

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JOHN A. PARKINS, JR.

JUDGE

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**Re: Tecot Electric v. Michelle Curtis-Howett
C.A. No. 08A-05-009 JAP**

Submitted: February 20, 2009

Decided: March 24, 2009

On Appeal from a Decision of the Industrial Accident Board

AFFIRMED.

Dear Counsel:

Before the Court is the appeal of Tecot Electric (“Tecot”) from a decision of the Industrial Accident Board (the “Board”),¹ which denied Tecot’s petition to terminate Ms. Curtis-Howett’s total disability benefits. The Board held that Tecot had failed to meet its burden of proving that Ms. Curtis-Howett was no longer totally incapacitated for the purpose of working. The issue is whether the Board’s decision is supported by sufficient evidence and otherwise free from legal error. For the reasons set forth below, the Court finds that the Board’s decision is supported by substantial evidence and free from legal error and, therefore, the decision of the Board is **AFFIRMED**.

I. FACTUAL AND PROCEDURAL HISTORY

On December 27, 2005, Ms. Curtis-Howett injured her lower back in a compensable work accident when she slipped and fell on some ice on her employer’s property. She then began receiving total disability benefits in the amount of \$234.63 a week. On May 24, 2007, her employer, Tecot, filed

¹ This case was decided by a Hearing Officer in place of the Board. Pursuant to 19 *Del. C.* § 2301B(a)(4) the Hearing Officer sits with the full authority of the Industrial Accident Board. For purposes of this opinion, the Hearing Officer will be referred to as the “Board.”

a petition to terminate her total disability benefits alleging that Ms. Curtis-Howett was capable of returning to work.

At the hearing before the Board on its motion, Tecot presented a surveillance tape, on which Ms. Curtis-Howett: walked to and from her car; carried small bags; loaded the car; opened and closed the car doors; bent and reached into the car's backseat; and filled the car's tires with air with the assistance of her daughter.

After reviewing Ms. Curtis-Howett's medical records and examining her twice, Tecot's expert Dr. Karl Rosenfeld opined that Ms. Curtis-Howett could return to full-time sedentary work with the following restrictions: no walking or standing more than two consecutive hours; no sitting more than two to four consecutive hours; no lifting or carrying more than five pounds; no pushing or pulling at all; no working at heights; no use of operation foot controls or machinery; no squatting or kneeling; only occasional climbing; and driving limited to transporting herself to and from work. Dr. Rosenfeld originally included a no bending restriction, however, after viewing the surveillance tape, Dr. Rosenfeld modified that restriction to occasional bending up to thirty-three percent of the day. Dr. Rosenfeld further testified that Ms. Curtis-Howett was not a symptom magnifier.

Michael Haley, a vocational case manager, also testified on behalf of Tecot. Relying on the restrictions placed on Ms. Curtis-Howett by Dr. Rosenfeld, Mr. Haley identified twelve positions, both full-time and part-time, that he opined were within Ms. Curtis-Howett's age, education, vocational training, experience, physical capabilities, and geographical area. He testified that each employer would hire someone taking legal medications, although he did not identify to the employer the specific medications that Ms. Curtis-Howett was taking.

Dr. Michael Sugarman, a board certified neurosurgeon, testified on behalf of Ms. Curtis-Howett. Dr. Sugarman initially treated Ms. Curtis-Howett for her work injury in January 1996 and performed multiple surgeries as part of her treatment. Dr. Sugarman diagnosed Ms. Curtis-Howett with chronic low back pain with ongoing radicular symptoms, numbness and tingling. He testified that Ms. Curtis-Howett takes Percocet (fifty to sixty milligrams) throughout the day and Soma (a muscle relaxer) at night, which bring her pain under control for short periods of time. He also stated, however, that "when those medications wear off, if she's done too much, she's going to feel it and she does feel it on a regular basis." Dr. Sugarman therefore opined that Ms. Curtis-Howett "would not be able to hold a job for any period of time" and remains totally disabled.

Ms. Curtis-Howett testified on her own behalf. She stated that she has constant dull pain in her lower back, weakness in and shooting pain from her right buttock down her right leg, and numbness in her right foot. In addition, she gets spasms in her calf and foot that “wipe her out.” She testified that she can sit for five to ten minutes before having to move around. She cannot drive for long period of time without having to get out of the car. Furthermore, she testified that almost every time she goes from a seated to a standing position she gets sharp pains going down her back and into her right thigh.

Ms. Curtis-Howett stated that there are times that she can physically do more things than other times due to the medications she is taking. She also testified that the surveillance tape showed her on a “good day” and that at the time of the tape, she had already taken 30-40 mg of Percocet that day. Ms. Curtis-Howett testified that she did not believe she could go back to work

The Board held that Tecot “failed to meet its burden of proving that [Ms. Curtis-Howett] is no longer totally incapacitated for the purpose of working.”² Rather, the Board “accept[ed] Dr. Sugarman’s opinion that [Ms. Curtis-Howett] would not be able to work on a routine basis even part-time

² *Curtis-Howett v. Tecot Electric*, IAB Hearing No. 1072218, at 10 (May 5, 2007).

and therefore, would not be able to maintain steady employment.”³ The Board was “not swayed” by the surveillance tape because the tape did “not capture how she felt later that day or thereafter” and the activities shown were “short in duration.”⁴ The Board also stated that it found Ms. Curtis-Howett to be “very credible and likeable.”⁵

II. STANDARD OF REVIEW

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from a decision of the Board, the appellate court is limited to a determination of whether there is substantial evidence in the record sufficient to support the Board's findings, and that such findings are free from legal error.⁶ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁷ The reviewing court does not weigh the evidence, determine questions of credibility, or make its own factual findings.⁸ When factual determinations

³ *Id.* at 11.

⁴ *Id.*

⁵ *Id.* at 10.

⁶ *Opportunity Center, Inc. v. Jamison*, 2007 WL 3262211, *2 (Del. Supr.).

⁷ *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del.1994).

⁸ *Johnson v. Chrysler Corp.*, 213 A.2d 64 (Del. 1965).

are at issue, the reviewing Court should defer to the experience and specialized competence of the Board.⁹

III. DISCUSSION

Tecot alleges that the Board committed legal error by accepting the opinions of Dr. Sugarman over those of Dr. Rosenfeld. It further asserts that the Board's decision, which relied upon Dr. Sugarman's allegedly flawed opinion, was not supported by substantial evidence and should be reversed.

It is well-settled that the Board is free to accept the testimony of one medical expert over the other.¹⁰ Tecot submits no case law in support of its position that the Board legally erred by adopting Dr. Sugarman's testimony over that of Dr. Rosenfeld. Rather, Tecot restates the facts established below and asks this Court to come to a different conclusion as to the two experts' conflicting testimony. It is solely within the function of Board to weigh evidence and make determinations of credibility. As such, the Board did not commit legal error by accepting Dr. Sugarman's testimony over that of Dr. Rosenfeld.¹¹

⁹ 29 *Del. C.* § 10142(d).

¹⁰ *DiSabatino v. Wortman*, 453 A.2d 102, 105 (Del. 1982).

¹¹ *See Clements v. Townsend*, 831 A.2d 870, 877 (Del. 2003) (holding that the Board did not err by accepting one medical expert's opinion over the other).

Furthermore, it is clear from a review of the evidence in this case, which must be viewed in a light most favorable to the prevailing party below, that the Board's decision was supported by substantial evidence. Ms. Curtis-Howett, who even Dr. Rosenfeld admitted was not a symptom magnifier, testified about her continuing pain and her heavy dependence on pain medication. She further testified that she could not return to work. Dr. Sugarman, a neurologist who has been treating her since 1996, testified that Ms. Curtis-Howett was incapable of returning to work, even on a part-time basis. The Board gave little weight to the surveillance video as it only showed activities in short duration and did not show the impact those activities had on Ms. Curtis-Howett.¹² This Court will not re-determine questions of credibility or make its own factual findings. Therefore, viewing the evidence in a light most favorable to Ms. Curtis-Howett, there was sufficient evidence from which the Board could conclude that Tecot failed to meet its burden of proving that Mr. Curtis-Howett is no longer incapacitated for the purpose of working.

¹² See *Standard Distributing, Inc. v. Hall*, 2006 WL 2714960 (Del. Super.) (affirming the Board's decision, which accepted the opinion of the employee's treating physician over that of the employer's medical expert and the surveillance tape of the employee).

IV. CONCLUSION

For the reasons stated above, the Board's denial of Tecot's petition to terminate Ms. Curtis-Howett's total disability benefits is **AFFIRMED**.

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary