

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

BEVERLY TESTA,)	
)	
Appellant,)	
)	
v.)	C.A. No. 08A-01-002-JEB
)	
STATE OF DELAWARE,)	
)	
Appellee.)	

Submitted: July 17, 2008
Decided: August 5, 2008

*Appeal from a Decision of the Industrial Accident Board.
Affirmed.*

OPINION

Appearances:

Joseph J. Rhoades, Esquire, and A. Dale Bowers, Esquire, Wilmington, DE.
Attorney for Beverly Testa.

John J. Klusman, Jr., Esquire, Wilmington, DE.
Attorney for the Employer/Appellee.

JOHN E. BABIARZ, JR., JUDGE

This is the Court's decision on Claimant Beverly Testa's appeal of a decision of the Industrial Accident Board ("Board") denying her petition for disability benefits. The Board found that no work-related accident had occurred. For the reasons explained below, the Board's decision is affirmed.

In December 2006 Claimant worked for the State of Delaware as a bus driver for the Delaware Administration for Regional Transit ("DART" or "Employer"). Claimant asserted that on December 27, while she was driving through Wilmington, her bus hit two potholes, causing the driver's seat to drop. Claimant experienced severe pain in her back and right leg and had difficulty finishing her route. She sought immediate treatment at the Wilmington Hospital Occupational on five separate occasions. She also began physical therapy at Christiana Care Physical Therapy but was referred to William T. Atkins, Jr., M.D., because the physical therapy aggravated her symptoms. Dr. Atkins ordered an EMG and an MRI. Dr. Atkins diagnosed Claimant with a lumbar strain and sprain, lumbar radiculopathy, and lumbar disc pathology.

Claimant filed a Petition to Determine Compensation Due in February 2007, in which she alleged that she injured her neck and low back in the accident. The Board held a hearing at which Claimant testified on her own behalf, each party presented expert medical testimony, and DART presented the testimony of the mechanic who inspected Claimant's bus after the incident.

Claimant's treating physician, Dr. Atkins, testified that he reviewed the history of

Claimant's back problems and offered his opinion that Claimant's current back problems are a result of the alleged work incident. Andrew Gelman, O.D., testified on Employer's behalf. He also reviewed her medical records, noting her previous back problems, including disc bulges and degeneration. His physical examination caused Claimant discomfort in the neck area. Dr. Gelman acknowledged that Claimant went to Wilmington Hospital right after the incident, but he found that she was not forthcoming about her history of back problems.

Lynn Proksch, master mechanic for DART, testified that he received a work order to inspect and repair the seat of a particular bus and submit a report on his findings. He removed the seat, inspected the scissor-shaped frame, the air system and levers and found no damage to any of the parts. There were no punctures in the seat. Mr. Proksch concluded that no repairs were needed. He testified that the seat could not have collapsed without sustaining some kind of damage. On cross-examination, Mr. Proksch conceded that he could not verify that the bus he inspected was the bus Claimant was driving, although the work order identified the bus by number.

Following the hearing, the Board issued a written decision denying Claimant's petition based on its finding that Claimant had not carried her burden of proving that a work-related accident occurred as she described it. The Board offered four reasons for its conclusion. First, the Board found that Claimant's testimony about her seat dropping to be unbelievable in light of Mr. Proksch's testimony. He stated that if the seat collapsed there would have been damage, and there was none. He also stated that the seat could not collapse

if the air bag was inflated, that is, in its normal condition; Claimant did not hear any air escape from the seat and there was no puncture in the bag.

Second, the Board found Claimant's version of the accident to be unbelievable. She stated that she had such extreme pain in her low back and right leg that she to wrap her left leg around the steering column to drive the bus. She stated that her seat was tilted forward so far that if she let go of the steering wheel, she would slide forward into the dashboard. Claimant finished her route, drove to the bus yard and drove home. She did not report the accident to dispatch or make any other type of call.

Third, the Board found that Claimant's testimony about her past medical history was less than clear and she was not forthcoming about previous back pain until forced to be. This was damaging to her credibility.

Fourth, other than medical documents which reported Claimant's version of the accident, Claimant presented no evidence to support her assertion that there was an accident or that she was injured in it. Claimant's low back treatment in December 2006 and January 2007 was not found to be evidence of an accident, especially in light of the fact that Claimant had had prior low back and neck problems which could cause flare-up of symptoms.

Claimant appealed the Board's decision to this Court. On appeal from a decision of an administrative board, this Court is limited to a determination of whether or not there is substantial in the record to support the Board's factual findings.¹ Substantial evidence is

¹*General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. Super. Ct. 1960).

relevant that a reasonable person might accept as adequate to support a conclusion.² The credibility of witnesses, the weight and reasonable inferences to be drawn therefrom are for the Board to determine.³ When two expert witnesses offer differing opinions, the Board is free to accept either opinion.⁴

Claimant argues first that the Board's finding that Claimant lacked credibility does not comport with the testimony presented at the hearing and is not based on substantial evidence. She asserts that the Board placed undue weight on opinions offered by Dr. Gelman in his deposition. Claimant argues that the Board's credibility finding was based on the testimony offered by both Dr. Gelman and Claimant herself, whom the Board did not find to be forthright in regard to her medical history or the manner in which the alleged accident occurred. When examined by Dr. Gelman Claimant did not disclose the fact that she had had an earlier back injury and she forgot earlier treatment she had received for back pain.

The Board was highly skeptical about the aftermath of the alleged accident. The Board doubted whether Claimant could have driven with her leg wrapped around the steering column and found it worked against her that she did not call dispatch at the time the accident occurred, but finished her route. The Court concludes that the Board's finding that Claimant was not credible is based on substantial evidence. Based on the testimony of Dr. Gelman,

²*Streett v. State*, 669 A.2d 9 (Del. Super. Ct. 1995).

³*Coleman v. Dep't. of Labor*, 288 A.2d 285 (Del. Super. Ct. 1972).

⁴*Id.*

Mr. Prokscht and Claimant herself, the Board concluded that no work-related accident occurred. That finding is also supported by substantial evidence and is not an abuse of discretion. The consequence of that finding is that no discussion of the disparities in the medical testimony is required. The decision of the Industrial Accident Board denying Claimant Beverly Testa's petition for disability benefits is *Affirmed*.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr/ram/bjw
Original to Prothonotary