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

JAMES DARNELL,	)	
	)	
Appellant,	)	
	)	
5.	)	C.A. No. 00A-08-006-JRJ
	)	
BOC GROUP, INC.,	)	
	)	
Appellee.	)	

O R D E R

Submitted: May 30, 2001
Decided: July 26, 2001

Appeal from a Decision of the Unemployment Insurance Appeal Board.
Decision Affirmed.

David J. Lyons, Esquire, Wilmington, Delaware, for Appellant James Darnell

Anthony M. Frabizzio, Esquire, Wilmington, Delaware, for Appellee BOC Group, Inc.

JURDEN, Judge

This is the Court's decision on Claimant James

Darnell's appeal of a decision of the Industrial Accident Board ("Board"). Having reviewed the parties' submissions, as well as the record below, the Court concludes that the Board's decision must be affirmed.

POSTURE

On July 8, 1999, Claimant filed a Petition to Determine Additional Compensation Due against BOC Group, Inc. ("BOC" or "Employer"). Claimant sought workers' compensation benefits for an uncontested work accident that occurred on July 15, 1998. After a Board hearing on July 13, 2000, Claimant's petition was granted in part and denied in part. Claimant filed a timely appeal of the Board's decision with the Superior Court. Briefing is complete, and the issues are ripe for decision.

FACTS

From June 1991 through July 1998, Claimant worked as a truck driver for BOC, a manufacturer and deliverer of industrial gases, located in Claymont, Delaware. On July 15, 1998, at approximately 11:30 p.m., Claimant was preparing to return to Delaware from Virginia, where he had made a delivery. As he was climbing into his truck, his

hand slipped off the handrail, and he fell approximately 30 inches to the ground.[1] Although the details of how he landed are unclear, it is undisputed that Claimant injured his back when he fell. He was able to get up and drive to Delaware, and also to make a short trip to Philadelphia and back. However, upon return to Delaware, his back and legs hurt, and he reported the accident to Employer's dispatcher. On July 17, his supervisor, Melvin Jones, advised him to go to Christiana Care Occupational Health (OH), where he was initially treated by a physician's assistant. A series of x-rays showed degenerative changes at multiple lumbar levels but no fractures. Claimant was given a total disability work slip from July 17 through July 20, and he used accrued leave to take off another two days.

When Claimant returned to work on or about July 23, 1998, he took a light duty position, which he held until

[1]Although some reports of the accident indicate that Claimant fell four feet to the ground, Claimant initially reported that he fell 30 inches. *See* Transcript of IAB Hearing # 1129420. Subsequent references to the transcript appear as "Tr. at page no."

November 1999. He worked in the office, assisting the dispatcher, doing paperwork on distribution and updating the computer program for scheduling. During this time, he continued to experience back pain, and was treated by a number of doctors, as described below.

Claimant's treating physician was Carole Tinklepaugh, M.D., an occupational medicine physician on staff at OH. Dr. Tinklepaugh's diagnosis was lumbrosacral strain with degenerative disc disease. Dr. Tinklepaugh prescribed certain nonsteroidal medications and referred Claimant to Schweizer's Therapy and Rehabilitation for physical therapy for his low back.

Because of continued lumbar spine pain, OH referred Claimant to Dr. Medinilla[2] for further consultation in September 1998. Dr. Medinilla conducted a neurological exam, which was essentially normal, and ordered further testing. A lumbar MRI showed significant degenerative changes but no disc herniations. Based on the test results, Dr. Medinilla concluded that Claimant had sustained a contusion of the back with paravertebral muscle strain and

[2]Dr. Medinilla's full name and credentials do not appear in the record.

probable sprain. Dr. Medinilla saw no need for surgery.

On February 23, 1999, Claimant was examined by William F. Young, M.D., at Employer' request. Dr. Young's diagnosis was diffuse musculoskeletal syndrome, probably related to a muscle strain. He found that Claimant had reached maximum medical improvement and did not need any further medical treatment.

In March 1999, Claimant was referred by OH to Joel S. Golden, M.D., because of continued pain in the lumbar spine. Claimant received three epidural injections to relieve the pain. Despite some initial relief, the pain continued. In August 1999, Dr. Golden referred Claimant to Jay Rush Fisher, an orthopaedic surgeon, for further evaluation of the lumbar spine.

Dr. Fisher ordered complete testing of the back, including MRI's of the cervical, thoracic and lumbar spine. X-ray testing showed significant changes in the cervical spine, congenital stenosis in the thoracic spine, and good alignment with subtle degenerative changes and congenital stenosis in the lumbar spine. A myelogram of the lumbar spine showed no central canal stenosis but mild degenerative

changes. Dr. Fisher believed that Claimant's back problems all were due to the work accident, based on Claimant's description of falling and striking his back, neck and head.

In November 1999, Dr. Fisher performed surgery on Claimant's cervical spine because of continuing neck and upper extremity problems. Up until this time, Claimant had not been treated for cervical spine problems.

At Employer's request, Claimant again saw Dr. Young on March 17, 2000. Dr. Young concluded that Claimant's tests showed minimal findings that were consistent with his degenerative condition and his age. He found that Claimant was capable of working without restrictions.

When Dr. Fisher released Claimant to light duty work in April 2000, Claimant contacted BOC but was told that the light duty position he had previously held had been eliminated for economic reasons. Claimant has not worked since his operation in November 1999.

Claimant initially filed for partial disability benefits in July 1999. As his condition changed, he amended his petition, seeking the following benefits: (1) total

disability benefits from July 17 through July 20, 1998; (2) partial disability benefits from July 21, 1998, through November 21, 1999; (3) recurrence of total disability benefits ongoing from November 22, 1999; and (4) medical expenses, including the cost of cervical spine surgery performed in November 1999.

The Board conducted a hearing on July 13, 2000. Claimant testified on his own behalf and presented deposition testimony from Dr. Tinklepaugh and Dr. Fisher. Employer presented testimony from Joseph Lucy, a rehabilitation employment expert, Melvin Jones, distribution manager for BOC, as well as the deposition testimony of Dr. Young.

On July 28, 2000, the Board issued a written decision. The Board found that Claimant's lumbar spine injuries were caused by the work accident and therefore granted him total disability benefits from July 17 through July 20, 1998, as well as the medical expenses for the three epidural injections to the lumbar spine. Second, the Board determined that Claimant's cervical spine injuries were not caused by the work accident and therefore denied coverage

for the cervical spine surgery, as well as total disability benefits following the cervical spine surgery. Third, the Board granted Claimant partial disability benefits for loss of earning capacity related to his lumbar spine injury ongoing from July 21, 1998 at a rate of $87.29 per week. Fourth, the Board granted Claimant one attorney's fee for issues relating to the lumbar spine.

ISSUES

On appeal, Claimant raises three issues. Claimant argues first that the Board erred in its calculation of the amount of the ongoing partial disability benefits. Second, Claimant argues that the Board erred in its determination that Claimant's neck injury was unrelated to the work accident. Finally, Claimant argues that the Board abused its discretion in awarding only one attorney's fee. Employer asserts that the Board's decision is free from legal error and that its factual findings are supported by substantial evidence.

SCOPE OF REVIEW

The function of the Superior Court on review of an administrative board decision is to determine whether the

agency's decision is supported by substantial evidence and is free from legal error.[3] Substantial evidence is such evidence as a reasonable person might accept as adequate to support a conclusion.[4] This Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, or make its own factual findings and conclusions.[5] It merely determines if the evidence is legally adequate to support the agency's factual findings.[6] The Court's review of alleged errors of law is plenary.[7]

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[3]*General Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686, 688 (1960); *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66-67 (1965).

[4]*Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, Del. Supr., 636 A.2d 892, 899 (1994).

[5]*Johnson v. Chrysler Corp.*, 213 A.2d at 66.

[6]Title 29 *Del. C.* § 10142(d).

[7]*Brooks v. Johnson*, Del. Supr., 506 A.2d 1001, 1002 (1989)

(citing *Nardo v. Nardo*, Del. Supr., 209 A.2d 905 (1965)).

DISCUSSION

A. Calculation of Partial Disability Benefits

1. The Board's determination of Claimant's post-injury earning power. The Board found that, because of injuries to his lumbar spine caused by the industrial accident, Claimant was entitled to partial disability benefits for a loss of earning capacity ongoing from July 21, 1998.[8] In calculating the amount of partial disability benefits, the Board awarded two-thirds of the difference between Claimant's pre-injury earnings as a truck driver ($1,075.94/week) and his post-injury earnings in the light duty job at BOC ($945.00/per week).[9] The resulting award is $87.29 per week, ongoing from July 21, 1998. In using these figures in the equation, the Board relied on *Ruddy v.*

[8]*See Hudson v. Intervet, Inc.*, Del. Super., C. A. No. 98A-07-002, Vaughn, J. (Aug. 10, 1999) (ORDER) (noting that, in order to obtain partial disability benefits, a claimant has the burden of proving a decreased earning capacity as a result of injuries sustained in a work-related accident).

[9]Title 19 *Del. C.*§ 2325 provides in part as follows: "For injuries resulting in partial disability for work. . . the compensation to be paid shall be 66 2/3 percent of the difference between the wages received by the injured employee before the injury and the earning power of the employee thereafter. . . ."

I.D. Griffith[10] for the proposition that "[p]roof of current earnings may be presumptive of Claimant's present earning capacity."[11] **2. Post-injury earning power.** Claimant argues that the Board erred generally in its determination of his earning capacity and specifically in its construction of *Ruddy*. To compute a claimant's entitlement to benefits, the Board compares actual pre-injury wages with the post-injury earning capacity.[12] Earning capacity means earning ability, rather than actual earnings, and is determined by many factors including age, education, general background, occupational and general experience, the nature of the work performable with the physical impairment, and the availability of such work.[13] A claimant's actual wage upon return to work can also be a factor. As announced in *Ruddy*,[14] where an employee returns

[10]Del. Supr., 237 A.2d 700, 703 (1968).

[11]Board Decision, Hearing # 1129420, at 19-20. Subsequent references to the Board's decision appear as "Dec. at page no."

[12]Title 19 *Del. C.* §2325.

[13]*Fields v. Johnson Controls*, Del. Super., C. A. No. 96A-07-019, Silverman, J. (Sept. 30, 1997) Mem. Op. at 4 (citing *Chrysler Corp. v. Williams*, Del. Super., 282 A.2d 629, 631 (1971) *aff'd*, Del. Supr., 293 A.2d 802 (1972)).

[14]237 A.2d at 703.

to work after an injury with the same employer at the same wage, there is a rebuttable presumption that there is no loss of earning capacity. This presumption is rebutted if the employee shows that the actual post-injury wage is "an unfair criterion of earning power."[15]

In the case at bar, Claimant argues that *Ruddy* does not apply to his case because he, unlike Bernard Ruddy, did not return to the same job at the same pay. However, the holding in *Ruddy* does not rest solely on those facts. Rather, the facts of *Ruddy* fit the general proposition that a claimant's post-injury actual wages may serve as a basis for determining his post-injury earning capacity if no other relevant evidence is offered.[16] That is, the actual wage creates a presumption that may be rebutted by evidence

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[15]*Id.*

[16]*See* 4 Arthur Larson, *Larson's Workers' Compensation Law* § 81.01[4] n. 13; § 81.03[1] (2000). *Riley Stoker/Ashland Oil v. Cirasole*, Del. Super., (April 2, 1990) (ORDER); *Hudson v. Intervet, Inc.*, Del. Super., C. A. No. 98A-07-002, Vaughn, J. (Aug. 10, 1999)

showing that the actual earnings do not fairly reflect claimant's earning capacity. This is the law in Delaware, as well as in other jurisdictions, and it is fully applicable to the case at bar. The Court concludes that the Board did not err in relying on *Ruddy*.

(ORDER).

3. Rebutting the presumption. Despite his assertion that *Ruddy* does not apply to his case, Claimant argues that two of the factors mentioned in *Ruddy* for rebutting the presumption created by actual earnings are relevant to his case. Without offering any support from the record, Claimant asserts that BOC provided him with light duty work as an inducement to refrain from pursuing a workers' compensation claim and that the light duty position was of uncertain duration.[17] The Court finds nothing in the record to support either of these contentions.[18] The Court also notes that, in making these arguments, Claimant impliedly concedes that *Ruddy* is applicable to his case.

4. Labor market survey. Claimant argues that the Board erred in failing to base Claimant's post-injury earning capacity on the evidence presented by Employer's rehabilitation expert. Claimant asserts that this evidence

[17]Opening Brief at 11.

[18]*See* Tr. at 27 for Claimant's account of how Employer handled his situation.

constitutes Employer's admission of Claimant's post-injury earning capacity and that the Board was therefore bound by it.

At the hearing, Joseph Lucy, a vocational consultant for Del Val Care Management in Wilmington, Delaware, testified that he prepared two labor market surveys for Claimant based primarily his application for a position as a truck driver with BOC.[19] He assumed sedentary restrictions from November 1999 through March 2000, and sedentary/light duty restrictions from March 2000 through June 2000. He identified a total of 14 possible positions, six of which fell into the category of sedentary/light duty. The average weekly wage for those positions was $433.70.

[19]For Mr. Lucy's testimony, *see* Tr. at 102-105. The survey and accompanying job descriptions are included in the unpaginated certified record as Employer's Exhibit #1.

Claimant did not cross examine Mr. Lucy. Claimant did not subpoena the potential employers identified by Mr. Lucy.[20] Claimant did not call a vocational rehabilitation specialist to testify on his behalf or present his own market survey. The only evidence Claimant presented on this question was the evidence of his light duty wages at BOC, and he made no attempt to rebut the presumption created by those wages. When counsel for Employer asked Claimant if he had looked for work, he said that he had, but he offered no information as to potential wages. He testified as follows: "I have several possibilities. I have talked with the County where I work. And I've talked with one of the men who owns a franchise over in our area so I wouldn't have to travel that far back and forth."[21]

In its decision, the Board correctly stated that Claimant bore the burden of showing a loss of earning

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[20]*See Adams v. Shore Disposal*, Del. Supr., 702 A.2d 272, 273 (1998) (holding that "due process requires that the claimant be permitted to subpoena witnesses in order to effectively develop his or her case and to cross-examine the employer's witnesses"); *Torres v. Allen Family Foods*, Del. Supr., 672 A.2d 26, 32 (1995)(finding that if claimant and counsel are "satisfied that a witness is needed, the Board may not refuse" to issue subpoena).

[21]Tr. at 60.

capacity related to the work accident.[22] The Board observed that the only evidence presented by Claimant as to earning capacity was the $945 per week wage he earned in the light duty position at BOC. The Board explicitly accepted this evidence.

[22]*See, e.g., Strawbridge & Clothier v. Campbell*, Del. Supr., 492 A.2d 853, 854 (1985).

It is not the function of this Court to reweigh the evidence.[23] If the Board's decision is supported by substantial record evidence, the Court must affirm.[24] Furthermore, in its role as factfinder, the Board is "free to discount or ignore evidence that it finds unworthy of credit and to base its decision only on the evidence that it finds credible."[25] This Court has previously found that an employer's labor market survey is not determinative of earning power where the presumption created by actual earnings shifts the burden of proof to the claimant to rebut the presumption.[26] In this case, the Board's findings were based squarely on the evidence (presented by Claimant himself) that Claimant earned $945 per week for 16 months in a job that suited his medical restrictions. The Court concludes that the Board's finding that Claimant's post-injury earning capacity was $945 per week is supported by

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[23]*Harvey v. Layton Home*, Del. Super., C. A. No. 91A-12-13, Bifferato, J. (Oct. 19, 1992) (ORDER).

[24]*Id.*

[25]*Stockwell v. Chrysler Corp.*, Del. Super., C.A. No. 98A-02-026, Carpenter J. (Nov. 30, 1999) (ORDER).

[26]*Hudson v. Intervet, Inc.*, Del. Supr., C. A. No. 98A-07-002, Vaughn, J. (Aug. 10, 1999) (ORDER).

substantial evidence.

B. Claimant's cervical spine injury

1. The Board's findings. In denying Claimant benefits for his cervical spine injuries, the Board made specific findings about the medical evidence and also about Claimant's credibility. Specifically, the Board rejected Dr. Fisher's opinion that the accident caused Claimant's pre-existing spinal degenerative changes to become symptomatic at some later point in time. The Board noted that the contemporaneous medical records with the accident, as well as Claimant's initial description of the fall, did not support Dr. Fisher's conclusions.

The Board also pointed out that there was no actual treatment to the cervical spine until Claimant saw Dr. Fisher, 14 months after the accident. As to Dr. Tinklepaugh, the Board noted her testimony that it is unusual for symptoms resulting from a trauma to appear months later and that the x-ray of Claimant's spine three months after the accident showed only mild degenerative changes. The Board noted Dr. Fisher's concession that this degenerative process may have caused Claimant's neck

problems.

2. Board's findings supported by substantial evidence. Having reviewed the record and the medical evidence, the Court concludes that the Board's finding that Claimant's neck problems were unrelated to the work accident is supported by substantial evidence, some of which the Board noted in its decision. Claimant challenges the Board's finding by emphasizing contrary evidence and by pointing to alleged inaccuracies in the Board's summation of the medical evidence. This approach is not consistent with the appellate scope of review, which requires this Court to affirm if there is substantial evidence to support the findings.[27] Having determined that there is such evidence, the Court nevertheless addresses Claimant's assertions because of the volume of evidence.

[27] *Oceanport Ind., Inc. v. Wilmington Stevedores*, 696 A.2d at 899.

3. First complaint of neck pain. Claimant argues first that the Board erred when it stated that Claimant did not complain of neck pain until four months after the accident. The record supports Claimant's contention. In the incident report which Claimant wrote the day after the accident, he stated that he "[f]ell backwards, landing flat-footed on the ground about 30 inches. Pain shot from lower back up into neck and around hips and top of pelvis."[28] He also mentioned neck discomfort to Dr. Medinilla on September 25, 1998,[29] although there was no treatment to the neck at that time.[30]

However, the Board's reference to November is not the basis for the Board's conclusion, but rather is part of the

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[28]Tr. at 121.

[29]Tr. at 77, 79.

[30]*See* Tinklepaugh Deposition, appearing in the unpaginated certified record, at 31-32. Subsequent references to this deposition appear as Tinklepaugh dep. at "page no."

Board's discussion of a larger issue -- the time lag between the accident itself and *actual treatment* to the cervical spine. On this subject, the Board found as follows:

> A significant gap exists in the period of time following the work accident before any cervical diagnosis is rendered. There is no medical record of any cervical complaints until November 1998, four months after the work accident, when Claimant first saw Dr. Hunt. All of Claimant's medical treatment up to his referral to Dr. Fisher, fourteen months after the work accident, was limited to the lumbar spine only. No diagnostic MRI study of the cervical spine was ordered until September 1999. Dr. Tinklepaugh agreed on cross-examination that there were no complaints to the neck or mid-back while Claimant was improving following eight months of treatment at OH after the work accident. She also opined that it was unusual for symptoms related to a trauma not to appear until months later. Cervical x-rays from October 1998, three months after the work accident, showed pre-existing degenerative changes and spurring only. Even Dr. Fisher conceded that the degenerative process throughout Claimant's spine had been in place for some time and that patients with congenital stenosis, such as Claimant, may have symptomatic changes without trauma.[31]

In context, the statement about November is only one of many reasons that the Board found that the medical evidence did not support a finding of causation on Claimant's neck problems, and a minor one as well. The real basis for the

[31]Bd. Dec. at 17.

Board's decision is that there was no *diagnosis of*, or *treatment for*, cervical spine problems until months after the work accident. To the extent that the Board erred in stating that Claimant did not complain of neck pain until four months after the accident, the inaccuracy is not grounds for reversal because there is substantial evidence to support the Board's ultimate conclusion that Claimant's neck problems were not related to the accident.

4. Timing of neck symptoms. Claimant also argues that the Board "erroneously **held** that [Dr.] Tinklepaugh testified that symptoms of traumatic injuries usually appear closer in time to the trauma and that it was unusual for them to turn up months later."[32] This argument fails for two reasons. First, the statement is not the Board's holding, but rather is a paraphrase of a portion of Dr. Tinklepaugh's testimony. Second, the statement accurately reflects Dr. Tinklepaugh's testimony on this point, despite Claimant's assertion to the contrary. At the hearing, Claimant's attorney presented Tinklepaugh's deposition testimony to the Board, as follows:

[32]Op. Br. at 14 (emphasis added).

> And [Dr. Tinklepaugh] said that she did have some concern as to Mr. Darnell's not really improving from the beginning and that there were certain things that came seemingly later or came later with the cervical, the neck and mid-back, which was not an initial issue is the case. She said that was, at the bottom of the page, line 20, at page 48, "It's a little unusual in my experience to have someone present weeks, months later with additional symptoms. And that was the case with him."[33]

Dr. Tinklepaugh then conceded that symptoms resulting from a trauma can sometimes manifest themselves at a later date, but she did not retract or otherwise qualify her previous statements. The Court finds that the Board did not misstate Dr. Tinklepaugh's testimony.

[33]Tr. at 84.

5. Degenerative spinal changes. Claimant argues that the Board "erroneously **held** that Darnell's preexisting degenerative spinal changes somehow supported the conclusion that Darnell's neck injury was unrelated to the fall at work."[34] The Board made no such holding. The Board noted that the October 1998 x-ray showed degenerative changes to Claimant's back and that even Dr. Fisher conceded that such a degenerative condition can become symptomatic without trauma.[35] The Board also noted that Dr. Young believed that weight-lifting could have contributed to the degenerative condition.[36] These statements are not erroneous and do not provide grounds for reversal.

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[34]Op. Br. at 14 (emphasis added).

[35]Bd. Dec. at 17.

[36]*Id.* at 17-18.

6. Credibility determinations. Claimant argues that the Board erred as a matter of both law and fact in finding that Dr. Young's testimony was more persuasive than Dr. Fisher's testimony. To support this position, Claimant relies *Lindsey v. Chrysler Corp.*,[37] in which this Court ordered a remand because the Board failed to resolve the conflicts in the medical evidence and did not articulate any theory of law.[38] The Court stated that "[s]ince both medical experts in the case at bar testified by deposition, the Court affords less than its usual deference to the Board's unexplained preference for [one doctor's] testimony."[39] The only parallel between *Lindsey* and the case at bar is that both cases involved expert testimony

[37]Del. Super., C. A. No. 94A-04-005, Barron, J. (Dec. 7, 1994)(Mem. Op).

[38]*Id.* at 7 (citing *Bd. of Public Educ. in Wilmington v. Rimlinger*, Del. Supr., 232 A.2d 98, 101 (1967)).

[39]*Id.*

presented to the factfinder by way of deposition. In the case at bar, the Board clearly stated its reasons for finding Dr. Young to be more persuasive than Dr. Fisher. Furthermore, there is no dispute as to the appropriate legal theory. In sum, *Lindsey* does not support Claimant's position.

Claimant also asserts that Dr. Young's testimony is unreliable because he failed to review all the medical records. Having reviewed the record, the Court notes that none of the three doctors was fully versed in Claimant's extensive medical history. It is well-settled that the Board is free to choose between the conflicting opinions of the medical experts,[40] and that any of the doctor's opinions constitutes substantial evidence for purposes of appeal.[41] The Board acted well within its bounds when it found Dr. Young to be more persuasive than Dr. Fisher.

