, typically at schools, for the months of March and April. When at a school for a show, Starbuck would have the puppet on her arms "somewhere in the range of two to three hours." *Id.* at 11. Outside of work, Starbuck played tennis with her eight-year-old daughter, went on bike rides, and did some gardening, but did not participate in activities that involved heavy lifting.

At some point Starbuck noticed pain in her right arm, and in October 2003 she visited her family physician, Dr. Subbareddy Puchalapalli at the Regional Family Medical Center. At that time, Starbuck was diagnosed as having a bone spur in her right elbow and lateral epicondylitis of the right elbow. In September 2004, Starbuck again visited the Regional Family Medical Center and reported that she had “worked hard in [the] yard” and that the “spur [was] inflamed again.” Appellant’s Appendix Volume IA at 30.

In February 2005, Starbuck was examined by Dr. Gary Ulrich at the AP&S Bone and Joint Center, and x-rays of her elbow revealed a “small spur of the lateral epicondylar region.” Id. at 31. After learning that Dr. Ulrich’s initial recommendation would not be covered by her insurer,¹ Starbuck elected to undergo surgery to her elbow. Dr. Ulrich performed a “[f]asciotomy, tenotomy, right elbow, with microablation” on Starbuck’s right elbow in April 2005. Id. at 38.

Due to pain in Starbuck’s neck and right shoulder area, Dr. Ulrich ordered an MRI in May 2005. The MRI showed “[m]oderate disk bulge” at two locations along Starbuck’s spine and “[m]ild degenerative disc disease changes and osteoarthritic changes” in one location. Id. at 47. Upon Dr. Ulrich’s recommendation, Starbuck participated in physical therapy due to the continued pain.

Also in May 2005, Starbuck informed the AP&S Bone and Joint Center by phone that she had “a form she would like [Dr. Ulrich] to look at regarding her work wanting

¹ Dr. Ulrich initially recommended to “[t]ry to proceed with orthotripsy, Sonorex,” but later learned that Sonorex was not covered by Starbuck’s health insurance company because it was “considered investigational.” Appellant’s Appendix Volume IA at 31, 33.

her to sign a form that states this issue is not work related.” Id. at 49. The Joint Center’s records show that Starbuck was called “regarding form [and] informed that Dr Ulrich had said to tell her ok and proceed as work related injury/condition.” Id. at 56. Dr. Ulrich prepared a letter dated June 2, 2005, indicating that Starbuck’s “condition of cervical strain and lateral epicondylitis as well as subacromial impingement of the right shoulder are work related” and that “[t]hey are work related in regards to repetitive, accumulative trauma type activities, push/pulling, keyboarding and overhead work.” Id. at 57.

Starbuck informed Dr. Ulrich that the physical therapy was “making her neck worse,” and Dr. Ulrich referred Starbuck to Dr. Frank Bender, a Board Certified Physiatrist who prescribed some medication and performed an EMG which disclosed normal nerve conditions and no evidence of radiculopathy, neuropathy or myopathy. Id. at 58. In July 2005, Dr. Bender referred Starbuck to Dr. Eric Stephanian at Midwest Neurosurgery for another opinion, and Dr. Stephanian also found no evidence of cervical radiculopathy.

In September 2005, Dr. Puchalapalli ordered an MRI of Starbuck’s right shoulder, and the MRI revealed a tear to Starbuck’s “distal rotator cuff.” Id. at 92. Dr. Puchalapalli referred Starbuck to Dr. Jeffery Bollenbacher at Sports + Orthopedics, P.C, who performed an arthroscopic repair of the rotator cuff in October 2005. Starbuck participated in additional physical therapy following the surgery. Starbuck was given time off from the Library to undergo both the April 2005 surgery to her elbow and the October 2005 procedure to her shoulder. At some point after the October 2005 procedure and before March 2007, Starbuck retired from the Library and began teaching preschool.

On January 17, 2006, Starbuck filed an application for adjustment of claim with the Board alleging that she suffered an injury “from spending many hours practicing and performing movements and skits with puppets that are managed in the Japanese fashion where the puppeteer holds the puppet out in front at arms length and maneuvers the puppet so as to obstruct the audience’s view of the black-clad puppeteer.” Appellant’s Appendix Volume I at 7.

On March 30, 2009, a hearing was held before a single hearing member and evidence was presented regarding Starbuck’s functioning capacity by several physicians. Specifically, in a letter dated July 6, 2007, Dr. Irving Haber stated that he performed a physical examination and functional capacity evaluation at the request of Starbuck’s counsel and concluded that Starbuck had an eleven percent whole person impairment. At the request of the Library, Dr. Gregory Merrell reviewed Starbuck’s medical records and in a letter dated September 12, 2008, concluded that Starbuck had a six percent whole person impairment rating.

Also at the hearing, the parties filed a stipulation of facts, Starbuck testified, and Starbuck’s medical records were submitted into evidence. Starbuck testified that, after experiencing “horrible” pain during a puppet performance in March 2004, she informed the Library “what had happened” and that she could no longer work as a puppeteer due to the pain in her arm. Hearing Transcript at 15. Starbuck testified that she “did not fill out an accident report or anything like that” at the time because although she had “been having trouble with the arm” she “hadn’t even put two and two together at that point” Id. at 16. Starbuck also testified that, at some point prior to the surgery on her right

elbow in April 2005, she went to “human resources for the Library” and “had a talk . . . about [her] trouble with [her] arm and that it had gotten worse, and now it was up to [her] neck and [her] arm, [her] shoulder and [her] neck.” Id. at 19. Starbuck testified that she told human resources that she “really truly [felt] that this is work-related” and felt that “from doing the puppets [she had] damage done to [her] arms.” Id.

On June 23, 2009, the single hearing member issued findings of fact and conclusions of law and ordered that Starbuck take nothing by way of her application. In its findings and conclusions, the single hearing member noted that, at the time Starbuck was diagnosed with having a bone spur in her right elbow and lateral epicondylitis of the right elbow in October 2003, her most recent puppet work had been in the spring of 2003; that when Starbuck reported pain in September 2004 she also reported a history of having worked hard in the yard and that her October 2003 spur was inflamed again; that Starbuck was later diagnosed with degenerative disc disease; and that Dr. Haber’s report did not appear to attribute Starbuck’s impairments to any work activity. The single hearing member also gave no weight to the June 2, 2005 letter by Dr. Ulrich and found that “[t]he abbreviated and perfunctory nature of the letter demonstrates that it was written to assist his patient rather than to be forensic in nature.” Id. at 15. The single hearing member found that “the evidence does not sufficiently establish a connection between [Starbuck’s] work activities and her lateral epicondylitis, her neck pain, and her right rotator cuff tear.” Id. at 16.

Starbuck sought review of the single member's decision by the Board, and after a hearing the Board issued an order affirming the decision of the single hearing member on December 2, 2009.

The issue is whether the Board erred when it affirmed the decision of the single hearing member denying Starbuck's application for adjustment of claim. In reviewing a worker's compensation decision, an appellate court is bound by the factual determinations of the Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. Christopher R. Brown, D.D.S., Inc. v. Decatur County Mem'l Hosp., 892 N.E.2d 642, 646 (Ind. 2008). We examine the record only to determine whether there is any substantial evidence and the reasonable inferences that can be drawn therefrom to support the Board's findings and conclusion. Id. As to the Board's interpretation of the law, an appellate court employs a deferential standard of review to the interpretation of a statute by an administrative agency charged with its enforcement in light of its expertise in the given area. Id. The Board will be reversed only if it incorrectly interpreted the Worker's Compensation Act. Id.

In evaluating the Board's decision, we will not reweigh the evidence or assess witness credibility. Perkins v. Jayco, 905 N.E.2d 1085, 1088 (Ind. Ct. App. 2009). Further, Starbuck as the claimant had the burden to prove a right to compensation under the Worker's Compensation Act. Id. As such, she appeals from a negative judgment. Id. When reviewing a negative judgment, we will not disturb the Board's findings of fact unless we conclude that the evidence is undisputed and leads inescapably to a contrary

result, considering only the evidence that tends to support the Board's determination together with any uncontradicted adverse evidence. Id.

Starbuck argues that the denial of her application is contrary to law. Specifically, Starbuck argues that medical evidence presented at the hearing, which included the letter prepared by Dr. Ulrich, "concludes that Starbuck had work-related injuries." Appellant's Brief at 11. Starbuck argues that she did report the March 2004 incident to her employer. Starbuck argues that "[t]he Single Hearing Member seems to focus fully on Starbuck's work with puppets at the library, and ignored all of the other physical activities that were involved with her work there." Id. Starbuck argues that she "testified that she had to do a lot of lifting and carrying, as well as a lot of keyboarding" and that "[t]hose were her regular duties" Id. at 12. Starbuck argues that "then there was . . . the renovation of the library from 2001 to 2003," that "[t]he way that the library was renovated was to have the Library staff physically move the library," and that "[t]his renovation went on for months and months and months." Id.

Starbuck further argues that there is no evidence to support the single hearing member's conclusion that Dr. Ulrich wrote the June 2, 2005 letter just to assist his patient. Starbuck argues that "[t]here was no testimony from any witness, nor any medical evidence from any doctor, stating that Starbuck did not have work-related injuries." Id. at 13. Starbuck argues that Dr. Merrell, the expert medical witness hired by the Library, did not dispute that Starbuck had work-related injuries. Starbuck also cites to Rankin v. Industrial Contractors, Inc., 144 Ind. App. 394, 246 N.E.2d 410 (1946), reh'g denied, and argues that her case is similar to Rankin "in that the undipusted

evidence is that her injuries arose out of and in the course of her employment at the Library” and that “[a]s in Rankin, a pre-existing condition that makes an employee more susceptible to an injury does not keep the injury from being compensable under the Worker’s Compensation Act.” Appellant’s Brief at 18-19.

The Library argues that Dr. Haber’s letter “did not include an opinion on causation” and that Dr. Merrell’s “report was not intended as a causation report.” Appellee’s Brief at 5. The Library also argues that, unlike in Rankin where the court found no absolutely no evidence of other causes of the claimant’s injuries in the record, the original onset of symptoms in this case was in 2003 and the return of the symptoms was in September 2004 and was attributed to work in the yard.² In her reply brief, Starbuck argues that the Library’s observation that Dr. Ulrich’s June 2, 2005 letter failed to reference the onset of symptoms from yard work is misleading in that it suggests that her visit to Regional Family Medical Center in September 2004 signaled the start of her problems when in fact she had been treated in October 2003. Starbuck also argues that Dr. Merrell’s report relates “to both causation and PPI rating.” Appellant’s Reply Brief at 7.

² The Library also appears to argue in its appellee’s brief that Starbuck failed to file her application for adjustment of claim within the applicable statutory period, and Starbuck argues in her reply brief that the statutory period did not begin until the permanence of her injuries was discernible and that “[t]he earliest possible date that the permanence of Starbuck’s condition would have been discern[i]ble is in March 2004.” Appellant’s Reply Brief at 6. We note that the Library does not point to the record to show that it raised this issue in the proceedings below, that no evidence was presented on this issue at the October 30, 2009 hearing or appears to be included in the record on appeal, and that the Board’s decision that Starbuck take nothing by way of her claim for adjustment was not based upon Starbuck’s failure to file her claim within the applicable statute of limitations but upon her failure to present sufficient evidence that her injuries were work-related.

The single hearing member found that the evidence regarding Starbuck's injuries, including medical records, letters prepared by Starbuck's physicians and experts retained by the parties, and the testimony of Starbuck, was insufficient to meet the legal standard necessary to establish compensability. We cannot say that the evidence is undisputed and leads inescapably to a result contrary to the decision of the Board affirming the single hearing member's findings and conclusions.

As previously stated, Starbuck as the claimant bore the burden of proving a right to compensation under the Act. Perkins, 905 N.E.2d at 1088. Starbuck alleged that she suffered injuries as a result of "spending many hours practicing and performing movements and skits with puppets." Appellant's Appendix Volume I at 7. At the March 30, 2009 hearing before the single hearing member, Starbuck presented evidence in an effort to support this claim, including her testimony regarding the alleged injuries and her medical records, and attempted to show that the medical issues related to her right elbow, right shoulder, and neck area for which she sought treatment were caused by her puppeteering and other activities while working at the Library. However, our review of Starbuck's testimony and medical records before the single hearing member reveals support for the determination that the evidence does not sufficiently establish a connection between Starbuck's work activities and her injuries.

In its findings and conclusions, the single hearing member emphasized the length of time between Starbuck's work as a puppeteer and her doctor visits. The record shows that Starbuck testified that she participated in puppet shows in April and May of the years 2002, 2003, and 2004, and the medical records presented at the hearing indicated that she

initially visited Dr. Puchalapalli in October 2003 and was told that she had a bone spur in her right elbow and lateral epicondylitis of the right elbow.

The single hearing member also noted that when Starbuck visited her doctor and reported pain in September 2004, she also reported having worked hard in the yard and that her bone spur was inflamed again, and the single hearing member emphasized that the visit was after the date that Starbuck testified that she experienced acute pain during a puppet show. Starbuck testified that she experienced horrible pain during a puppet performance in March 2004, and according to the records presented at the hearing, she again visited Dr. Puchalapalli in September 2004 and reported that she had “worked hard in [the] yard” and that the “spur [was] inflamed again.” Appellant’s Appendix Volume IA at 30.

In addition, the single hearing member gave no weight to the letter prepared by Dr. Ulrich dated June 2, 2005 and found that the “abbreviated and perfunctory nature of the letter” demonstrated that it was written to assist Starbuck “rather than to be forensic in nature.” See Appellant’s Appendix Volume I at 15. The record appears to indicate that Dr. Ulrich’s letter was prepared at Starbuck’s request. Starbuck testified that she received a form from “the insurance carrier who [was] covering [her] surgery” and that the form asked “is this work-related?”, that she indicated that “it [was] work-related,” and that she “asked Dr. Ulrich for a letter if he felt that it was work-related, because I showed him pictures like this and said, this is what I was doing for how many years,” and that “Dr. Ulrich gave me a letter, and I sent those off.” Hearing Transcript at 19-20. The medical records presented at the hearing showed that Starbuck informed the AP&S Bone

and Joint Center by phone in May 2005 that she had “a form she would like [Dr. Ulrich] to look at regarding her work wanting her to sign a form that states this issue is not work related.” Appellant’s Appendix Volume IA at 49. Mindful that we may not reweigh the evidence, see Perkins, 905 N.E.2d at 1088, we cannot say that the Board abused its discretion in affirming the single hearing member’s finding that the letter should be given no weight upon the basis that it was abbreviated and written to assist Starbuck, especially in light of the fact that Starbuck’s medical records were available for examination before the single hearing member and the Board.

Further, the single hearing member found that Dr. Haber’s letter did not appear to attribute Starbuck’s impairments to any work activity. In his letter, Dr. Haber stated that he performed a functional capacity evaluation of Starbuck and issued an opinion regarding Starbuck’s impairments and whole person impairment rating, and the letter does not appear to expressly determine that Starbuck’s impairments were the result of her puppet or other work at the Library.

The single hearing member was able to hear the testimony of Starbuck and examine all of the exhibits submitted by the parties, including Starbuck’s medical records, the evaluations prepared by Dr. Haber and Dr. Merrell, and visual and written information related to the Kids on the Block puppet program.

Our review of the findings and conclusions of the single hearing member and Board and the pertinent evidence in the record does not convince us that the evidence

leads inescapably to the conclusion opposite that reached by the Board.³ The single hearing member and the Board weighed the evidence and determined that Starbuck failed to prove that her injuries arose out of and in the course of her employment. Under the circumstances, we will not disturb the conclusion of the Board in affirming the single hearing member's determination. See Pavese v. Cleaning Solutions, 894 N.E.2d 570, 578 (Ind. Ct. App. 2008) (holding that the claimant failed to meet her burden of proving that her injury arose out of her employment and affirming the Board's decision that the claimant's injuries were not compensable under the Worker's Compensation Act).

For the foregoing reasons, the judgment of the Worker's Compensation Board is affirmed.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.

³ Starbuck also points to the finding of the single hearing member which stated in part that "[Starbuck] contends she felt a sudden onset of pain in March 2004 while performing a puppet show but never made any such report to her employer." See Appellant's Appendix Volume I at 15. To the extent that Starbuck argues that this finding was erroneous, we note that we may not assess the credibility of Starbuck's testimony, see Perkins, 905 N.E.2d at 1088, and that, even if the Library did not present evidence which contradicted Starbuck's testimony on this issue and the finding challenged by Starbuck is erroneous, reversal and remand on that basis would not be warranted because the other findings and conclusions of the single hearing member and the Board are not erroneous and support the Board's award. See Havlin v. Wabash Int'l, 787 N.E.2d 379, 383 (Ind. Ct. App. 2003) (concluding that erroneous findings and conclusions are superfluous and not fatal to Board's judgment where remaining valid findings and conclusion support judgment).