SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

April 25, 2008

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RE: Barry L. Tatman v. Daisy Construction
C.A. No. 06A-10-003-ESB
Letter Opinion

Date Submitted: December 13, 2007

Dear Counsel:

This is my decision on Barry L. Tatman's appeal of the Industrial Accident Board's denial of his claim for workers' compensation benefits. Tatman worked as a laborer for Daisy Construction. He claims that he hurt his back while pulling a generator into a shed on April 29, 2004. The Board denied Tatman's claim because it did not believe him when he testified that he hurt his back at work. I have affirmed the Board's decision because it is supported by substantial evidence in the record and free from legal error.

STATEMENT OF FACTS

No one saw Tatman hurt his back at work and he did not immediately report his injury to his co-workers or supervisor. He just went home. Tatman was scheduled to work the next day, a Friday, but he did not go to work. He also did not call in to say why he was not coming to work. However, Tatman did go to the office near the end of the day to get his paycheck. While at the

office, Tatman spoke with the secretary and his supervisor, Tom Collins. Tatman and Collins offered conflicting versions of their conversation that day when they testified before the Board. Tatman testified that he told Collins he hurt his back while trying to pull a generator into a shed. Collins testified that Tatman never mentioned hurting his back until he was asked why he did not come to work and even then he was unsure if it was an old or new back problem. Collins did fill out an injury report. It stated that Tatman was unsure of how or when he hurt his back. Daisy terminated Tatman on May 28, 2004, because he never came back to work.

The Board held a hearing on July 7, 2006. Tatman, Collins, Ed Stepp, Director of Risk Management Services for Daisy, Dr. Balepur Venkataramana and Dr. William Sommers testified. Tatman testified about his alleged accident, medical treatment and efforts to find work. Collins testified about his meeting with Tatman the day after the alleged accident. Stepp testified about his attempts to contact Tatman about light-duty work and his termination of Tatman's employment. Drs. Venkataramana and Sommers testified about Tatman's medical care. Tatman does have a herniated disc. However, the two doctors disagreed as to whether it was caused by trauma or was degenerative in nature. The Board ruled that Tatman did not prove that he hurt his back at work, concluding that he was not a credible witness.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is

supported by substantial evidence and whether the agency made any errors of law.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[5]

DISCUSSION

The Board denied Tatman's claim because it concluded that he was not credible when he testified that he hurt his back at work. The Board concluded that Tatman was not credible because his testimony conflicted with Collins' testimony about his conversation with Tatman the day after the alleged accident and Stepp's testimony about Tatman's failure to contact him about light-duty work and also because the Board found that Tatman's complaints of pain were inconsistent with his medical records and the findings of Drs. Sommers and Venkataramana.

Tatman argues that the Board's decision was based upon collateral, irrelevant, insubstantial and contradicted testimony. The Board often has to make judgments about the credibility of the witnesses who appear before it. The Board's credibility determinations will not be disturbed on

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[1] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

[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), *app. dism.*, 515 A.2d 397 (Del. 1986).

[3] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[4] 29 *Del.C.* § 10142(d).

[5] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

appeal unless the Court determines that the Board abused its discretion.[6] On appeal, the Court will not independently "weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[7] The Board has the authority to accept the testimony of one witness over that of another.[8] When it does so it must state its reasons for making its credibility determinations.[9] This Court, on appeal, does not sit as the trier of fact to weigh the evidence and determine witness credibility.[10] Determinations of credibility are exclusively reserved for the Board.[11] The Court is not free to substitute its own judgment on witness credibility for that of the Board, even if the Court would reach a different conclusion based upon the facts presented.[12]

Tatman had the burden of proving that he hurt his back at work. No one saw Tatman hurt his back at work and the medical testimony about the cause of his back problems was not conclusive. Therefore, Tatman's case rested largely on his credibility as a witness. The Board accepted the testimony of Dr. Sommers, Stepp, and Collins over that of Tatman. In doing so, the Board did not abuse its discretion.