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[40]*DiSabatino Bros., Inc. v. Wortman*, Del. Supr., 453 A.2d 105, 106 (cited in *Stockwell v. Chrysler Corp.*, Del. Super., C. A. No. 98A-02-026, Carpenter, J. (Nov. 30, 1999) (ORDER).

[41]*Reese v. Home Budget Center*, Del. Supr., 619 A.2d 907, 910 (1992). *See also DiSabatino Bros. v. Wortman*, 453 A.2d at 106 (reinstating Board's decision following Superior Court's reversal and holding that the Board's "clear and firm decision" should not be remanded for clarification simply because the Board did not say why it rejected the conclusions of claimant's physician).

7. Conflicting versions of the work accident.

Claimant argues that the Board erred in its observation that Claimant offered inconsistent descriptions of the accident. The Board stated that it did not find Claimant to be credible regarding his neck problems, noting that his description of the accident changed with each successive doctor and pointing out three different versions of the event. The record supports these findings. In the incident report, dated July 15, 1998, Claimant stated in part that:

> [m]y hand slipped off of the outside rail causing me to fall backwards. Attempting to grab at the door handle and missed. Fell backwards, landing flat-footed on the ground about 30 inches. Pain shot from lower back up into neck and around hips and top of pelvis. Checking outside rail, found a greasy substance at top that caused hand to slip.[42]

[42]Tr. at 121.

In this first description, Claimant does not mention falling onto his back or head, or losing consciousness. In August 1999, Claimant told Dr. Fisher that he "[l]anded on his back side, knocked himself out. Fall itself was not from too large of a height, but he did fall directly back onto his head."[43] These accounts of the accident are very different, and Dr. Tinklepaugh also noted that Claimant gave dissimilar versions of the accident to her and to Dr. Medinilla.[44] The Court concludes that there is substantial evidence to support the Board's finding that Claimant's testimony regarding his neck injury was not always credible.

C. Attorney's Fees

The Board awarded Claimant one attorney's fee for having prevailed on the issue of compensable injuries to the lumbar spine. Without benefit of authority, Claimant argues that counsel can be adequately compensated only if

[43]Fisher Deposition at 6.

[44]Tr. at 77-79; Tinklepaugh Dep. at 32-34.

attorney's fees are awarded for each issue successfully litigated before the Board. Claimant was successful on the issue of the lumbar spine injury for three days of total disability and ongoing partial disability, as well as the $1150 cost of the injections to his lumbar spine.

Pursuant to 19 *Del. C.* § 2320(10), an award of an attorney's fee is mandatory for a claimant who is successful before the Board.[45] However, the Board has discretion in deciding the number of issues it will treat separately for purposes of attorney's fees.[46] Thus the standard of review is abuse of discretion.

In awarding one attorney's fee, the Board noted the appropriate *Cox*[47] factors and also considered the benefit

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[45]*See also Simmons v. Delaware State Hosp.*, Del. Supr., 660 A.2d 384,389 (1995).

[46]*Id.* at 391 n. 5.

[47]*General Motors Corp. v. Cox*, Del. Supr., 304 A.2d 55, 57 (1973) (providing a non-exhaustive list of factors to be considered in determining reasonable attorney's fees).

received by Claimant. The Board found that the issues were "relatively complex" but that question of medical expenses was subsumed within the issues of causation.

The Court agrees. Employer did not contest the occurrence of a work-related accident or the three days of total disability following the accident. The subject of the lumbar injections, which arose in the course of Dr. Tinklepaugh's chronology of Claimant's treatment, was a straightforward matter. The primary dispute was whether the cervical injuries were attributable to the work accident, and Claimant did not prevail on this issue. The Court finds no abuse of discretion in the Board's award.

CONCLUSION

For all the foregoing reasons, the Court concludes that the Board's decision must be and hereby is ***Affirmed.***

It Is So ORDERED.

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Jan R. Jurden, Judge

Original to Prothonotary