

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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Re: ***Kenneth Mode v. Valmont Structures, Inc.***
C.A. No. S09A-09-001 RFS

*Upon an Appeal from the Industrial Accident Board.
Remanded, with Jurisdiction Retained.*

Submitted: June 1, 2010
Decided: June 11, 2010

Dear Ms. Green and Mr. Radulski:

Pending before me is Claimant Kenneth Mode's appeal of a decision of the Industrial Accident Board ("Board") granting him a 19-percent impairment to the lumbar spine. In his Opening Brief, Claimant argues that the Board mischaracterized the evidence by finding that Dr. Gelman, Employer Valmont's expert medical witness, attributed Claimant's permanent impairment to the work injury. To buttress this claim, Claimant's Reply Brief presents deposition testimony offered by Dr. Gelman at a

subsequent proceeding on a related matter. It clarified Dr. Gelman's opinion that Claimant's current condition is not related to the work accident. Employer has moved to strike the portion of the Reply Brief that contains Dr. Gelman's subsequent testimony as not being properly before the Court on appeal of the Board's decision.

Claimant opposes the motion to strike, arguing that Dr. Gelman's subsequent testimony is necessary to show the Board mischaracterized the testimony given by Dr. Gelman in his first deposition and that Employer followed suit in the Answering Brief. Claimant argues that Employer was aware of Dr. Gelman's subsequent statements regarding the lack of causation. Counsel for Claimant also asserts that she had a duty of candor under Professional Conduct Rules 3.3 and 4.1 to correct any misapprehension about the facts that might have been engendered by Employer's argument.¹

Facts

On February 1, 2006, Claimant injured his lumbar spine during the course of his employment with Valmont Structures ("Employer"). Following conservative treatment, Claimant underwent surgery in March 2007. The surgery failed to resolve the pain and numbness that Claimant continues to experience in his back and legs. Claimant subsequently filed a Petition to Determine Additional Compensation Due for a 33-percent permanent impairment rating to the lumbar spine.

¹Claimant also raises an issue regarding the physicians' use of AMA guidelines for determining percentages of permanent impairment. This issue will be addressed when the case is returned to this Court following the remand to the Industrial Accident Board.

At the hearing before the Board, the sole issue raised was the degree of permanent impairment. Stephen Rodgers, M.D., testified on Claimant's behalf. He offered his expert opinion that, based on the Fifth Edition of the AMA Guides to Permanent Impairment ("Fifth Edition"), Claimant had a 33- percent impairment of the low back causally related to the work accident. Employer presented the testimony of Andrew J. Gelman, D.O., who stated his expert opinion that Claimant had a 19-percent impairment, based on the Sixth Edition of the AMA Guides to Permanent Impairment ("Sixth Edition"). Both doctors discussed their preferences for either the Fifth Edition or the Sixth Edition. They both examined Claimant and reviewed his medical records.

The Board Decision

The Board found that Claimant has a 19-percent permanent impairment to the lumbar spine related to the industrial accident. In its decision, the Board reviewed the evidence, including the lengthy testimony of both doctors and the conflicting evidence as to the percent of the impairment and the relative merits of the Fifth Edition and the Sixth Edition. The Board stated that Claimant bore the burden of proving the 33-percent impairment and identified its own task as resolving the conflicts in the expert testimony. The Board noted that the physicians had similar findings, generally, as to Claimant's condition but that they used different editions of the AMA Guides. The Board explicitly accepted the opinions of Dr. Gelman as to both the percentage of impairment and the use of the Sixth Edition.

Scope of Review

The function of this Court on review of a decision of an administrative board is to determine whether the board's decision is supported by substantial evidence.² Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion.³ This Court does not weigh the evidence, determine questions of credibility or make its own factual findings.⁴ It merely determines whether the decision is supported by the record and is free from legal error.⁵ As the trier of fact, the Board is free to resolve conflicts between experts' opinions by accepting the opinion of one expert over another if supported by substantial evidence.⁶

Discussion

Claimant argues that the Board's finding of a 19-percent impairment is error because it is based on a mistaken premise, which is not supported by substantial evidence. That is, Claimant asserts that Dr. Gelman made no finding of causation. The record shows that causation was not an issue at the hearing and that Dr. Gelman was not asked by either counsel for Claimant or for Employer any questions about causation. Dr.

²*General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

³*Oceanport Ind. v. Wilmington Stevedores.*, 636 A.2d 892, 899 (Del. 1994).

⁴*Johnson v. Chrysler*, 213 A.2d 64, 66 (Del. 1965).

⁵*Quaker City Motor Parts v. Sheldon*, 2001 WL 282808 (Del. Super.).

⁶*DiSabatino Bros. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

Gelman is an experienced professional who understood that the cause of Claimant's injury was a condition of receiving a workers' compensation award. At no time in his deposition in preparation for the permanency hearing did Dr. Gelman attribute Claimant's ongoing problems to the work accident. Dr. Gelman stated his opinion as to Claimant's diagnosis as follows:

Q: And, Doctor, what is your opinion with respect to the February 1st, 2006 injury?

A: I commented in my report that Mr. Mode probably strained or sprained his lower back, and I acknowledged that he may have exacerbated some underlying and preexisting disc disease at the L5-S1 level.

Q: Doctor, what is your current diagnosis?

A: Mr. Mode would fall within a description of a failed back syndrome. . . . that is attributable to elements of scar or epidural fibrosis involving elements at the L5-S1 level and associated nerve root.⁷

Dr. Gelman made no further statements regarding causation or attribution of Claimant's current problems to the work injury.

In its decision, the Board stated that Dr. Gelman "found that Claimant has nineteen percent permanent impairment to the lumbar spine that is causally related to the industrial

⁷Transcript Andrew J. Gelman, D.O. (April 3, 2009) at 8-9.

accident.”⁸ Dr. Gelman did not offer such a statement, nor is this statement a reasonable inference to be derived from Dr. Gelman’s testimony. As previously noted, the question of causation was not addressed at the hearing.

In the Reply Brief, Claimant asserted that Dr. Gelman addressed causation more squarely at a subsequent deposition between the parties. When asked whether the requirement for ongoing pain management was attributable to the 2006 work injury, Dr. Gelman responded: “Well, that’s going to be the Board’s decision because I don’t think the treatment has addressed the work injury. I think the treatment has addressed a degenerative condition, that being the L5-S1 aspect for which he has had treatment, including surgery.”⁹

The doctor went on to say: “I believe he probably didn’t sustain any more than a soft tissue strain and sprain, and that has nothing to do with what he’s since been treated for and/or for what he’s being treated for at this time.”¹⁰ He agreed a permanency rating of no more than four percent could be assigned for the sprain/strain. When asked whether he had previously stated that the 19 percent permanency rating was wholly attributable to the work accident, he responded that he “didn’t speak of it either way.”¹¹

⁸Board Decision at 7.

⁹Transcript Andrew J. Gelman, D.O. (April 5, 2010) at 34.

¹⁰*Id.* at 35.

¹¹*Id.* at 40.

Dr. Gelman's testimony continued as follows:

Q: When you believe that permanency is not related to an Industrial Accident Board, that something important for you to let the Board know, isn't it? . . .

A: Not unless I'm specifically asked about that. I address permanency as an entity.

Q: So you address permanency and you did not believe it was important to let either counsel or the Board know that the permanency was not attributed to the industrial accident?

A: Well, it's spelled out pretty clear in my report what I thought occurred as a result of the industrial accident and what he has since been treated [sic]. I addressed the concept of a rating based on Mr. Mode's presentation to me. If it's otherwise not in my other depositions, then legal counsel probably didn't ask me to further break it down.¹²

When Dr. Gelman gave his first deposition, he had formed an opinion as to causation, and he knew that causation is the focal point for determining whether a claimant is entitled to workers' compensation benefits. Yet, he did not express that opinion until the question was explicitly presented to him in the subsequent deposition. Then and only then was he candid about the connection, or lack thereof, between Claimant's work accident and Claimant's present condition.

¹²*Id.* at 41.

The general rule is that evidence that was not presented to the Board is not properly before this Court on appeal of a Board decision. In this case, when the evidence proffered in the Reply Brief was not available at the hearing before the Board, and when the proffered evidence so clearly strikes the target, the Court finds that it is in the best interest of the parties and the Board to remand the matter to the Board for consideration of Dr. Gelman's deposition dated April 5, 2010, along with the evidence presented at the permanency hearing in order to fully resolve the issue of causation of Claimant's condition.

In the interest of justice, I am remanding this case for the Board to address the issue of causation of Claimant's permanency. On remand, the parties shall be given the opportunity to present additional evidence and legal argument to supplement the record on the issue of causation.¹³ The Board shall determine the appropriate standard of causation and apply that standard to the facts surrounding Claimant's injury.¹⁴

Jurisdiction is retained, and the Board shall decide the question within ninety days.

IT IS SO ORDERED.

Very truly yours,

¹³*Mullens v. Worthy Construction Co.*, 2001 WL 1738868 (Del. Super.) (citing *State v. Steen*, 719 A.2d 930 (Del. 1998) (holding that on remand to the Industrial Accident Board, the parties have a statutory right pursuant to 19 *Del. C.* § 2350(b) to present evidence and make legal argument at the hearing)).

¹⁴*Id.*

Richard F. Stokes

Original to Prothonotary