

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

SANDRA PERSON-GAINES)	
)	CIVIL ACTION NUMBER
Appellant)	
)	08A-08-011-JOH
v.)	
)	
PEPCO HOLDINGS, INC.)	
)	
Appellee)	
)	

Submitted: March 27, 2009
Decided: April 23, 2009

MEMORANDUM OPINION

Upon Appeal from the Industrial Accident Board - AFFIRMED

Appearances:

Michael D. Bednash, Esquire, of Kimmel Carter Roman & Peltz, Newark, Delaware,
attorney for appellant

Elizabeth A. Saurman, Esquire, of Marshall Dennehy Warner Coleman & Goggin,
attorney for appellee

HERLIHY, Judge

This case comes to Superior Court as an appeal from the Industrial Accident Board (“Board”). On July 30, 2007, the claimant, Sandra Person-Gaines (“Person-Gaines”), filed a Petition to Determine Additional Compensation Due against her employer Pepco Holdings, Inc. (“Pepco”). The petition asked for benefits due to an alleged increase in the permanent impairment of her lumbar spine.

The initial work related injury that set these proceedings in motion occurred on March 18, 1988. On that date, Person-Gaines suffered a low back injury while working at Pepco. In the compensation proceedings following that injury, Pepco admitted the injury was compensable. As a result, Person-Gaines was found to have a 10% permanent impairment injury to her lumbar spine and a 2.5% permanent impairment injury to her right lower extremity.¹ This diagnosis was obtained during a 1993 hearing.

Her instant petition asks for increased benefits as a result of increasing impairment to her lumbar spine. She claims her lumbar spine impairment has increased from the 1993 level of 10% to a present-day level of 17%.

The Board held a hearing on March 12, 2008. A Workers’ Compensation Hearing Officer presided over the proceedings.² On July 28, 2008, the Board issued its decision denying Person-Gaines’ petition finding she had not shown an increase in impairment. An

¹ The percentages are figures based upon the DRE Category III of the AMA Guides. All percentages in this opinion reflect those guidelines.

² 19 *Del. C.* § 2301(B).

appeal of that finding has been filed by Person-Gaines. Because the Court finds the opinion of the Board is based on sufficient evidence, the ruling below is AFFIRMED.

Factual Background

Person-Gaines sustained a work related injury to her low back in March 1988. At the 2008 hearing, she testified her low back, specifically her lumbar spine, had been steadily deteriorating since 1993. In 1993, she was still working for Pepco but was receiving benefits based upon a 10% permanent impairment to her lumbar spine and a 2.5% permanent impairment to her lower extremity. However, during a Board hearing in 1995, she testified the pain from her injury prevented her from continuing work. On cross-examination in the current hearing, Person-Gaines admitted that when she stopped working in 1995, the Board found her not totally disabled. She further acknowledged the Board's proceedings from her 1995 claim had found her neck pain and headaches were not related to her 1988 work injury.

The remainder of the 2008 hearing, consisted of expert testimony from two doctors, Dr. Pierre LeRoy and Dr. John Townsend, III. Dr. LeRoy testified for the claimant after examining her on March 6, 2007. He had previously treated Person-Gaines on a regular basis from 1997 to 1999. In 2004, he began to see Person-Gaines again, though only once or twice a year. At the hearing, Dr. LeRoy opined that Person-Gaines had permanent low back impairment and diagnosed her impairment to be 13-17%. Dr. LeRoy also reviewed Person-Gaines' three MRIs that were taken on October 26, 1995, March 5, 1999, and

December 4, 2006. From those MRIs, he concluded that the permanent impairment to the lumbar spine was 10-13% whole person or 13-17% relative to the lumbar spine. Dr. LeRoy also stated he had treated Person-Gaines in 1997 and noted that he would have diagnosed her, at that point in time, with around a 5% permanent impairment to her lumbar spine. Therefore, Dr. LeRoy's testimony calculated a 8% to 12% increase in her permanent impairment from 1997 to 2007.

Furthermore, Dr. LeRoy elaborated on Person-Gaines' disc herniations at L5-S1 and L4-5 based on the three MRIs before him. Dr. LeRoy concluded increasing forms of disc herniations were exhibiting themselves at both sites. He further opined Person-Gaines had stenosis at the L4-5 region of the spine. This lead him to believe that Person-Gaines' impairments had significantly worsened since 1997. He concluded the progressing nature of her spinal herniations as evidenced by the MRIs merited a finding for increased benefits.

Dr. Townsend testified for Pepco. At Pepco's request, he had been seeing Person-Gaines on multiple occasions (July 1995, February 1996, October 1997, April 1999 and November 2007) to monitor her medical status. Viewing the same medical records available to Dr. LeRoy, Dr. Townsend concluded Person-Gaines had a 15% permanent impairment to her lumbar spine. Although Dr. Townsend noted this was higher than the figure in 1993, he disagreed with Dr. LeRoy's conclusion that the increasing impairment was causally related to her 1988 injury.

First, Dr. Townsend referenced a change in AMA guidelines for measuring impairment had taken place since 1993. Previously, the back and leg impairment were rated separately. But under the new system the leg symptoms and back symptoms are combined into one figure. He stated this deviation skewed the comparison of the 1993 percentage to the 2007 percentage. Given the 15% rating today, Dr. Townsend stated such an injury using the 1993 guidelines would have been about 12-13%. In other words, Person-Gaines received a 2-3% “bump” in her impairment index evaluation based only upon the new standards being used by the AMA. To put it another way, placing the two ratings systems together, her 12.5% impairment (10% for her back and 2.5% for her leg) under the 1993 system equated basically to the current 15% rating.

Second, Dr. Townsend testified that there was no objective change in Person-Gaines’ condition and attributed the increased impairment to the patient’s worsening degenerative condition unrelated to the work injury. Therefore, Dr. Townsend concluded her 1988 injury was not the primary cause of her increased impairment. He further testified the MRIs showed the claimant’s general degenerative problems were not isolated to the area where she had surgery. Although he admitted Person-Gaines’ stenosis could be due to disc herniation, he testified to his belief the stenosis was congenital or degenerative.

Parties’ Contentions

Person-Gaines’ sole contention is the Board failed to support its findings of fact with

substantial evidence. Person-Gaines argues the Board's decision is inconsistent because it agreed with both medical experts that her condition had deteriorated from her 1993 level but then concluded the claimant should not receive additional compensation for that increased impairment.

Pepco argues the findings of the Board were based on sufficient evidence. It contends the reliance upon the Board of Dr. Townsend's opinion was sufficient to deny Person-Gaines' petition.

Standard of Review

The duty of this Court on an appeal from the Board is to determine whether the decision below is supported by substantial evidence and free from legal error.³ Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴ The standard of review "requires the reviewing court to search the entire record to determine whether, on the basis of all of the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."⁵ It is within the province of the Board to determine the credibility of witnesses and the factual inferences that are made from those determinations.⁶ Only where there is no substantial,

³ *General Motors Corp. v. Jarrel*, 493 A.2d 978, 980 (Del. Super. 1985).

⁴ *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

⁵ *Nat'l Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980).

⁶ *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 158 (Del. 2006).

competent evidence to support the Board's factual findings may this Court overturn the Board's decision.⁷

Discussion

The sole issue before the Court is whether the Board relied on sufficient evidence to conclude Person-Gaines' increased permanent impairment to her lumbar spine from 1993 to 2007 was not causally related to her 1988 work injury. After reviewing the record, it is clear the Board had sufficient evidence in the form of Dr. Townsend's expert testimony. Therefore, the ruling below is affirmed.

Person-Gaines correctly points out there was substantial evidence to find that she had experienced an increase in her permanent impairment to her lumbar spine. Indeed, both Dr. LeRoy and Dr. Townsend confirmed this fact. However, Person-Gaines mistakenly frames the issue on these facts alone to conclude the Board failed to find in her favor. By doing so, she has neglected to acknowledge the remainder of Dr. Townsend's testimony, which provided substantial evidence to conclude her increased impairments were not work related.

A review of the hearing below shows the Board heard substantial evidence from Dr. Townsend. In its opinion, the Board set forth, with great clarity, two lines of reasoning offered by Dr. Townsend upon which it relied. The first was the finding that the 15% impairment diagnosis using modern standards artificially inflated her spinal impairment

⁷ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965).

when compared to her 1993 evaluation. The other finding of fact was that Person-Gaines' physical impairments were exacerbating as a result of congenital or degenerative factors unrelated to her work injury.

Furthermore, the Board found Dr. Townsend's testimony to be credible and Dr. LeRoy's as unreliable. It made such a finding on the fact that Dr. LeRoy stated he would have diagnosed Person-Gaines with only a 5% permanent impairment in spite of the fact she had already been diagnosed with a 10% impairment in 1993. The Board also concluded Dr. LeRoy could not cite to any pertinent or specific medical records to support an objective change in Person-Gaines' impairment. In Delaware, the Board is allowed to credit one medical expert's opinions from other medical testimony that is offered, so long as the favored testimony is supported by substantial evidence.⁸

Conclusion

Because the Board's opinion clearly sets out its findings of fact based on the expert testimony it deemed as credible and such findings of fact were based on substantial evidence, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

J.

⁸ *Cottman v. Burris Fence Const.*, 918 A.2d 338, 2006 WL 3742580, at *4 (Del. Dec. 19, 2006) (TABLE).