Tatman and Collins offered conflicting testimony about the conversation they had the day

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[6] *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1995).

[7] *Johnson*, 213 A.2d at 66.

[8] *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993).

[9] *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998).

[10] *State v. Stevens*, 2001 WL 541473, at *3 (Del. Super. May 15, 2001).

[11] *Playtex Products v. Harris*, 2004 WL 1965985, at *2 (Del. Super. Aug. 31, 2004).

[12] *General Motor Corp. v. Kane*, 901 A.2d 119 (Table), 2006 WL 1650807, at *5 (Del. June 13, 2006), citing *Anderson v. GMC*, 748 A.2d 406 (Del. 2000) (ORDER) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

after Tatman allegedly hurt his back. Tatman testified that he told Collins that he hurt his back while pulling a generator into a shed. Collins testified that Tatman said nothing about hurting his back until he was asked why he didn't show up for work. It was only then, according to Collins, that Tatman said that he did not come to work because his back hurt. When Collins asked Tatman what was wrong with his back, Tatman said that he didn't know. Knowing that Tatman had missed work before because of his back, Collins asked him if it was an old or new back problem. Tatman said, according to Collins, that he did not know and would just take care of it over the weekend. Collins did prepare a report about his conversation with Tatman. The report states that Tatman was unsure of how or when the injury happened. Thus, the report prepared by Collins, when his conversation with Tatman was fresh in his mind and the parties were not in litigation, supports Collins' testimony. The inconsistency between Tatman's testimony and the report prepared by Collins does call into question Tatman's credibility and supports the Board's decision to rely upon Collins' testimony and not Tatman's.

Tatman and Stepp offered conflicting testimony about whether or not Tatman ever reported for light-duty work. Tatman testified that he received a written release for light-duty work on May 14, 2004, and that he gave it to Collins, but that Collins told him that he had no light-duty work available. Tatman testified at the unemployment hearing that he went to Daisey's office every week looking for work. Collins testified that he never saw Tatman again after April 30, 2004. Stepp testified that the written release for light-duty work came to him in the mail. Once he got it, he sent a letter to Tatman about light-duty work, but that it was returned to him. Stepp also testified that he had no phone number for Tatman. Finally, according to Stepp, he terminated Tatman's employment on May 28, 2004, because Tatman never came back to work. Stepp prepared a report on May 28,

2004. The report states that Tatman was terminated for not complying with Daisy's light-duty policy and that he never showed up at work or called into work. Thus, the report prepared by Stepp, when the events were fresh in his mind and the parties were not in litigation, supports Stepp's testimony. The inconsistency between Tatman's testimony and the report prepared by Stepp does call into question Tatman's credibility and supports the Board's decision to rely upon Stepp's testimony and not Tatman's. Given the conflicts between Tatman's testimony and the two written reports dealing with the alleged accident and Tatman's actions after it, it can hardly be said that the Board's decision to reject Tatman's testimony on these matters was an abuse of discretion.

Tatman's testimony about the level of pain that he is experiencing also conflicted with his medical records and the testimony and reports of some of the doctors that examined him. Dr. Sommers testified that, based on the medical records from Tatman's visit to the emergency room on May 4, 2004, Tatman exaggerated his level of pain because he described it as an eight on a scale of zero to ten, while the emergency room notes indicated that he appeared to be quite comfortable, walked with a steady gait to the treatment room, was not in acute distress, denied paresthesia, and denied extremity weakness. Dr. Sommers also testified that Tatman's complaint of constant stabbing and aching pains were disproportionate to Dr. Medhi's findings. Dr. Venkataramana testified that Tatman only has a 6.6 percent permanent impairment to his lumber spine. Despite this modest impairment, Tatman told the Board that he can only wash one dish at a time. Dr. Anthony's report indicated that Tatman's complaints were not typical for someone with an L4 radiculopathy. Given the conflicts between Tatman's testimony and his medical records, the Board did not abuse its discretion in rejecting his testimony.

There is, of course, other evidence in the record that support the Board's conclusion that

Tatman did not hurt his back at work on April 29, 2004. When you combine this evidence with Tatman's credibility problems, you have the following:

1. No one at the job site saw Tatman hurt his back.

2. Tatman did not tell any of his co-workers at the job site that he hurt his back at work.

3. Tatman did not immediately tell his supervisor that he hurt his back at work.

4. Tatman did not immediately seek medical treatment.

5. Tatman's testimony about how he hurt his back conflicted with the report prepared by Collins.

6. Tatman's testimony about seeking light-duty work conflicted with the report prepared by Stepp.

7. Tatman's complaints of pain were exaggerated.

8. Tatman had missed work because of back problems before April 29, 2004.

9. Tatman's back problem could have been caused by trauma or a degenerative condition.

Given all of this evidence, much of which was uncontested, the Board's conclusion that Tatman did not hurt his back at work is supported by substantial evidence in the record and free from legal error.

Tatman also argues that the Board was bound by the Division of Unemployment Insurance Appeals Referee's finding that (1) Tatman was injured at work on April 29, 2004, (2) Tatman reported weekly to Daisy to seek light-duty work and each time was told that there was no light-duty work available, and (3) Tatman's health insurance was cancelled on April 30, 2004. Daisy argues that this is a rather remarkable argument and should be rejected because Tatman's attorney told the Board that his only purpose in introducing these "findings of fact" was to corroborate Tatman's testimony and to impeach the testimony of Daisy's witnesses. The following is the exchange

between the Board and the attorneys for Tatman and Daisy.

Mr. Dolan: This has not been saved for the attack in the end. Mr. Stepp and the other employer's witness testified the thrust of their testimony was that Mr. Tatman did not advise them of the injury that he voluntarily terminated his employment and the testimony that Mr. Tatman proposes to introduce is a finding from the Delaware Department of Labor, date of claim was 5/22/2005, date of hearing was 7/18/2005 and this is the decision which basically directly contradicts, the finding from the Department of Labor directly contradicts the testimony that employer has offered that states or that suggests that Mr. Tatman voluntarily terminated his employment. That is relevant both to the employer's credibility and to whether or not Mr. Tatman was able to work and whether or not Mr. Tatman related his incident to his employer. Therefore we think it is proper rebuttal testimony.

Mr. Baker: I have never heard of (inaudible) proceeding being introduced in another one. In fact, there is specific case law on that or what is it, *Messick v. Star Enterprise* where findings by this board were not admissible at a trial on the very same injury before the Superior Court. This isn't even on the same injury, this is on a different matter in front of a different tribunal altogether. I don't see how under the law it can possibly be utilized. And Mr. Dolan hasn't given an explanation as to why it is being utilized now as opposed to during the case in chief when it could have and should have been.

Mr. Dolan: This is only the introduction to corroborate Mr. Tatman's testimony. For two purposes, to corroborate Mr. Tatman's testimony that he was, that he was actually terminated and to impeach the testimony of the employer that the claim Mr. Tatman was, actually quit. And the findings of this Board suggests or the findings of this Board of the Department of Labor will suggest that Mr. Tatman was not terminated for just cause. That contradicts the employer's, that impeaches the employer's statement that Mr. Tatman quit. And that goes to the employer's credibility. That is what it is being introduced for, not for any of the other findings here. (Emphasis added).

Hearing Officer: Because the findings of that board are not binding. (Emphasis added).

Mr. Dolan: The findings of this board are not. (Emphasis added).

Hearing Officer: This board.

Mr. Dolan: Are not binding from this board but this is simply being introduced to impeach the credibility of the offered witness by the employer. (Emphasis added).

Hearing Officer: Anything else Mr. Baker? I will allow a little bit of this. Okay? But I just want to make clear for everyone here and for the record that the findings in there are not binding, okay, on this proceeding. But you can present the evidence. (Emphasis added).[13]

Tatman's argument is indeed rather remarkable. His attorney repeatedly told the Board that he was offering the Referee's "findings of fact" only to corroborate Tatman's testimony and impeach the testimony of Daisy's witnesses and that the "findings of fact" were not binding on the Board. The Board took Tatman's attorney at his word and accepted the "findings of fact" for this purpose and no other. Now on appeal, Tatman argues that, despite what his attorney told the Board and what the Board accepted, the Board should have considered the Referee's "findings of fact" as binding on the Board and dispositive of the sole issue in this case. I will not allow Tatman to mislead the Board and then raise an argument on appeal that was not presented to the Board, particularly since the argument is contrary to the representations that Tatman's attorney made to the Board.[14]

Tatman's final argument is that it was improper for Daisy's attorney and the Board to question Tatman about his efforts to find work in the two years prior to the hearing and how he currently spends his days. Tatman argues that this line of questioning was irrelevant because the only issue before the Board was whether or not Tatman hurt his back at work on April 29, 2004. Daisey argues that cross-examination on these matters was relevant because Tatman's credibility was always at issue and the manner in which Tatman behaved after the alleged accident affected his credibility. I review the Board's admission of evidence on an abuse of discretion standard.[15] I noted

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[13] Tr. IAB Hearing No. 1253622, at 109-111.

[14] *Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997).

[15] *Clark v. State*, 894 A.2d 406 (Table), 2006 WL 454508, at *2 (Del. Feb. 24, 2006).

previously that no one saw Tatman hurt his back at work and that the medical evidence regarding how he hurt his back was inconclusive. Therefore, Tatman's credibility as a witness was critical, particularly since he had the burden of proof. As a starting point, "[i]n order to ensure the efficient adjudication of claims, the Board has the power to make its own rules. Pursuant to that power, the Board may relax the rules of evidence and allow the proceedings to be less formal than a trial. For example, the Board may allow hearsay evidence to be admitted into the record."[16] "The Board may not, however, relax rules which are designed to ensure the fairness of the proceeding."[17] "While the nature of the proceedings and the spirit of the Compensation Law justify some relaxation of the technical rules of evidence, nevertheless, it is fundamental that the right to confront witnesses, to cross-examine them, to refute them, and to have a record of their testimony must be accorded unless waived."[18] Additionally, "the Board may examine all witnesses."[19] In the absence of an abuse of that process, a reviewing court will not fault the administrative agency.[20]

Tatman himself raised the two matters that he is now complaining about. Tatman's attorney's second question to Tatman on direct examination was, "Are you currently employed?" Tatman's answer was "No." Tatman's attorney's last three questions to Tatman on direct examination dealt with the severity of pain Tatman felt at the time of the accident and on the day of

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[16] *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995).

[17] *Id.*

[18] *Id.* citing *General Chemical Div., Allied Chemical & Dye Corp., v. Fasano*, 94 A.2d 600, 601 (Del. Super. 1953).

[19] 19 *Del.C.* § 2348.

[20] *General Motor Corp. v. Kane*, 2006 WL 1650807, at *5 (Del. June 13, 2006), citing *Anderson v. GMC*, 748 A.2d 406 (Del. 2000) (ORDER) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

the hearing before the Board. Tatman told the Board that the pain in his back is as severe now as it was when he hurt his back on April 29, 2004. This line of questioning created the impression that Tatman is now in so much pain that he can not work. Having asked these questions and created this impression, Tatman certainly "opened the door" to cross-examination on these matters. The fact that Tatman's answers to Daisy's cross-examination raised questions about his credibility is nothing more than a part of the process. Tatman simply has no legitimate basis to complain. The Board did not abuse its discretion in allowing this line of questioning.

CONCLUSION

The Board's decision is affirmed.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley