

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JOHN BRISTOR, :
 : C.A. No. K19A-07-001 WLW
 Claimant Below-Appellant, :
 :
 v. :
 :
 DOVER DOWNS, INC., :
 :
 Employer Below-Appellee. :

Submitted: February 6, 2020
Decided: May 18, 2020

ORDER

Upon an Appeal From the Decision of the
Industrial Accident Board
Reversed and Remanded.

Candance E. Holmes, Esquire and Walt F. Schmittinger, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for Claimant Below-Appellant.

John J. Ellis, Esquire of Heckler & Frabizzio, Wilmington, Delaware; attorney for Employer Below-Appellee.

WITHAM, R.J.

INTRODUCTION

This is an appeal filed by Jason Bristor (“Appellant”) regarding a decision of the Industrial Accident Board (“the Board”) not to award him the payment for one of his visits to the doctor. The Board determined that Dover Downs (“Appellee”) already paid the bill in question. For the reasons set forth below, the case is **REVERSED AND REMANDED**.

FACTUAL AND PROCEDURAL BACKGROUND

1. On July 11, 2010, Appellant sustained a compensable work injury while working for Dover Downs (“Employer”) as a security guard.¹ On November 7, 2018, Appellant filed a Petition to Determine Additional Compensation Due seeking compensability of treatment he already received from Dr. Jason Scoop, M.D. on April 14, 2017, and authorization for more treatments recommended by his doctor.² On March 25, 2019, Appellant filed an Amendment to his Petition, which consisted of an additional Exhibit (“Exhibit C”).³ Exhibit C, which was dated March 20, 2019, presented Dr. Scoop’s log of Appellant’s treatments and also included a handwritten note indicating that the bill for April 14, 2017, remained outstanding.⁴ The hearing was originally scheduled for April 29, 2019, but was later rescheduled for June 24, 2019, due to a conflict in the Board’s calendar.⁵

¹ See Opening Brief of the Claimant Below-Appellant (“Opening Brief”) at 2.

² *Id.*

³ *Id.*

⁴ *See Id.*

⁵ *Id.*

2. During the hearing, Appellant presented Dr. Scoop's testimony and also argued himself that the bill for April 14, 2017, remained outstanding.⁶ The employer argued that the bill was paid and presented a payment log to confirm its position.⁷ Following the hearing, the Board denied Appellant's Petition and found that Appellant did not meet his burden of proof to demonstrate that the bill remained outstanding.⁸ Appellant then brought this case to the Superior Court to challenge the Board's determination, and the Employer responded in opposition.⁹ The Employer also filed a Motion to Strike a portion of the Appellant's submission that references Exhibit C, as well as the Exhibit itself, based on the assertion that the Board did not consider the Exhibit.¹⁰ Appellant opposed the Motion arguing that the Exhibit should not be stricken because it was a part of the record and, therefore, it was or should have been considered.¹¹

PARTIES' CONTENTIONS

3. Appellant argues that the Board should not have considered the payment log as evidence, and that it erred in concluding that Appellant did not meet his burden to demonstrate that the bill remained outstanding.¹² Appellant argues that Exhibit C was a part of the record below and demonstrated, together with other

⁶ *Id.* at 2-3

⁷ *See Id.* at 2. The payment log was not authenticated, but the Board agreed to consider it and to give it the weight it deserved under the circumstances.

⁸ *See Id.* at 6.

⁹ *Id.*

¹⁰ *See* Employer-Below, Appellee's Motion to Strike ("Mot. to Strike").

¹¹ *See* Claimant Below-Appellant's Response to Employer Below-Appellee's Motion to Strike ("Response to Mot.").

¹² *See* Opening Brief.

testimony, that the bill for April 14, 2017, remained unpaid.¹³ Appellant concedes that the document was not presented at the hearing but maintains that it was submitted to the Board prior to the hearing and, therefore, was or should have been considered by the Board.¹⁴ Appellant points out that 29 *Del. C.* § 10128 requires the Board to make its decision based upon the entire record of the case¹⁵. Appellant further argues that Exhibit C was relevant and material to the determination of the case because it showed that Appellee did not pay the Appellant's doctor's bill.¹⁶

4. Appellee claims that the bill was paid, the Board properly determined that Appellant did not meet his burden to show otherwise, and the payment log was properly considered by the Board.¹⁷ Appellee also argues that Exhibit C must be stricken from this appeal because it was not a part of the record below and, therefore, cannot be considered.¹⁸ Appellee argues that just because a document was sent to the Board, it does not become a part of the evidentiary record.¹⁹ Appellee states that Appellant "never submitted Exhibit C into evidence below."²⁰

¹³ Response to Mot. at 1-2.

¹⁴ *Id.* at 1. The document was submitted to the Board on March 25, 2019, and the hearing took place on June 24, 2019.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 3.

¹⁷ See Employer-Below/Appellee's Answering Brief ("Answering Brief").

¹⁸ Mot. to Strike at 2.

¹⁹ *Id.* Appellee cites no law to support this proposition.

²⁰ *Id.* at 3.

STANDARD OF REVIEW

5. This Court is limited in its review to “a determination of whether the Board’s decision is supported by substantial evidence and free from legal error.”²¹ Substantial evidence is that “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.”²² The Court does not consider the weight of the evidence, does not determine questions of credibility, and does not make findings of fact.²³ “Absent an abuse of discretion, a Board decision that is without legal error and supported by substantial evidence will be affirmed.”²⁴ However, the Court reviews questions of law and statutory interpretation *de novo*.²⁵

DISCUSSION

6. “The agency shall make its decision based upon the entire record of the case and upon the summaries and recommendations of its subordinates.”²⁶ The main issue at the hearing was whether Appellant needed more treatments that Appellee would have to pay for. There was also a dispute as to whether Appellee paid for Appellant’s last visit to his doctor, Dr. Scoop, which occurred on April 14, 2017. Exhibit C is a ledger prepared by Dr. Scoop outlining all the visits/treatments Appellant had with him, which has a handwritten note on the bottom that indicates

²¹ *Longobardi v. Unemployment Ins. Appeal Bd.*, 287 A.2d 690, 692 (Del. Super. 1971) (citing *Air Mod Corporation v. Newton*, 215 A.2d 434 (Del.Supr.Ct.1965)).

²² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

²³ *Sheryl Johnson v. First State Staffing Solutions and UIAB*, 2020 WL 591776 at *2 (Del. Super. Feb. 6, 2020) (citing *Anchor Motor Freight, Inc. v. Unemployment Ins. Appeal Bd.*, 325 A.2d 374, 375 (Del. Super. 1974)).

²⁴ *Id.* (citing *Filanowski v. Port Contractors, Inc.*, 2007 WL 2229019, at *1 (Del. Aug. 2, 2007)).

²⁵ *Delaware Dep’t of Nat. Res. & Envtl. Control v. Sussex Cty.*, 34 A.3d 1087, 1090 (Del. 2011).

²⁶ 29 Del. C. § 10128(a).

that Appellant's bill from April 14, 2017 was sent to collections.²⁷ The Board did not mention or reference Exhibit C in its decision. However, the Board considered the testimony of Dr. Scoop and Appellant's treatment history with him. Dr. Scoop and Appellant both testified that the bill for one of Appellant's visits to Dr. Scoop's office remains unpaid, which is also what Exhibit C is supposed to support. Appellee argued at the hearing that the bill was paid and presented a payment log. The Board decided not to award the payment to Appellant:

“There is no real dispute regarding the compensability of Dr. Scoop's office visit and the cortisone injection administered on April 14, 2017. The burden falls on Claimant to prove that the payment for such bill is due and owing. Claimant thinks the bill remains outstanding, and Dr. Scoop did not seem sure it was still outstanding, as he testified it was his understanding that it remains unpaid. The bill appears to be paid as per the payment log Dover Downs produced. Therefore, there is nothing for the Board to award regarding payment of this undisputed medical bill from April 14, 2017.”²⁸

7. Because the Board had to consider the entire record of the case, Exhibit C, which was provided to the Board before the hearing, should have been considered. Furthermore, if it is a part of the record, this Court has no reason to strike the document. However, if the Board did not consider it and made a decision about the April 14, 2017 bill, the case should be remanded back for reconsideration. It should be noted, however, that the Board made its decision not to award payment for April 14, 2017, largely based on the payment log produced by Dover Downs. The Board's procedural rules require that the evidence rules are followed during the hearings

²⁷ See Opening Brief, Exhibit C.

²⁸ *Jason Bristor v. Dover Downs, Inc.* IAB No. 1353147 at 12 (June 24, 2019).

insofar as practicable and that all evidence that possesses probative value is considered.²⁹ The Board, in this case, considered the evidence of payment even though it was not properly authenticated. However, even if this evidence was not considered, the burden of proof to establish that a bill remained unpaid was on the Claimant-Appellant.³⁰ The Board determined that Claimant-Appellant did not meet his burden.

8. It is possible that the note contained in Exhibit C would have made no difference in determining whether the bill remained outstanding. It is also possible that the Board considered the Exhibit but did not give it enough weight and, therefore, did not mention it in its decision. Exhibit C was submitted to the Board before the hearing, even though it was not presented during the hearing. Because it is unclear whether the Exhibit was considered, the case needs to be remanded for clarification. If the Board did, in fact, consider the document and made its decision not to award payment based on the way it resolved conflicting evidence, this Court would affirm the Board's decision absent legal error. Because the evidentiary record does not reflect whether the Board considered Exhibit C, the Court must reverse and remand the case.³¹

²⁹ *Van Pelt v. Beebe Med. Ctr.*, 860 A.2d 812, fn 3 (Table) (Del. 2004) (citing IAB Rule 14(b)).

³⁰ *See Guy J. Johnson Transp. Co. v. Dunkle*, 541 A.2d 551, 553 (Del. 1988). Claimant must present evidence that (a) he has incurred medical expenses, (b) such expenses are attributable to a work-related injury and (c) the employer has not paid such expenses as required by 19 *Del.C.* § 2322.

³¹ The Court does not need to address the Motion to Strike at this stage of the proceedings.

CONCLUSION

9. For all of the foregoing reasons, the case is **REVERSED AND REMANDED.**

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh