SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

September 29, 2010

Ashley M. Oland, Esquire
Law Office of Edward C. Gill, P.A.
P.O. Box 824
Georgetown, DE 19947

H. Garrett Baker, Esquire
Elzufon, Austin, Reardon, Tarlov & Mondell, P.A.
300 Delaware Avenue, 17th Floor
P.O. Box 1630
Wilmington, DE 19899

RE: Corey J. Smith vs. R.A.M. Construction Co.
C.A. No. S09A-11-001 ESB
Letter Opinion

Date Submitted: June 2, 2010

Dear Counsel:

This is my decision on Corey J. Smith's appeal of the Industrial Accident Board's decision to grant R.A.M. Construction Company's petition to terminate his workmens' compensation benefits. Smith worked as a laborer for R.A.M. He injured his back while carrying a railroad tie at work in August 1997. Glen D. Rowe, D.O., an orthopedic surgeon, operated on Smith's back for a herniated disc in November 1997. He released Smith to return to work in March 1998. Dr. Rowe treated Smith for low back pain intermittently through 2004. Smith started seeing Ali Kalamchi, M.D., an orthopedic surgeon, in 2004. Dr. Kalamchi operated on Smith's back in July 2006 and April 2008. Dr. Kalamchi released Smith to return to work on October 2, 2008. After being released to return to work, Smith stopped seeing Dr. Kalamchi and went back to Dr. Rowe. Dr. Rowe examined Smith on February 10, 2009. He determined, without reviewing Dr. Kalamchi's medical records, that

Smith was totally disabled.

Smith has received certain workmens' compensation benefits, including compensation for total disability. He commuted his entitlement to partial disability benefits in 1998. R.A.M. filed a petition to terminate Smith's workmens' compensation benefits on December 22, 2008. The Board held a hearing on R.A.M.'s petition on May 29, 2009. John B. Townsend, M.D., Shelli Palmer, Dr. Rowe, Smith, and his wife, Rachel, testified at the hearing.

Dr. Townsend is a neurologist. He examined Smith 10 times from 1998 to 2009. Dr. Townsend testified that Smith is capable of working with certain restrictions. Dr. Rowe testified that Smith is totally disabled and can not work at all. Both Drs. Townsend and Rowe reviewed and relied upon Dr. Kalamchi's medical records in reaching their respective opinions. Dr. Townsend agreed with Dr. Kalamchi's decision to return Smith to work. Dr. Rowe disagreed with it. Shelli Palmer is a vocational case manager. She testified about a number of jobs that Smith could do. Smith and his wife testified about his injuries and efforts to find a job.

The Board granted R.A.M.'s petition to terminate Smith's workmens' compensation benefits, finding that he was not totally disabled, was not a *prima facie* displaced worker, and had not made a reasonable effort to find a job. In reaching these findings, the Board accepted Dr. Townsend's testimony over Dr. Rowe's testimony. I have affirmed the Board's decision because it is in accordance with the applicable law and supported by substantial evidence in the record.

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.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[5]

DISCUSSION

I. Dr. Kalamchi's Medical Records

Smith argues that the Board abused its discretion when it considered certain portions of Dr. Kalamchi's medical records in reaching its decision to terminate Smith's workmens' compensation benefits. Dr. Kalamchi performed two surgeries on Smith's back

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

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

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

[4] 29 *Del.C.* § 10142(d).

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

and treated him for nearly five years. He did not testify at the hearing. Dr. Kalamchi's medical records indicate that he released Smith to light-duty work with certain restrictions on October 2, 2008, and that he believed that in an eight hour day that Smith could sit up for four hours, stand up for two hours, walk one hour, and drive for one hour. Both Drs. Townsend and Rowe reviewed Dr. Kalamchi's medical records before they testified at the hearing. Dr. Townsend agreed with Dr. Kalamchi's findings and believed that Smith could work full-time with certain restrictions, albeit less restrictive ones than Dr. Kalamchi's. Dr. Rowe disagreed with both Drs. Kalamchi and Townsend.

The Board, in its summary of the evidence, noted that Dr. Kalamchi had released Smith to return to light-duty work with certain restrictions. The Board also noted that Dr. Townsend agreed with Dr. Kalamchi's findings and believed that Smith could work full-time with certain restrictions. The Board, in its findings of facts and conclusions of law, expressly accepted Dr. Townsend's opinion and rejected Dr. Rowe's opinion about Smith's ability to work. The Board noted that to the extent that Drs. Townsend and Kalamchi disagreed over the restrictions that should be placed on Smith while he worked, the Board had accepted Dr. Townsend's restrictions because he had seen Smith more recently than had Dr. Kalamchi. Thus, the Board, in reaching its decision, relied upon Dr. Townsend's testimony.

Smith argues that the information in Dr. Kalamchi's medical records regarding the surgeries performed, when they occurred, and Smith's complaints were admissible. However, according to Smith, the Board should not have relied on Dr. Kalamchi's opinion about Smith's ability to return to work because it was hearsay. Smith argues that this violates the Board's Rule 14(B), which states:

> The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed insofar as practicable; However, that evidence will be considered by the Board, which, in its opinion, possesses any probative value commonly accepted by reasonable prudent men in the conduct of their affairs. The Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of its discretion.

Delaware Rule of Evidence 801 (c) states:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Delaware Rule of Evidence 802 states:

> "Hearsay is not admissible except as provided by law or by these Rules."

Smith has mischaracterized how the Board used Dr. Kalamchi's records, ignored the Board's reliance on Dr. Townsend's testimony in reaching its decision, failed to understand how the evidentiary rules are applied before an administrative agency, failed to object to the admission of Dr. Kalamchi's records and Dr. Townsend's testimony, and ignored the substantial evidence in the record supporting the Board's decision. Both Drs. Townsend and Rowe reviewed and relied upon Dr. Kalamchi's medical records in reaching their opinions. Medical doctors routinely rely upon the medical records of other doctors in reaching their opinions. There is nothing unusual or improper about this in general or in an administrative proceeding in particular. Moreover, the Board did not just rely solely upon Dr. Kalamchi's opinion about Smith's medical condition and ability to return to work in reaching its decision. Instead, the Board also relied on Dr. Townsend's opinion on these matters. Dr. Townsend testified that he agreed with Dr. Kalamchi's conclusion that Smith was not medically disabled and could return to work with certain restrictions. The Board,

when reaching its decision, expressly relied upon Dr. Townsend's testimony. Thus, it is a mischaracterization for Smith to suggest that the Board relied solely on Dr. Kalamchi's opinion when it actually relied upon Dr. Townsend's opinion.

Moreover, the evidentiary rules regarding hearsay are relaxed before administrative agencies. "Administrative agencies, such as the Board, are not strictly bound by the technical rules of evidence."[6] The evidentiary rules applicable to a hearing before the Board are "[s]ignificantly more relaxed than those that apply in ... [the Superior] Court."[7] All evidence which could conceivably throw light on the controversy should be heard."[8] For that reason, "[h]earsay is commonly permitted"[9] and "does not warrant a reversal of the Board's decision so long as there is other competent evidence with probative value in the record to support the Board's decision."[10] "An abuse of discretion [with regard to the admission of evidence] occurs when the Board exceeds 'the bounds of reason in view of the circumstances and has ignored rules of law or practice so as to produce injustice."[11] This Court has held that the Board's consideration of the reports of physicians, who did not testify before the Board, possessed probative value even though the substance of their

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[6] *Goldsmith v. Unemployment Ins. Appeal Bd.*, 1982 WL 591941, at *2 (Del. Super. Mar. 9, 1982).

[7] *Edwards v. Carmen Marinelli-Pat Mar, Inc.*, 1992 WL 390687, at *2 (Del. Super. Dec. 3, 1992).

[8] *Ridings v. Unemployment Insurance Appeal Bd.*, 407 A.2d 238, 240 (Del. Super. 1979).

[9] *McMillin v. Royal Surf Club*, 1991 WL 18075, at *2 (Del. Super. Feb. 1, 1991).

[10] *Goldsmith*, 1982 WL 591942, at *3.

[11] *McDowell v. State*, 1991 WL 35679, at *3 (Del. Super. Mar. 14, 1991) (ORDER)(quoting *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

reports was ascertained through the testimony of different medical experts appearing before the Board.[12] The Board's reliance upon Dr. Kalamchi's medical records and his statements in them is wholly consistent with the applicable law.

Smith also never objected to the admission of Dr. Kalamchi's medical records and Dr. Townsend's testimony. The purpose of an objection is to prevent unreliable testimony from coming in and being considered by the trier of fact. "It appears to be the general rule, supported by the overwhelming weight of authority, that where inadmissible hearsay evidence is admitted without objection, it may properly be considered in determining the facts, the only question being with regard to how much weight should be accorded thereto."[13] "The general rule that issues as to the admissibility of hearsay evidence are waived by failure to make objection to its introduction has been applied in workers' compensation cases to permit consideration of hearsay evidence."[14] In order to show error, the Delaware Rules of Evidence require a timely objection.[15] In *Standard Distributing, Inc. v. Hall*[16], the Supreme Court stated:

> While the Board operates "less formally than courts of law," and "the rules of evidence do not strictly apply," it is nonetheless an adversarial proceeding where the rules of evidence apply insofar as practicable[citation omitted]. An objection before the Board to the admissibility of evidence gives the Board the opportunity to determine the merits of the issue, to exclude

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[12] *Schock Brothers, Inc. v. Stacey*, 1991 WL 113329, at *4-5 (Del. Super. June 18, 1991).

[13] Annotation, *Consideration, in determining facts, of inadmissable hearsay evidence introduced without objection*, 79 A.L.R.2d 890, 897 (1961).

[14] 82 AmJur2d *Workmans' Compensation* § 582 (1992)(footnotes omitted).

[15] D.R.E. 103(a)(1).

[16] 897 A.2d 155 (Del. 2006).

> unreliable evidence and preserve any evidentiary issue for appellate review.[17]

At the start of the hearing, R.A.M. offered Dr. Townsend's deposition into evidence. Dr. Townsend repeatedly referred to Dr. Kalamchi's medical records during his deposition. The Board asked Smith if he had "any objection to the admission of the deposition"[18] and Smith responded "no objection."[19] If Smith had wanted to object to any part of Dr. Townsend's deposition testimony, then he should have objected prior to its admittance or at any time while the testimony was being received. He did not. By not objecting, Smith prevented the Board from determining the merits of the issue, and thereby preserving the issue for appellate review by this Court.

II. Total Disability

Smith argues that the Board's finding that he is not totally disabled is not supported by substantial evidence in the record, reasoning that there is other evidence in the record supporting his belief that he is totally disabled. Smith has misunderstood the Court's role when resolving an appeal from an administrative agency. It is not the Court's role to review the evidence and then reach its own decision. The Court's role is to determine if there is substantial evidence in the record to support the Board's decision. I have concluded that there is in this case. The Board's decision is based upon Smith's medical records, Dr. Townsend's opinion, Shelli Palmer's opinion, and its own observations of Smith during the hearing. Dr. Kalamchi's medical records for the months after Smith's last surgery in 2008

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[17] *Id.* at 157-58..

[18] Hearing Transcript at 5.

[19] *Id.*

indicated that Smith had significant relief in his pain, improvement of his left foot numbness, a normal gait, was walking better, satisfactory hip rotation and was less stiff. Both Drs. Rowe and Townsend found that Smith's reflexes were normal and that he had good strength in his lower extremities. They also found that Smith's fusion was solid. Dr. Townsend testified that Smith was not totally disabled and could work. The Board found Dr. Townsend to be a more credible witness than Dr. Rowe.[20] The Board is free to choose between conflicting medical expert opinions" which will constitute substantial evidence for purposes of appeal." This is hardly surprising since Dr. Rowe had concluded that Smith was totally disabled without reviewing Dr. Kalamchi's medical records for the last five years. Moreover, Dr. Rowe's opinion was based largely on factors that were not particularly persuasive and Smith's subjective complaints. He said that Smith could not work because he would have to change his position frequently and was taking pain medication. However, there was no evidence in the record to suggest that Smith was drowsy and unable to function properly or that an employer would not accommodate his need to move around while working. Dr. Rowe also relied upon an EMG that indicated a potential nerve compromise at L5 - 51. Dr. Townsend questioned the reliability of the EMG because it was done by a physical therapist. He testified that a physical therapist was not qualified to perform and interpret an EMG. Moreover, Dr. Townsend could not find any evidence of an impingement of Smith's nerve root structures. Quite simply, the Board found that there was no objective evidence that would support a conclusion that Smith was totally disabled. Both Dr. Townsend and Shelli Palmer testified that there were jobs that

[20] *Glanden v. Land Preg. Inc.*, 918 A.2d 1098, 1102 (Del. 2007).

Smith could do. The Board watched Smith during the hearing and observed that he was able to sit for a long time, which was contrary to Smith's testimony that he could only sit for 20 minutes at a time. Thus, there is clearly substantial evidence in the record to support the Board's finding that Smith is not totally disabled.

III. Displaced Worker

Once R.A.M. established that Smith was not totally disabled, the burden shifted to Smith to show that he was a displaced worker. The Board found that Smith was not a displaced worker. Smith argues that there is not substantial evidence in the record to support the Board's finding. Smith could have shown that he was a displaced worker in two ways. One, Smith could show that he was a *prima facie* displaced worker, which is defined as one who "although not utterly helpless physically, because of the degree of obvious physical impairment, combined with various factors such as mental capacity, education, training and age, is placed in a situation where he could not ordinarily sell his services in any well-known branch of the labor market."[21] The Board found that Smith was not a *prima facie* displaced worker. Smith is a forty-five years old. He has an eighth grade education, can read and write, and was able to pass the test to get a commercial driver's license, which he still has. The Board found that Smith, with this background, could work in an entry level position with no experience. Both Dr. Townsend and Shelli Palmer testified that Smith could do this type of work. This is certainly a well-established branch of the labor market. The Board's finding that Smith could do this type of work is supported by substantial evidence in the record.

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[21] *Joynes v. Peninsula Oil Comp.*, 2001 WL 392242, at *3 (Del. Super. March 14, 2001).

Two, Smith could show that he was a displaced worker by establishing that he made a reasonable effort to find a job but was unable to do so because of his medical condition.[22] A reasonable job search is defined as "entailing a diligent, good faith effort to locate suitable employment in the vicinity."[23] The testimony before the Board established that Smith's wife called the employers listed in the labor market survey on his behalf. The Board determined that this did not constitute a good faith effort to find a job and that his efforts were far too minimal to establish actual displacement. I agree. It is highly unusual for someone's spouse to look for a job for her spouse by calling prospective employers on the phone, and I am sure that is how Smith's prospective employers viewed it. Also, just spending one day trying to find a job is certainly not much of an effort. Smith's job search efforts were minimal and are not sufficient to establish actual displacement. The Board's finding that Smith was not a displaced worker is supported by substantial evidence in the record.

CONCLUSION

The Board's decision is affirmed for the reasons set forth herein.

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

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[22] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).

[23] *Bernier v. Forbes Steele & Wire Corp.*, 1986 WL 3980, at *2 (Del. Super. March 5, 1986).