IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JOAN WEST,)
)
Appellant,)
)
v.) C.A. No. 08A-08-003-RFS
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)
WAL-MART, INC.,)
)
Appellee,)

MEMORANDUM OPINION

Upon Appellants' Appeal of the Industrial Accident Board. Affirmed.

Submitted:September 2, 2008
Decided:December 30, 2008

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David G. Culley, Esquire, and Leroy A. Tice, Esquire, Tybout Redfearn & Pell, Wilmington, DE, Attorneys for Appellee.

STOKES, Judge

This is an appeal from the November 21, 2007 decision of the Industrial Accident Board (hereinafter "Board"), granting Joan West (hereinafter "Claimant") an award of a medical witness fee for Dr. Quinn, but denying an award of a medical witness fee for Dr. Volatile. Claimant now appeals, in part, the decision of the Board, seeking to reverse the denial of a medical witness fee for Dr. Volatile. For the reasons set forth below, the Board's decision is upheld.

STATEMENT OF FACTS

The underlying facts of this matter were fully stated in this Court's March 31, 2006 and August 29, 2007 decisions involving the same parties. *See West v. Wal-Mart, Inc.*, 2006 WL 1148759 (Del. Super. 2006); 2007 WL 2446810 (Del. Super. 2007). The Court's factual recitation is repeated here for completeness.

Claimant was injured in a compensable work-related accident in March 2001. Her employer was Wal-Mart, Inc. (hereinafter "Walmart"). Claimant suffered a herniated disc and received workers compensation benefits. On September 28, 2004, Claimant filed a Petition to Determine Additional Compensation Due against Walmart, asking for partial disability benefits and unpaid medical expenses relating back to her injury.

Claimant underwent lumbar fusion surgery on February 4, 2002. Eight months later, in October of 2002, a bone scan indicated that the fusion may have failed. The recommendation to the Claimant was to undergo further surgery in 2003. However,

Claimant failed to do so. At some point around February of 2003, Claimant had a stroke.[1] In April of 2003, she had an appointment with Doctor Edward Quinn, her treating physician. He noted that at this time, Claimant had recovered from her stroke for the most part, was ambulatory with the help of a cane and neurologically intact. The x-rays from that appointment showed that the fusion appeared to have solidified. At this point, Dr Quinn released Claimant to light duty work with back precautions. The precautions included no prolonged standing, walking, sitting, stooping or bending and no running, jumping or twisting. Dr. Quinn did not put any restrictions on the number of hours Claimant could work when he released her to work in April of 2003. However, Claimant did not return to work in April 2003, nor did she return in the months immediately following.

Claimant did not actually return to work until March 2004. In the eleven months between her release and her return to work, Claimant continued to receive worker's compensation benefits from Wal-Mart. When these benefits were terminated by Wal-Mart, Claimant then returned to work. At this point, Claimant's treating physician limited

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[1] There is apparently some discrepancy as to when the stroke occurred. Claimant states that the stroke occurred on February 14, 2003. Tr. 34-36. The medical records introduced in the case pertaining to the stroke are from Dr. Quinn's transcribed notes, from an April 2003 appointment, which state that the stroke occurred on October 14, 2003. Both sides acknowledge that this must be an error. Notwithstanding the discrepancy, all sides seem to agree that Claimant had "recovered from the stroke, for the most part" by the time of the April 2003 appointment, as is stated by Claimant's attorney, referencing his conversation with Claimant's treating physician. Tr. 16, quoting Dr. Quinn Deposition at 15.

the number of hours that Claimant could work for the first two months of her return based on, in his words, "her deconditioned status only."

Claimant had an open ended benefits agreement with Wal-Mart relating to this compensable work accident which was finally terminated by Wal-Mart effective March 8, 2004.

In March 2004, Claimant returned to Dr. Quinn and was reexamined. The objective physical examination was essentially the same as it had been eleven months beforehand. However, the major change was subjective. In March 2004, Claimant reported considerable improvement in her condition from eleven months before, and told Dr. Quinn that she was ready to go back to work. At this point Dr. Quinn released her to return to work on a progressive basis, to consist of four hours for the first month, six hours for the second month, and full time after eight weeks. His concern was that Claimant was deconditioned from having been out of work for so long, and that going from zero to eight hours would be difficult for her.[2]

On February 14, 2005, the Board conducted an evidentiary hearing on Claimant's Petition to Determine Additional Compensation Due. Claimant was requesting, at that time, payment of over $1,200.00 in medical bills and a period of partial disability from March 9, 2004 until some reasonable time period thereafter. Testifying on behalf of

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[2] During Dr. Quinn's deposition the following exchange took place:

> Q: [Save] for her deconditioned state, there was no medical reason as a result of her work injury or the sequelae associated with the surgery that she couldn't work on a full-time basis?
>
> A: It was her deconditioned status only.

Claimant, by deposition, were Dr. Thomas Volatile and Dr. Edward Quinn. Dr. Volatile, an orthopedic surgeon, largely deferred to and agreed with Dr. Quinn on relevant recommendations and findings. In fact, Dr. Volatile only saw the Claimant two times and stated that he was unaware that her injuries were work-related until just prior to his deposition.

The Board's February 28, 2005 decision denied the Claimant's Petition. In the decision, Claimant's credibility was called into question. Also, the Board concluded that Claimant could have returned to work in April of 2003 and simply chose not to do so. In the Board's words, Claimant "offer[ed] no explanation as to why she failed to obey the doctor's instructions to return to work except to say that Dr. Quinn never informed her that she could work." Ex. B of Opening Br. of Claimant Below-Appellant at 5.

Furthermore, the Board denied Claimant the right to recover any of the roughly $1,200.00 allegedly owed for medical expenses. The Board stated that "multiple invoices were submitted but the Board [was] unable to discern what treatment was provided for what disorder by what provider and for what reason." Ex. B of Opening Br. of Claimant Below-Appellant at 6. It was added that the "Board is certainly not tasked nor inclined to page through the invoices and figure this out." *Id.*

Claimant appealed the Board's February 28, 2005 decision to the Superior Court on December 30, 2005. The Court's March 31, 2006 opinion reversed and remanded the matter back to the Board. It was found that the Board had neglected its function by not adequately addressing the medical bills submitted. Additionally, the Board was instructed to consider the case law of *Gilliard-Belfast v. Wendy's,* 754 A.2d 251 (Del.2000) and

Mackert v. Grotto's Pizza, IAB Hearing No. 1231323 (May 27, 2004) with regard to the issue of partial disability benefits.

Upon remand, the parties chose not to present additional evidence or argument to the Board. In its second opinion, dated September 7, 2006, the Board acknowledged that documentation had been produced as to the medical expenses incurred. Consequently, the Board found in favor of Claimant for $1,233.16 in medical expenses.

On the matter of temporary partial disability benefits, the Board found the case *sub judice* to be distinguishable from the two cases cited by the Superior Court. The Board reasoned that in *Gilliard-Belfast* the Court had found that a claimant could rely on the advice of a treating physician regarding the *inability* to work until the Board resolves the conflict. Ex. A of Opening Br. of Claimant Below-Appellant at 2. In the present matter, the Board concluded that "Claimant was released to work by her treating physician, so she was not placed in the 'untenable position' of ignoring her treating physician's instructions." *Id.*

Similarly, the Board found the present case to be distinguishable from *Mackert,* which applied the *Gilliard-Belfast* principles. The Board stated that "[i]n *Mackert,* the claimant was released to work part-time by her treating physician from the beginning; whereas in the case at hand, Claimant's treating physician released her to work full-time, she ignored the release for eleven months and did not work, and then sought another work note for part-time work that gradually increased to full-time work." Ex. A of Opening Br. of Claimant Below-Appellant at 2. Since Claimant caused the increased work restrictions by ignoring her doctor's instructions, the Board concluded that Wal-Mart should not be held responsible for the increased wage loss. *Id.*

The Board's second decision was appealed to this Court. Appeal was, however, limited to the Board's denial of temporary partial disability benefits, and its failure to award medical witness fees and attorney's fees. On August 29, 2007, this Court affirmed the Board's denial of partial disability benefits, but reversed and remanded on the issue of attorney's fees and reasonable medical witness fees. The parties have made no argument regarding attorney's fees since then, so this Court will assume that issue has been resolved.

Upon remand, the Board awarded Claimant fees for Dr. Quinn, but not for Dr. Volatile on November 7, 2007. The Board found that the two witnesses were in the same practice group and that Dr. Volatile only summarized Dr. Quinn's records and deferred to his opinion. The Board ruled that Dr. Volatile's testimony was unreasonably cumulative and redundant and did not order compensation for his testimony.

Following this ruling, Claimant filed a Motion for Reargument, arguing that since Dr. Quinn never submitted a bill for his testimony, the fee for Dr. Volatile should be awarded since Walmart would still only have to pay one medical witness fee. The Board ruled on November 21, 2007 that Dr. Quinn's bill was irrelevant to the issue of Dr. Volatile's fee and denied the motion.

The Board's decision regarding Dr. Volatile's fee has been appealed to this Court. Appeal is limited only to that issue.

STANDARD OF REVIEW

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law, and a determination of whether substantial

evidence exists to support the Board's findings of fact and conclusions of law. *Histed v. E. I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 WL 164292 (Del. Super. 2003) at *1. Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). It is more than a scintilla but less than a preponderance of the evidence. *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988). In conducting its review, this Court is not to engage in the practice of judging witness credibility or weighing the evidence proffered; those functions are reserved exclusively for the Board. *Id.* at 1106.

Questions of law are reviewed de novo. *McDonalds v. Fountain*, 2007 WL 1806163 (Del. Super. 2007) at *1. Absent error of law, the standard of review for a Board's decision is abuse of discretion. *Opportunity Center, Inc. v. Jamison*, 2007 WL 3262211 (Del. Supr. 2007) at *2. The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances." *Willis* at *1.

DISCUSSION

19 Del. C. § 2322(e) provides:

> The fees of medical witnesses testifying at hearings before the Industrial Accident Board in behalf of an injured employee shall be taxed as a cost to the employer or the employer's insurance carrier in the event the injured employee receives an award.

Much like an award of reasonable attorney's fees, the award of reasonable medical witness fees is mandatory and must be awarded by the Board to a successful claimant. *Jepsen,* 2005 WL 578801 (Del. Super. 2005). The Board also has broad discretion in

determining the reasonableness of medical witness fees and may decline to award certain witness fees should the Board determine that the number of witnesses called was unreasonable and that the testimony provided by such witnesses was redundant or cumulative because of the testimony of other medical witnesses. *Brandywine School District v. Hoskins*, 492 A.2d 1247, 1252 (Del. 1985); *Nanticoke Homes v. Miller*, 2003 WL 22232809 (Del. Super. 2003) at *5.

Claimant did receive an "award" within the bounds of 19 Del. C. § 2322(e) when the Boarded awarded $1,233.16 in medical expenses. *See Christiana Hilton v. Martinez,* 752 A.2d 1167 (Del.2000) (finding claimant had received award when Board ordered the payment of medical bills). The Board also found again that Dr. Volatile summarized Dr. Quinn's treatment records and deferred to Dr. Quinn regarding the total disability period. The Board cited the proper standard from *Miller*; there was no error of law here. The Board's determinations of fact are to be upheld, provided there is substantial evidence on which it could reasonably make its decision. The only question then is whether the Board abused its discretion in finding that Dr. Volatile's testimony was redundant and that calling two witnesses was unreasonable. This Court finds that it did not.

Dr. Quinn was Claimant's regular physician and treated her for her injuries related to the incident at work. Dr. Quinn's partner, Dr. Volatile, substituted for him on two occasions in October of 2002. Those were his only connections to the case. His testimony mostly consisted of reading Dr. Quinn's records. He also testified that he had no opinion of his own regarding her ability to return to work. This evidence is substantial enough for the Board to determine that his testimony was cumulative and redundant.

The next issue is whether Claimant called an unreasonable number of witnesses. The law on this issue does not set a particular number as being reasonable or unreasonable; it allows the Board to examine it on a case by case basis. Claimant has argued that two witnesses could not be an unreasonable number, relying partly on the ruling in *Brandywine* that two identical testimonies from a physician was not unreasonable. 492 A.2d 1247. The issue presented in that case is completely different from the one in this case; there the claimant felt that his case would be strengthened by having his witness testify at trial instead of simply using his deposition testimony. *Id.* Claimant also relies on the finding in *Keeler v. Conco Tellus, Inc.*, 1996 WL 658805 (Del. Super. 1996), that the three witnesses called in that case were reasonable. That case differed in that the third witness's testimony was not redundant, but was simply found by the Board to be unreliable. *Id.* at *7. *Keeler* did not hold that three witnesses would always be a reasonable number; it remains within the Board's discretion to decide what number is reasonable for each case. It was clear that Dr. Volatile's testimony could not have offered anything substantially beyond Dr. Quinn's opinion. The Board did not abuse its discretion in finding that the testimony of an additional witness constituted an unreasonable number for the purposes of this particular case.

Claimant's Motion for Reargument was properly denied by the Board. The fact that Dr. Quinn did not submit a bill has no relevance to Dr. Volatile's testimony. The Board's ruling was that Dr. Quinn's testimony was reasonable and compensable, but that Dr. Volatile's was not. Claimant did not cite any law which suggests that determination can be transferred from one witness to another depending on the bills they later submit.

The Board made no error of law and committed no abuse of discretion in denying Claimant's motion.

CONCLUSION

Considering the foregoing, the decision of the Industrial Accident Board is affirmed.

IT IS SO ORDERED