IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CITY OF WILMINGTON,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 02A-06-014-FSS
	)	
DAVID L. JONES,	)	
	)	
Appellee.	)	

Submitted: November 14, 2002
Decided: February 27, 2003

ORDER

Upon Appeal from the Industrial Accident Board –
AFFIRMED

Martin C. Meltzer, Esquire, City of Wilmington Law Department, 800 N. French Street, 9th Floor, Wilmington, Delaware 19801. Attorney for Appellant.

W. Christopher Componovo, Esquire, Law Offices of Joseph J. Rhodes, 1225 King Street, P.O. Box 874, Wilmington, Delaware 19801. Attorney for Appellee.

SILVERMAN, J.

The City of Wilmington has appealed from the June 11, 2002 Industrial Accident Board's decision finding that David L. Jones is entitled to additional compensation. Relying on the fact that he removed himself from work then retroactively sought a medical excuse, the City contends that Jones was not entitled to benefits. Relying on unrebutted expert medical testimony provided by Jones, the Board decided that Jones's claim was good. This is the court's decision on appeal.

I.

On September 15, 1999, Jones injured his neck and back while working as a police officer for the City. Jones was at roll call when the chair he was sitting on collapsed, causing Jones to fall backwards. Jones suffered a cervical strain and sprain, lumber strain as well as a disc herniation at the L5-S1 level. As a result, Jones missed five to six months of work before returning without restriction. Jones was treated by Stephen M. Beneck, M.D., a physical medicine specialist. The treatment included physical therapy and chiropractic adjustments.

Jones testified that after returning to work in Spring 2000, he occasionally suffered flare-ups of his neck and back pain. Dr. Beneck testified that it was common for someone with such injuries to experience flare-ups from time to time. Dr. Beneck further testified that either a change or increase in activity or prolonged postures such as sitting for long periods could aggravate disc problems and

cause flare-ups. Additionally, Dr. Beneck testified that reasonable treatment for flare-ups would be physical therapy or manual treatment.

Dr. Beneck treated Jones several times for the flare-ups. Specifically, in June 2001, after standing while on parol at the Greek festival, Jones complained that his condition seemed worse. Dr. Beneck recommended that Jones continue exercising and taking medicine as needed. A few months later in September 2001, Jones suffered another flare-up. Again, prolonged standing was the cause. This time Dr. Beneck ordered chiropractic treatment as Jones was not back to his "base line." In October 2001, Jones sustained a non-work related injury to his Achilles tendon. This caused Jones to be assigned to inside duty requiring nine to ten hours of sitting a day. Jones testified that his back became continually sore and stiff. By mid December 2001, Jones ran out of medicine. Over-the-counter medicine did not provide relief. It was at this time, according to Jones, that he tried to schedule an appointment with Dr. Beneck as he had in the past. Jones testified that the earliest appointment available was January 3, 2002. Jones notified the City that he was having neck and back problems and would not be in to work. Jones subsequently missed approximately a week. That missed week is what this case is about.

When Jones returned to work, he was informed by the personnel department that his time off would not be covered under his workers' compensation

benefits. He was told that he would have to use sick leave or vacation time. Jones testified that he requested a note from Dr. Beneck at his January 3, 2002 appointment because he felt "that this was a recurring injury and it should be covered under the injury."

Dr. Beneck gave Jones a note indicating that, "Mr. Jones was out of work from 12/7 to 12/16 due to a flare-up of his work related low back injury." And while a retroactive note was not the usual way to establish an excuse for missing work, Dr. Beneck testified that he had no reason to doubt Jones. Dr. Beneck also testified his retroactive opinion was based on Jones's subjective complaints combined with Jones's medical history. At the January 3 appointment, Dr. Beneck told Jones to avoid prolonged sitting if possible, continue with his exercise program and undergo a two week chiropractic treatment program. And he gave Jones new prescriptions.

II.

Jones contends, of course, that his absence from December 7, 2001 through December 16, 2001 was due to another flare-up of his work related injury. Thus, Jones argues that his workers' compensation benefits should cover his lost time. Jones alleges, and the Board obviously believed, that he was unable to get an appointment with Dr. Beneck at the flare-up's onset. And since he was out of

medicine, his pain worsened and his mobility grew more restricted, causing the week's absence.

