

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

STATE OF DELAWARE,)
Employer Below-Appellant,)
)
v.)
) C. A. No.: 08A-08-018
MIRIAM J. ANDERSON,)
Claimant Below – Appellee.)
)
)
)
)

Submitted: February 9, 2009
Decided: June 2, 2009

Upon Appeal from the Decisions of
the Industrial Accident Board.
Affirmed.

ORDER

Danielle K. Yearick, Esq. and Lauren C. McConnell, Esq., 750 Shipyard Drive, Suite 400, P.O. Box 2092, Wilmington, DE 19899-2092, *attorneys for Employer Below-Appellant.*

John S. Grady, Esq., 6 North Bradford Street, Dover, DE 19901, *attorney for Claimant Below-Appellee.*

SCOTT, J.

Introduction

Before the Court is Appellant's appeal from the decisions of the Industrial Accident Board ("Board"). Having reviewed the parties' submissions and the record below, the Court concludes that the Board's decisions must be **Affirmed.**

Facts

On May 9, 1994, Appellant, Miriam J. Anderson ("Anderson") was injured after falling down steps while working as a toll collector. On July 15, 1994, Anderson underwent lumbar laminectomy and discectomy surgeries for disk herniation and radicular complaints. Her injuries were deemed compensable and in October 1996 permanency was paid for injuries to her lower back and lower extremities, neck and upper right extremity.

On March 16, 2007, Anderson filed a Petition to Determine Additional Compensation Due seeking, among other things, compensation for bowel and bladder injuries, reimbursement for incontinence pads and payment for assisted living. A two-part hearing was held on August 29, 2007 and November 20, 2007. The Board issued its decision on June 20, 2007. It granted Anderson's Petition for Additional Compensation Due relating to her previously compensable injuries but denied her request for compensation for permanent impairment to her bowel and bladder and for reimbursement for incontinence

pads on the basis of the statute of limitations. The Board also awarded Anderson payment for two hours per day of assisted care until a future hearing could be held to determine reasonable and necessary assisted care.

On June 25, 2007, Anderson filed a motion for reargument challenging the Court's decision regarding the statute of limitations. The Board adopted Anderson's reasoning and amended its June 20, 2007 decision acknowledging that Anderson had filed a claim for compensation regarding permanent injury to her bowel and bladder and related medical expenses within five years of receiving her last payment pursuant to 19 *Del. C.* §2361(b). Employer filed this appeal of the Board's decisions on August 26, 2008.

Grounds for Appeal

Employer asserts four grounds for appeal. It claims that the Board erred as a matter of law and fact in finding that: (1) Anderson's bowel and bladder claims are not barred by the statute of limitations; (2) Anderson's bowel and bladder injuries are compensable; (3) Anderson is entitled to two hours per day of assisted living; and (4) surveillance tapes of Anderson must be excluded.

Standard of Review

When reviewing the decision of an administrative agency, this Court's role is to determine only whether the agency exercised its power arbitrarily, committed an error of law, or made findings of fact which are unsupported by

the evidence.¹ The agency's decision must stand so long as it is supported by substantial evidence.² Substantial evidence is relevant evidence that a reasonable person would accept as adequate, this standard requires more than a scintilla but less than a preponderance.³

The Court is not the trier of fact and will not assess the credibility of witnesses.⁴ The Court will defer to the Board's evidentiary decisions, absent an abuse of discretion.⁵ Abuse of discretion occurs when a fact finder has "exceeded the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."⁶ However, review of the Board's application of legal principles is *de novo*.⁷

Discussion

Statute of Limitations

Whether Anderson's bowel and bladder claims are barred by the statute of limitations is a mixed question of law and fact. Therefore, the Court must determine whether the Board applied the correct legal standard and whether the Board's factual findings are supported by substantial evidence. If substantial

¹ *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981) citing *Kreshtool v. Delmarva Pwr. & Light Co.*, 310 A.2d 649 (Del. Super. 1973).

² *Id.*

³ *Olney*, 425 A.2d at 614.

⁴ *Id.* at 613

⁵ *Jarman v. Willow Grove Meats*, 1994 WL 146031 (Del. Super., March 30, 1994).

⁶ *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

⁷ *E.I. DuPont De Nemours & Co. Inc., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

evidence exists and the Board's decision is free from legal error, the Superior Court's decision must be affirmed.⁸

Employer argues that Anderson's claim for permanent impairment to her bowel and bladder and her request for reimbursement for incontinence pads are barred by the applicable statute of limitations. Employer argues that the two year statute of limitations provided for under 19 *Del. C.* § 2361(a) applies in this case. 19 *Del. C.* § 2361(a) provides:

In case of personal injury, all claims for compensation shall be forever barred unless, within 2 years after the accident, the parties have agreed upon the compensation as provided in § 2344 of this title or unless, within 2 years after the accident, 1 or more of the interested parties have appealed to the Board as provided in § 2345 of this title.

The Board originally agreed with Employer and barred Anderson's claims under this section. Upon reconsideration, however, the Board found that 10 *Del. C.* § 2361(b) applies rather than Section 2361(a). 10 *Del. C.* § 2361(b) provides:

Where payments of compensation have been made in any case under an agreement approved by the Board or by an award of the Board, no statute of limitation shall take effect until the expiration of 5 years from the time of the making of the last payment for which a proper receipt has been filed with the Department.

⁸ *Geroski v. Playtex Family Products*, 676 A.2d 903 (Del. 1996).

The Court agrees with the Board's determination that Section 2361(b) applies in this case. There is no dispute that Employer acknowledged compensability for Anderson's injuries resulting from the 1994 work accident. It began making payments of compensation in October 1996 and has continued to make payments for those injuries up to the time of the Board hearing. Because payments of compensation have been and are being made to the plaintiff pursuant to the initial, October 1996 agreement, Section 2361(b) applies and the time limitation for making additional claims is five years after payments have ceased. The Board's decision is free from legal error and thus must stand.

In finding Section 2361(b) applicable, the Board made a finding of fact that Anderson's bowel and bladder problems were related to the 1994 work injury. The Court finds that this factual finding is supported by substantial evidence. According to Anderson's medical expert, Dr. Meyers, Anderson experienced a history of mixed urinary incontinence beginning in 1994 after she suffered spinal trauma from her work related accident. He testified that in 2001/2002, Anderson underwent several surgeries to implant a catheter which aggravated her bowel and bladder problems. He testified that the injury and irritation to the Anderson's spinal cord and nerves is the main contributing factor to her bowel and bladder the problems. Based on

Dr. Meyers' testimony, there exists sufficient evidence to support the Board's finding that Anderson's bowel and bladder injuries are related to the 1994 work related injury.

Employer argues that even if the injuries are related, they are separate and distinct thus any compensation payments that it made were for different injuries which do not trigger the applicability of Section 2361(b).

Specifically, Employer claims that it only made payments for Anderson's lower back and lower extremities, neck and her upper right extremity thus additional compensable claims are only those related to those specific injuries. The Court does not adopt Employer's narrow interpretation of Section 2361(b). The language of the statute does not require that payments of compensation must be related to certain injuries. The Court interprets the statute more broadly so as to govern all claims which arise from a particular work-related injury, even those that develop subsequent to the original claim. Compensation for those claims, however, is contingent upon a showing that the injuries resulted from the original work related accident. The Board made such a factual finding and the Court finds its decision substantially supported by the record.

Motion for Reargument

Employer argues that Anderson's motion for reargument was improper because it failed to cite any new evidence of law that was not presented at the time of the original decision. It claims that the Board relied on 19 *Del. C.* 2361(b) which was available to the Board at the time of its original decision and therefore Anderson's motion merely rehashes arguments that were properly addressed on the merits at the hearing. Employer also argues that the Board failed to cite any evidence to support its conclusion that Section 2361(b) applies in this case.

A motion for reargument will generally be denied unless the moving party can demonstrate that "the Court overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or the facts such as would affect the outcome of the decision."⁹ By its motion, Anderson successfully argued to the Board that it had misapprehended the law which affected the outcome of its decision. It was proper for the Board to acknowledge a mistake in its interpretation of the statute of limitations and correct its error. The Court finds no abuse of discretion. Furthermore, as discussed above, the Court finds that the Board's decision has substantial evidentiary support in the record.

⁹ *Monsanto v. Aetna*, 1994 WL 46726, *2 (Del. Super. Jan. 14, 1994).

Assisted Living

In her Petition to Determine Additional Compensation Due, Anderson requested compensability for assisted living. The Board granted Employer's motion to bifurcate the hearing in order to address the issue of compensability for assisted living at a later date. Based on the evidence presented during the first two hearings, the Board found that Anderson was in need of some level of assisted living and awarded her two hours per day of assisted living until a further hearing could be held to more definitely determine what level of care is reasonable and necessary.

The Board's decision is supported by Dr. Meyers' testimony that assisted living is appropriate for Anderson because she is unable to cook or clean, she suffers from severe depression and she needs medication monitoring. The Board relied on this testimony and granted Anderson two hours per day of assisted living in order to ensure that she has meal preparation, oversight of medication, laundry and miscellaneous chores done as needed to help around the house and to maintain her sanitary needs. The Court does not find that the Board's decision exceeded the bounds of reason in view of the circumstances described by Dr. Meyers. A further hearing will permit the parties to more fully address their arguments regarding necessity and costs.

Surveillance Footage

Employer sought to admit surveillance footage shot on three different dates all of which occurred after the first hearing. The Employer provided notice of the tapes on October 23, 2007. The second hearing was held on November 20, 2007. Pursuant to Industrial Accident Board Rule 9(e), either party may modify a pretrial memorandum prior to thirty days *before* the hearing. It is within the Board's discretion to waive the thirty-day requirement upon written application.¹⁰ A decision to waive the 30 day requirement will only be reversed if it was an abuse of discretion to do so.¹¹ Because Employer failed to give 30 days notice of their intent to introduce the surveillance tapes, the Board decision not to allow their admittance is soundly supported by Rule 9(e). The board exercised its discretion in excluding the tapes and the Court finds no basis to disturb its decision.

Conclusion

For the above-stated reasons, the Board's decisions are hereby

AFFIRMED.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.

¹⁰ Industrial Accident Board Rule 9(E).

¹¹ *McIntosh v. Chrysler Corp.*, 1995 WL 339078 (Del. Super., March 16, 1995).