SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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GEORGETOWN, DE 19947

January 30, 2014

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RE: *Michael Evans v. Johnny Janosik, Inc.*
C.A. No.: S13A-02-002 ESB

Date Submitted: October 8, 2013

Dear Counsel:

This is my decision on Michael Evans' appeal of the Industrial Accident Board's finding that certain medications he was taking are not reasonable and necessary for treatment of his wrist, arm and shoulder injuries and are therefore not compensable under the workers' compensation laws.

STATEMENT OF THE CASE

Evans was injured while employed by Johnny Janosik, Inc. Janosik operates a furniture store in Laurel, Delaware. Evans was injured on April 7, 2005. Evans was holding a headboard on the roof of a golf cart with his right hand when the wind blew the headboard over, causing Evans' right arm to be pushed behind him and pinned in that position for several minutes before help could arrive. Evans experienced pain

and swelling in his right wrist, arm and shoulder. Evans underwent arthroscopic surgery on his right wrist. The surgery did not provide Evans with sufficient relief. Janosik acknowledged that Evans' injuries were compensable and paid for his workers' compensation benefits. Since the accident, Evans has been treated by several doctors over the years for chronic pain. Evans is currently being treated by Jay I. Freid, M.D.

Evans filed a petition in November 2009 seeking payment for certain medications that he was taking to treat his injuries.[1] Janosik did not dispute the medications that Evans was taking to treat his pain,[2] but it did dispute the medications Evans was taking to treat his anxiety, anger, depression and psychotic disorder.[3] The Board held a hearing on May10, 2010. The hearing focused on the medications that Janosik contested and whether they were reasonable and necessary for the treatment of Evans' injuries. The Board found that all of the medications that Evans was taking

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[1] The Board's May 24, 2010 decision on Evans' Petition to Determine Additional Compensation Due does not clearly identify the medications being challenged by Janosik or the ones Evans sought payment for. Prior to the decision, it appears that Evans was taking and was seeking payment for Vicodin, Cymbalta, Zanaflex, Flexeril, Klonopin, Effexor, Remeron and Xanax. *Evans v. Johnny Janosik, Inc.,* No. 1267863 at 5, 10 (Del. I.A.B. May 24, 2010).

[2] Hydrocodone and Tizandine. This information was found in footnote 1 of the Board's May 24, 2010 decision.

[3] Effexor, Remeron, Klonopin and Xanax. These appear to be the drugs Evans took for his psychiatric illnesses. *Evans v. Johnny Janosik, Inc.,* No. 1267863 at 10 (Del. I.A.B. May 24, 2010).

were reasonable and necessary for the treatment of his injuries and were therefore compensable. The Board then awarded Evans $9,358.08 for outstanding prescription medication expenses that he had incurred.

Janosik filed for Utilization Review[4] in 2011 to determine whether Evans' use of Hydrocodone, Klonopin, Cymbalta and Zanaflex was compliant with the Delaware Workers' Compensation Health Care Practice Guidelines[5]. The Utilization Review found that all of the medications were compliant with the guidelines except for one, Zanaflex. Both parties appealed the Utilization Review decision to the Board. The parties resolved their dispute and entered into a joint stipulation on November 15, 2011. According to the joint stipulation, Janosik agreed to withdraw its appeal and to not challenge the compliance of Evans' medications with the guidelines for at least six months.

Janosik waited for six months and then filed for a second Utilization Review on May 23, 2012 to determine whether Evans' use of Hydrocodone, Klonopin and Cymbalta was compliant with the guidelines. The Utilization Review found that the medications were compliant with the guidelines in a decision dated June 19, 2012. Janosik appealed the decision to the Board.

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[4] 19 *Del. C.* §2322F(j).

[5] 19 Del. Admin. C. §1342.

The Board held a hearing on January 14, 2013. Janosik argued that Evans' use of Hydrocodone, Klonopin and Cymbalta was not reasonable and necessary for the treatment of his injuries. Richard I. Katz, M.D., testified on behalf of Janosik. Dr. Katz is board certified in psychiatry, neurology, and clinical neurophysiology electrodiagnosis. Dr. Katz examined Evans on October 18, 2010, September 22, 2011, and June 26, 2012. Dr. Katz also reviewed Evans' medical records and the June 19, 2012 Utilization Review decision.

Dr. Katz told the Board that his physical examinations of Evans showed no objective findings for Evans' complaints of pain and that he could not find any reason for Evans' continued use of narcotic medications other than his subjective complaints of pain. Dr. Katz also told the Board about the harmful effects of the continued use of high-dose narcotics, how physicians have to be careful when prescribing such medications, and the need to question why the patient is complaining about pain. Dr. Katz concluded by telling the Board that the narcotic medications Evans was taking were not reasonable and necessary for the treatment of his injuries. Evans did not testify at the hearing and he did not present any witnesses on his behalf. Evans did argue that the Board was bound by its prior decision in this case and the agreements between the parties.

The Board rejected Evans' argument and accepted Dr. Katz's testimony and

found that Evans' use of Hydrocodone, Klonopin and Cymbalta was not reasonable and necessary for the treatment of his injuries and therefore are not compensable. This is Evans' appeal of that decision.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.[6] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[7] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[8] It merely determines if the evidence is legally adequate to support the agency's factual findings.[9] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to

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[6] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

[7] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986)(TABLE).

[8] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[9] 29 *Del.C.* § 10142(d).

support its conclusions.[10]

DISCUSSION

Evans argues that the Board erred as a matter of law when it found that *res judicata* and collateral estoppel did not bind the Board to its prior decision and agreements between the parties.[11] Evans further argues that the only way for Janosik to challenge what the Board had previously decided is for Janosik to seek relief under 19 *Del. C.* §2347.

1. The Prior Decision and Agreement

Evans' argument is based on the Board's May 24, 2010 decision and the November 15, 2011 agreement between the parties. The Board's May 24, 2010 decision found that Evans should be compensated for the Effexor, Remeron, Klonopin and Xanax that he had already taken for the treatment of his injuries. The November 15, 2011 agreement provided that Evans could take Hydrocodone, Klonopin and Cymbalta for the treatment of his injuries for the next six months without challenge by Janosik. Neither the May 24, 2010 decision nor the November 15, 2011 agreement provided that Evans could take these drugs forever. Janosik only

[10] *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

[11] Evans' attorney was given an opportunity to identify all applicable agreements that supported his argument, but did not identify any other agreement than the one agreement discussed herein.

sought Utilization Review in 2012 of Cymbalta, Hydrocodone and Klonopin. Indeed, based on the Utilization Review decision, it appears that these were the only drugs that Evans was taking at the time.[12] Thus, these are the only medications that are now in dispute.

Res judicata and collateral estoppel are related doctrines that preclude repetitive litigation.[13] 19 *Del. C.* §2347 sets forth the process for a party to seek review by the Board of an agreement or award. It states, in applicable part, that:

> On the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in 6

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[12] The 2012 Utilization Review decision mentions Zanaflex as a drug to be reviewed, but the decision itself suggests that Evans was no long taking Zanaflex.

[13] *Res judicata* prevents a party "from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties." *Betts v. Townsend, Inc.*, 765 A.2d 531, 534 (Del. 2000). The *res judicata* bar applies when: "(1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and, (5) the decree in the prior action was a final decree." *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 192 (Del. 2009). Collateral estoppel "prohibits a party from relitigating a factual issue that was adjudicated previously."*M.G. Bancorporation, Inc., v. Le Beau*, 737 A.2d 513, 520 (Del. 1999). Collateral estoppel will preclude relitigation of relevant issues where the following conditions exist: (1) the issue(s) previously decided is (are) identical to the issue at bar; (2) the prior issue was finally adjudicated on the merits; (3) the parties against whom the doctrine is invoked were the same parties in the previous proceeding or in privy with the party to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue(s) in the prior hearing. *Clark v. St. Paul Fire and Marine Ins. Co.*, 2006 WL 3095949 (Del. Super. Oct. 30, 2006) *citing City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 324 (Del. Super. 2002).

months, review any agreement or award.

> On such review, the Board may make an award ending, diminishing, increasing or renewing the compensation previously agreed upon or awarded, and designating the persons entitled thereto, subject to this chapter, and shall state its conclusions of facts and rulings of law. The Department shall immediately send to the parties a copy of the award by personal delivery or by certified mail.

Res judicata, collateral estoppel and 19 *Del. C.* §2347 do not support Evans' argument because Janosik was not challenging the Board's prior decision or any agreement of the parties. The November 15, 2011agreement did not, as I have already noted, provide that Evans could take certain medications forever. It only provided that Janosik would not challenge Evans' use of those medications for six months. Janosik abided by the terms of that agreement and waited six months before seeking utilization review. Thus, this particular agreement expired by its own terms and is of no further relevance. Evans also failed to produce any other agreement between the parties that would support his argument.

The Board's May 10, 2010 decision found that Evans' past use of certain drugs was reasonable and necessary for the treatment of his injuries and that he should be compensated by Janosik for the prescription medication bills that he had already incurred. Similarly, this decision did not, as I have already noted, provide that Evans could take this cocktail of medications forever. Thus, there is nothing in either the

Board's May 10, 2010 decision or the November 15, 2011 agreement that Janosik is trying to revisit, making *res judicata*, collateral estoppel and 19 *Del. C.* §2347 inapplicable.

Moreover, 19 *Del. C.* §2322F(j) allows Janosik to contest Evans' ongoing medical treatment for compliance with the Health Care Practice Guidelines. 19 *Del.C.* § 2322C(1) provides, in applicable part, that:

> The Health Care Advisory Panel shall adopt and recommend a coordinated set of health care practice guidelines and associated procedures to guide utilization of health care treatments in workers' compensation, including but not limited to care provided for the treatment of employees by or under the supervision of a licensed health care provider, prescription drug utilization, inpatient hospitalization and length of stay, diagnostic testing, physical therapy, chiropractic care and palliative care. The health care practice guidelines shall apply to all treatments provided after the effective date of the regulation referred to in paragraph (7) of this section, regardless of the date of injury. (Emphasis added).

The Health Care Practice Guidelines apply to all treatments provided after May 23, 2008, making Evans' treatment subject to them. 19 *Del. C.* §2322F(j) provides for utilization review of an injured worker's treatment for those claims which have been acknowledged to be compensable. It states, in applicable part, the following:

> Utilization review.– The Health Care Advisory Panel shall develop a utilization review program. The intent is to provide reference for employers, insurance carriers, and health care providers for evaluation of health care and charges. The intended purpose of utilization review

> services shall be the prompt resolution of issues related to treatment and/or compliance with the health care payment system or practice guidelines for those claims which have been acknowledged to be compensable.[14] An employer or insurance carrier may engage in utilization review to evaluate the quality, reasonableness and/or necessity of proposed or provided health care services for acknowledged compensable claims. (Emphasis added).

Section 2322F(j) further provides that "[i]f a party disagrees with the findings following utilization review, a petition may be filed with the Industrial Accident Board for *de novo* review."

The purpose of utilization review is to resolve issues related to treatment and/or compliance with the Health Care Practice Guidelines for those claims which have been acknowledged to be compensable. Janosik has acknowledged that Evans' claims are compensable. The issue is whether his current use of certain medications is in accordance with the applicable guidelines.[15] An employer or insurance carrier may file for a utilization review to evaluate the necessity of proposed or provided services.[16] This is all that Janosik has done and it is permitted by this statute. Evans' argument that if a Board at some time approves the use of certain medications that those medications may be taken forever is contrary to the plain language of Section

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[14] 19 *Del.C.* § 2322F(j).

[15] 19 *Del.C.* § 2322F(j).

[16] *Id.*

2322F(j). Evans was injured over eight years ago. To think that the treatment he received years ago is still relevant now without some sort of occasional review is unreasonable. The Legislature understood this, and provided for the utilization review process, with an opportunity to appeal the utilization reviewer's decision to the Board. 19 *Del.C.* § 2322F(j) does not conflict with *res judicata,* collateral estoppel or 19 *Del.C.* § 2347. It clearly provides that treatment plans are to be reviewed and modified when necessary. Thus, there is no legal or factual basis for Evans' argument.

2. The Board's Finding

The Board found that Evans' use of Hydrocodone, Klonopin and Cymbalta was not reasonable and necessary for the treatment of his injuries. On this issue the Board only had medical testimony from one physician. The practice guidelines[17] for the drugs that Evans was taking state, in applicable part, the following:

> There is no single formula for pharmacological treatment of patients with chronic nonmalignant pain...
>
> Rather, drug treatment requires close monitoring of the patient's response to therapy, flexibility on the part of the prescriber and a willingness to change treatment when circumstances change...
>
> All medications should be given an appropriate trial in order to

[17] These are excerpts of the same guidelines that were used by the medical doctor that conducted the 2012 utilization review that is the subject of this appeal.

test for therapeutic effect.[18]

Thus, for all intents and purposes, there are no hard and fast guidelines for the medications that Evans was taking, making it a largely discretionary decision for a medical doctor to make. Dr. Katz told the Board that he could not find any objective reason for Evans' complaints of pain and that he could also not find any reason for Evans continued use of these medications other than his subjective complaints of pain. Dr. Katz also told the Board about the harmful effects of taking narcotics for a long period of time. And finally, Dr. Katz told the Board that the medications that Evans was taking were not reasonable and necessary for the treatment of his injuries. The Board's finding that the high-dose narcotics that Evans was taking were not reasonable and necessary for treatment of his injuries is supported by Dr. Katz's testimony.

CONCLUSION

The Industrial Accident Board's decision is in accordance with the applicable law and based upon substantial evidence in the record. Therefore, it is **AFFIRMED.**

[18] 19 Del. Admin. C. §1342-6.4.6.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal
oc: Prothonotary
cc: Counsel