

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

This is an appeal from the decision of the Industrial Accident Board ("Board") granting compensation under the Worker's Compensation Act¹ for injuries suffered by the Claimant-Below/Appellee, Thomas Simmons. Mr. Simmons was employed by Day and Zimmermann Security ("Day\Zimmermann"), the Employer-Below/Appellant, as a security guard earning \$370.00 per week in September 2005. On September 19, 2005, Mr. Simmons was working in that capacity at the ACE Insurance Company Corporate Campus located in Wilmington, Delaware when he suffered a heart attack.

No one disputes the nature and/or extent of the injury suffered on September 19. The controversy centers instead on whether that event occurred during the course

¹ See 19 Del. C. Ch. 21, et. seq. All subsequent references to sections of the Worker's Compensation Act shall hereinafter be by section only.

and scope of Mr. Simmons' employment with Day/Zimmermann. Mr. Simmons claims that his heart attack was precipitated by and occurred while responding to an employee emergency on that date. The specific activity that he was engaged in at the time was described by Mr. Simmons as running across a parking lot into a building and twice ascending then descending four flights of stairs within a brief period of time.

On December 30, 2005, Mr. Simmons filed a petition with the Board seeking worker's compensation benefits. Ultimately, he claimed that as a result of his heart attack and the resulting hospital stays, including two surgeries,² he was entitled to total disability benefits pursuant to § 2324 for two periods of time. The first period began on September 20, 2005 and ended November 28,

² The first surgery was a quadruple bypass while the second surgery involved the placement of a stent in Mr. Simmons' coronary artery.

2005. The second period was initiated on January 7, 2006 and lasted through January 30, 2006. Day/Zimmermann opposed the petition arguing that Mr. Simmons' heart attack was proximately caused by preexisting coronary artery disease unrelated to the employee emergency that was reported. It did not, as a result, arise out of his employment with that entity.

The Board heard the matter on May 10, 2006 and granted Mr. Simmons' petition on July 11, 2006.³ It ruled that Mr. Simmons' heart attack did arise out of his employment with Day/Zimmermann. Compensation was awarded for the two periods of disability claimed along with medical witness and attorney's fees.

On July 14, 2006, Simmons filed a motion seeking clarification of the July 11 decision as to the

³ *Thomas Simmons v. Day and Zimmermann Security*, No. 1279125 (Del. I.A.B. July 11, 2006).

attorney's fees awarded followed on July 18 by his motion for additional compensation for expenses incurred. In response to those filings, Day/Zimmermann filed a motion for rehearing and clarification on July 19, 2006. A hearing was held on August 31, 2006.

The Board issued a written decision on September 13, 2006, granting Mr. Simmons' request for additional attorney's fees.⁴ It ruled that the second surgery to insert a stent was not related to the September 19 accident but that the coronary repair surgery was so connected and therefore compensable. The Board denied Day/Zimmermann's motion for a reconsideration of the Board's finding of a link between the heart attack and Mr. Simmons' employment.

On September 22, 2006, Mr. Simmons filed a cross

⁴ *Thomas Simmons v. Day and Zimmermann Security*, No. 1279125 (Del. I.A.B. Sept. 13, 2006).

motion for reconsideration arguing that the second surgery, the placement of the stent, was related to the original injury. On October 12, 2006, Mr. Simmons again filed a motion for additional compensation and permanent impairment. The hearing on these motions was held on November 9, 2006.

In an order dated December 11, 2006,⁵ the Board determined that Mr. Simmons' second surgery for placement of the stent was a compensable work related injury. However, the Board declined to intervene with respect to the portion of Mr. Simmons' motion regarding compensation for his alleged scars. It found as well that the fee charged by Mr. Simmons' expert witness was reasonable. Finally, the Board declined to issue an order to compel production of itemized or specialized medical bills as

⁵ *Thomas Simmons v. Day and Zimmermann Security*, No. 1279125 (Del. I.A.B. Dec. 11, 2006).

requested by Day/Zimmermann.

Following the Board's final order, Day/Zimmermann appealed to this Court and essentially made three arguments in support of that appeal.⁶ First, Day/Zimmermann contends that the Board's decision was legally deficient because its finding of a causal relationship between Mr. Simmons' employment and the injury suffered was not supported by substantial evidence. Second, it contends that the Board's delay in rendering its decision following the May 11, 2006 hearing violated § 2348(k) thereby constituting legal error. Third, Day/Zimmermann argues that the Board erred as a matter of law in awarding attorney and expert witness fees, contending that the fees awarded were excessive.

The basis of the Board's initial decision on July 11

⁶ While Day/Zimmermann's primary focus is on the Board's July 11 decision, the challenge clearly encompasses that body's September 13 and December 11 orders as well.

was that Mr. Simmons' physical exertion in response to the reported employee emergency was the triggering event which caused his heart attack. The heart attack was therefore a compensable work related injury. Both sides introduced evidence by means of expert and lay witnesses in support of their respective positions. For purposes of addressing the issues raised by Day/Zimmermann, a summary of that evidence follows.

Expert Medical Testimony

Day/Zimmermann introduced the testimony of Dr. Irene Stolar, a board certified specialist in internal medicine and cardiovascular disease via deposition. Dr. Stolar testified that Mr. Simmons had severe preexisting cardiovascular disease. Based upon her review of Mr. Simmons' medical records, the doctor related that Mr. Simmons had suffered from angina, had been diagnosed with

hypertension and suffered from diaphoresis (excessive sweating). In addition, the records reflected complaints of shortness of breath with episodes of chest pains and palpitations once or twice a month with increasing frequency in the year before his September 19 heart attack.⁷ Dr. Stolar opined that based on the severity of Mr. Simmons' cardiovascular disease, which had existed for twenty or thirty years, Mr. Simmons would have had problems at some point in time irrespective of physical exertion.⁸

Dr. Paul Davis testified on behalf of Mr. Simmons, also by deposition. Dr. Davis is a cardiothoracic surgeon who assisted during Mr. Simmons' surgery. Dr. Davis reviewed his medical records and noted that Mr. Simmons had no previous history of heart difficulty and

⁷ *Simmons*, No. 1279125 at 8-9 (Del. I.A.B. July 11, 2006).

⁸ *Id.* at 10.

disagreed with Dr. Stolar's view that Mr. Simmons' heart attack was unrelated to the events of September 19.

Dr. Davis noted that coronary artery disease can remain latent and asymptomatic until a triggering event, such as physical exertion, occurs. However, Dr. Davis went on to opine that physical exertion can trigger a heart attack in someone with such a preexisting condition as Dr. Stolar attributed to Mr. Simmons. Finally, he concluded that despite any condition that may have existed on September 19, Mr. Simmons' injury occurred as a result of his physical exertion in response to the employee emergency described above.

Lay Testimony

In support of its opposition to Mr. Simmons' petition, Day/Zimmermann obtained statements from three of its employees, Jay Galloway, William Bellows and Marty

Sellers, who witnessed the events in question.⁹ These statements were obtained on February 8, 2006. Two of the statements were recorded. In each of the statements, the witnesses reported that Mr. Simmons told his supervisor he was experiencing problems which he believed were associated with his heart and that he needed a blood pressure cuff before the employee emergency was reported.¹⁰

Mr. Simmons presented a written statement dated January 17, 2006 signed by Mr. Sellers.¹¹ That statement contradicted Mr. Sellers' February 8 statement given to Day/Zimmermann about the events of September 19. In his

⁹ Notably, standard operating procedure is for all incidents to be recorded in a log kept by Day/Zimmermann employees at the security station within the ACE building. The log entry for the events of September 19, 2005 is missing, therefore, it was necessary for Day/Zimmermann to take the statements of each witness.

¹⁰ Hr'g Tr. *Thomas Simmons v. Day and Zimmermann Security*, No. 1279125 at 176-179 (Del. I.A.B. May 10, 2006).

¹¹ Hr'g Tr. at 99-102. The statement was not provided to counsel for Day/Zimmermann until March 2, 2006 for unexplained reasons.

January 17 statement, Mr. Sellers indicates that Mr. Simmons became symptomatic after responding to the employee emergency. That statement was provided by Mr. Sellers to Mr. Simmons when he learned Mr. Simmons was not receiving workman's compensation benefits.

Contrary to what Dr. Stolar testified was reflected in his medical records, Mr. Simmons denied suffering from any chest pains in the year prior to his September 19 heart attack. He denied episodes of fatigue or shortness of breath. Finally, Mr. Simmons admits that he suffered from hypertension but that he, "felt good and decided to cut back on the medicines."¹² Mr. Simmons did admit to suffering from angina but noted that the last time it occurred was 1984.

Relevant portions of the records relating to the emergency transportation and treatment he received on

¹² *Simmons*, No. 1279125 at 4 (Del. I.A.B. July 11, 2006).

September 19 were also introduced by Mr. Simmons. The hospital emergency room records revealed that Mr. Simmons suffered from a sudden onset of chest pain after vigorous activity on September 19. Records from the ambulance personnel noted that Mr. Simmons suffered a sudden onset of chest pain while running up stairs.

DISCUSSION

When reviewing an appeal from the Board, the only role of the appellate court is to determine whether the decision of the Board is supported by substantial evidence and is free from legal error.¹³ Substantial evidence means such relevant evidence as a reasonable

¹³ *Levan v. Independence Mall, Inc.*, 940 A.2d 929, 932-3 (Del. 2007).

mind might accept as adequate to support a conclusion.¹⁴

It is well established that the appellate court does not sit as the trier of fact, rehear the case, weigh the evidence, make credibility determinations or substitute its own judgment for that of the Board.¹⁵ If there was substantial evidence, these finding must be affirmed.¹⁶

Substantial Evidence

After reviewing the record, the Court must conclude that the Board's decision is in fact supported by substantial evidence and the challenges by Day/Zimmermann in this regard must fail as a result.

It appears that Day/Zimmermann wants this Court to review the evidence that was put before the Board at the

¹⁴ *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. Supr. 1994)

¹⁵ *Id.*

¹⁶ *General Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960).

hearing on May 10, 2006 and determine that the weight of the evidence dictates that Mr. Simmons' claim be denied. Again, the limited role of this Court is to determine whether there is substantial evidence in the record which supports the Board's decision.¹⁷ It is the exclusive function of the Board to resolve conflicts in the evidence and weigh witness credibility.¹⁸

Both sides presented medical evidence which tended to establish that Mr. Simmons had a preexisting symptomatic heart condition prior to the work accident. However, the medical testimony was in conflict as to whether Mr. Simmons' response to the employee emergency precipitated his heart attack. The Board chose to accept the opinion of Dr. Davis. That it was free to do exactly that, i.e.,

¹⁷ *Standard Distributing Inc. v. Hall*, 2006, WL 2714960 at *4 (Del. Super. Sept. 20, 2006).

¹⁸ *Id.* citing *Playtex Products Inc. v. Leonard*, 2004 WL 2419141 at *7 (Del. Super. Oct. 12, 2004).

accept the testimony of one medical expert over another, is well settled in this state.¹⁹

Day/Zimmermann also contends that Mr. Simmons' heart attack was not the result of physical exertion on September 19, 2005. Instead, Day/Zimmermann contends that the heart attack was a result of his preexisting coronary artery disease and could have happened at any time. The fact that the event happened while he was at work on September 19 was simply coincidental, it argues. In support of that position, Day/Zimmermann presented statements of witnesses who recalled that Mr. Simmons was symptomatic prior to the employee emergency. Mr. Simmons provided evidence in support of the opposite conclusion.

The Board chose to accept as more persuasive the testimony that supported Mr. Simmons' view that the heart

¹⁹ *DiSabatino Bros. v. Wortman*, 453 A.2d 102, 106 (Del. 1981).

attack was the result of physical exertion on September 19. Once again, it is the Board which is empowered to perform that function, not this Court.²⁰ That the Board did so is readily apparent.²¹

Moreover, when an injury arises from a "specific" and "clearly identifiable industrial accident", a "but for" analysis must be applied to the facts to determine whether proximate cause has been established, thereby linking the work accident to the injury suffered.²² The Delaware Supreme Court has recognized that:

A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability. . . [t]he employer takes

²⁰ *Freeman*, 164 A.2d at 688; *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965).

²¹ *Thomas Simmons v. Day and Zimmermann Security*, No. 1279125 at 12 (Del. I.A.B. Jul. 11, 2006).

²² *Steen v. State of Delaware*, 1997 WL 33442119, at *2 (Del. Super.) citing *Reese v. Home Budget Center*, 619 A.2d 907 (Del. Supr. 1992).

the employee as he finds him.²³

Because the Board found Mr. Simmons' version of the events more credible with respect to where Mr. Simmons was located as well as what he was doing when the heart attack occurred, any preexisting condition which Mr. Simmons had, would not disqualify him from eligibility for worker's compensation claims.

Legal Error

It is readily apparent that the passages of time between the hearings and the decisions that followed do not fall within the allowable parameters set forth in § 2348(k).²⁴ That provision does not, however, provide

²³ *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. Supr. 1992) citing *General Motors Corp. v. McNemar*, 202 A.2d 803, 807-807 (Del. Supr. 1964).

²⁴ The relevant language of § 2348(k) reads:

No later than 14 days after a hearing, the [Industrial Accident] Board shall render a written decision that succinctly and clearly states its findings of fact and conclusions of law. To that end, where appropriate, the

any sanction for the failure to do so and this Court can not act as a substitute for the Delaware General Assembly for purposes of filling that void. Nor has Day/Zimmermann been able to otherwise establish that it is entitled to any relief because of the delays in question.

Day/Zimmermann contends that it was prejudiced by the Board's failure to act in a timely fashion. As evidence of that prejudice, it argues without more, that the Board could not be expected to accurately recall the specifics of each hearing because of the length of the delays. That argument is without merit for at least three

Board may render a decision at the hearing and read such decision into the record for its incorporation in the hearing transcript. Each Board decision shall be filed among the Board's records and a copy thereof shall be served personally on or sent by certified mail to each of the parties in interest or to the attorneys representing the parties, if such parties are represented by counsel. In any instance where a decision cannot be reached within 14 days, the Board shall provide the parties with a written estimate of when the decision will be rendered. Such additional time shall not exceed an additional 14 days.

reasons.

In the first instance, Day/Zimmermann fails to recognize that the proceedings and evidence that were put before the Board were recorded and/or preserved pursuant to § 2350(b). Day/Zimmermann also conveniently ignores the legal maneuvering in general or its specific contribution to the passage of time in the form of additional motions filed and arguments advanced. Lastly, Day/Zimmermann did not complain of any delay or otherwise put the Board on notice that there was a problem in that regard. Indeed, there did not seem to be a problem until Day/Zimmermann's briefing in support of this appeal began.

In short, whatever the delay, the record does not any reflect any prejudice against Day/Zimmermann which can be attributed to the failure to comply with § 2348(k). Assuming *arguendo* that there was, Day/Zimmermann either

contributed or acquiesced to it. In any event, any delay by the Board in issuing orders in this matter was at best harmless and warrants no action by the Court even if it were so empowered.

Attorneys Fees

An award of attorney's fees is not automatic; the Board is entitled to exercise discretion in that regard.²⁵ That discretion must be exercised in a manner consistent with the purposes underlying the Worker's Compensation Act.²⁶ If the Board decides to make such an award, it must apply the factors in *General Motors Corp. v. Cox*²⁷ to determine whether the amount requested as attorney's fees is reasonable. The Cox criteria are recognized as

²⁵ *Simmons v. Delaware State Hospital*, 660 A.2d 284, 289 (Del. 1995).

²⁶ *Histed v. E.I. DuPont*, 621 A.2d 342 (Del. 1993).

²⁷ 304 A.2d 55, 57 (Del. 1973).

guidelines rather than rules that must be strictly applied and/or followed.²⁸ The Board need only show that it considered the Cox factors in reaching its decision.

The Board did exactly that. In its July 11 opinion, the Board expressly addressed the aforementioned factors, including the affidavit filed in support of the application by Mr. Simmons' counsel before making the award.

Day/Zimmermann points to the Board's July 11 order which misstates the attorney's fee award as \$8,754.60 instead of \$8,574.60. However, the transposition of the 7 and the 5 does not rise to the level of reversible error. Nor do any of Day/Zimmermann's concerns relative to agreements between Mr. Simmons' counsel and health care providers have any bearing on the issues that were before the Board.

²⁸ Cox, 304 A.2d at 57.

Simply put, the record does not reflect any error, legal or otherwise, in the award of attorney's fees for Mr. Simmons' counsel in the amount of \$8,574.60.

Expert Witness Fees

In its order dated December 11, 2006, the Board declined to reduce the witness fee of \$3,250 assessed pursuant to § 2322(e) and noted that "Dr. Davis' occupation as a cardiothoracic surgeon rightly commands a premium for his services as an expert witness."²⁹ Day/Zimmermann has failed to provide any basis for the reduction of the witness fee awarded to Dr. Davis except to argue that it is excessive. Notwithstanding that contention, Day/Zimmermann states that, "In general, for a specific expertise, fees somewhere in the range of \$3,000 for testimony before a Board might be

²⁹ *Simmons*, No. 1279125 at 2 (Del. I.A.B. Dec. 11, 2006).

reasonable.”³⁰ Without more and in light of this concession, the Board’s decision must stand.

³⁰ Appellant’s Op. Br. at 40.

CONCLUSION

In light of the foregoing, the Court must conclude that the Board's decision is supported by substantial evidence and is free from legal error. Accordingly, the decision of the Board must be, and hereby is, **affirmed**.

IT IS SO ORDERED.

TOLIVER, JUDGE