The City alleges that Jones voluntarily removed himself from work. Only after he learned that his time off would be charged against his personal time was Jones motivated to make an appointment with Dr. Beneck and request a disability note. The City tries to strengthen its position by arguing that there was no record of Jones calling Dr. Beneck's office on December 6, 2001. The City also mentions that in the past, Jones was able to get an appointment on short notice. At the core, the City seems to believe that if the Board's decision stands, City workers will miss work as they see fit and still be entitled to benefits merely by submitting a doctor's excuse, whenever.

III.

The standard of review on appeal is limited.[1] As to questions of law, the court's review is plenary. But as to questions of fact, it does not reexamine evidence, much less make its own findings. The Board's decision stands, if there are no legal errors and substantial evidence supports its factual findings.[2] Substantial evidence

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[1] *Del. Code Ann.* tit. 29 § 10142, § 10161(a)(8) (1997 & Supp. 2000).

[2] *General Motors Corp. v. Jarrell*, 493 A.2d 978 (Del. Super. Ct. 1985).

is adequate to a reasonable mind to support a conclusion.[3] The reviewing court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] Simply put, the court does not sit as trier of fact, nor should the court replace its judgment for the Board's.[5] The court determines if the evidence is legally adequate to support the agency's factual findings.[6] In this case, the court is concerned whether the Board's conclusion that Jones was entitled to additional compensation, despite the unusual way he made his claim, is supported by the law and the record.

With respect to medical testimony, *Sears, Roebuck & Co. v. Farley*[7] holds, "where medical testimony is based solely upon the subjective complaints of the claimant, a trier of fact is free to accept that medical testimony." Additionally, when a physician's opinion is based on the veracity of a claimant's complaints, the Board is permitted to rely upon the claimant's credibility when crediting or discounting the

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

4 *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1995).

5 *Id.*

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

7 290 A.2d 639, 641 (Del. 1972), citing *DeBernard v. Reed*, 277 A.2d 684, 686 (Del. 1971).

physician's testimony.[8] Here, the Board clearly believed Jones and it relied on Dr. Beneck's unrebutted expert medical opinion.

The City did not present expert medical testimony because the City concluded *ipse dixit*,

> There is a substantial and legitimate reason for the lack of medical testimony by the City. It would have been as inconclusive as Dr. Beneck's retroactive evaluation. The City would be requesting [its] expert to retroactively look a month or more into the past and at least two to three weeks after the claimant returned to full duty give a medical opinion on the severity of the claimant['s] condition. What evidence could the City Physician use to evaluate the claimant's prior condition or the subjective complaints of the claimant himself? It would be as meaningless as any other evaluation retroactively given and founded upon the self serving statements of the claimant.

Dr. Beneck seemingly was not troubled in reaching his opinion. Neither the Board, nor the court, knows that a physician cannot make a retroactive diagnosis as the City claims. The City, at least, could have provided expert testimony to back its claim that a retroactive diagnosis based on the patient's subjective complaints cannot be medically sound.

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[8] *Beyer v. Nanticoke Homes, Inc.*, Del. Super., C.A. No. 91A-01-002, Ridgely, J. (January 10, 1992).

IV.

On a Petition to Determine Additional Compensation Due, the claimant carries the burden of proof and must demonstrate by a preponderance of the evidence that but for his work accident, claimant would not have experienced a recurrence of total disability.[9] After hearing all the testimony, weighing the facts, and the credibility of the witnesses, including Jones and Dr. Beneck, the Board concluded that there was a causal connection between Jones's initial work injury and his total disability's recurrence from December 6, 2001 until December 16, 2001. Thus, the backwards way that Jones established his claim is not dispositive.

The court appreciates the City's implicit concern about employees unilaterally taking themselves out of work. Employees who fail to report to work run the risk that they will not receive benefits and they may even be subject to discharge. That is especially true if, at their Industrial Accident Board hearings, the City presents expert medical testimony on its behalf. In this case, however, the worker had an established, compensable injury. He had an established history of flare-ups. He was assigned to duty that could precipitate a flare-up. And most importantly, his self-assessment was ultimately proved correct by unrebutted expert testimony. This is not *de novo* review. The court will not attempt to weigh the evidence, which is the

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[9] *Reese v. Home Budget Center*, 619 A.2d 907 (Del. 1992).

Board's role. There is substantial evidence supporting the Board's finding. And that finding is consistent with the law.

V.

For the foregoing reasons, the June 11, 2002 decision finding that Jones is entitled to additional compensation is **AFFIRMED**.

IT IS SO ORDERED.

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Judge

oc: Prothonotary