IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL HENDERSON,	)	
	)	
Claimant-Below/	)	
Appellant,	)	
	)	
	)	
5.	)	C.A. No. 01A-01-015(CHT)
	)	
	)	
EASTERN SHORE ACOUSTICAL,	)	
	)	
Employer-Below/	)	
Appellee.	)	

OPINION AND ORDER

On The Claimant's Appeal from the Decision of the Unemployment Insurance Appeal Board

Date Assigned: July 12, 2001
Decided: November 2, 2001

Kenneth F. Carmine, Esquire, POTTER, CARMINE & LEONARD, P.A., 840 North Union Street, Post Office Box 514, Wilmington, Delaware, 19899, Attorney for the Claimant-Below/Appellant.

Maria Paris Newill, Esquire, HECKLER & FRABIZZIO, 919 Market Street, Suite 1300, Post Office Box 128, Wilmington, Delaware, Attorney for the Appellee.

TOLIVER, Judge

FACTS AND PROCEDURAL POSTURE

The Employee-Below/Appellant, Michael Henderson, brings this appeal from the decision of the Industrial Accident Board ("Board"). That which follows is the Court's review of this decision.

Mr. Henderson's claim for workers' compensation benefits arises from a shoulder injury that he sustained while working for the Employer-Below/Appellee, Eastern Shore Acoustical ("Eastern"), on April 14, 1999.[1] He was employed as a ceiling tile installer and was injured while carrying out his assigned duties. Following his injury, Mr. Henderson continued to work for Eastern until September 16, 1999, when he underwent a surgical procedure to repair the injured shoulder. Eastern acknowledged Mr. Henderson's injury and paid him total disability benefits of $268.00 per week given his average weekly wage of $402.00 which was in turn based upon his hourly rate of pay on the date of his injury. Eastern submitted an Agreement as to Compensation, which Mr. Henderson did not sign.

[1] The "First Report of Occupational Injury or Disease" filed on behalf of Eastern with the Board on August 18, 1999, listed April 14, 1999 as the date upon which the injury occurred. The location was not referenced.

On April 10, 2000, Mr. Henderson filed a Petition to Determine Compensation Due with the Board. The basis of his petition was that his weekly wage was substantially higher, $734.46, than the amount as determined by Eastern. Mr. Henderson arrived at this sum based upon his contention that the date of the injury was not April 14, but April 19, 1999. The significance of this date is that on April 19 he was earning an hourly wage of $24.64 at a "rate" job[2] at the Postlethwait School in Rising Sun, Delaware. The day after Mr. Henderson filed his petition, April 11, 2000, Eastern filed a Petition for Review claiming that Mr. Henderson was capable of returning to work as of that date.

Mr. Henderson first sought treatment for his injury from Dr. Eric Schwartz and Dr. Glenn Rowe beginning on July 10, 1999. He subsequently underwent the surgical procedure referred to above and was released on October 8, 1999 by Dr.

[2] A "rate" job or "scale" job is a situation whereby a contractor bids on a job that is funded by the state. In such situations, there is typically a mandated rate of pay based upon the particular trade being performed by the employees of the contractor. In most instances, this mandated rate of pay is higher than the employees "normal" rate of pay.

Schwartz to return to light-duty work exclusive of any overhead activity. One month later, Dr. Schwartz eased those restrictions and allowed Mr. Henderson to increase his employment-related activities to medium duty. However, Eastern did not have any work available which met the restrictions so imposed. This medium-duty restriction remained in effect for the balance of Mr. Henderson's treatment with Drs. Schwartz and Rowe.

It also appears that Mr. Henderson received chiropractic treatment from a Dr. Shreppler[3] and Dr. Jeffrey J. West. Dr. Shreppler rendered treatment to Mr. Henderson contemporaneously with, or subsequent to his treatment with Drs. Schwartz and Rowe. Dr. West began treating him on March 27, 2000, and continued to do so until the date the matter was heard by the Board.

That hearing was held on August 11, 2000. Both sides presented witnesses who appeared either in person or by deposition.

[3] A more specific identification of the doctor was not available in the record put before the Board.

Dr. Errol Ger testified by deposition on behalf of Eastern after having examined Mr. Henderson and reviewing his medical records on May 15, 2000. He opined that Mr. Henderson's injury was related to his work, but that he was capable of returning to work full time with restrictions, as of April 11, 2000.[4] Finally, Dr. Ger testified that according to an MRI conducted on Mr. Henderson on October 29, 1999, he suffers from an underlying degenerative disc disease which was not related to his work.

Dr. West testified on behalf of Mr. Henderson, also by deposition. Based upon his examination and treatment of Mr. Henderson, Dr. West concluded that Mr. Henderson could have returned to work as early as March, 2000 with certain restrictions, gradually decreasing until he was able to resume his duties full time. Lastly, he affirmed Dr. Ger's opinion in that Mr. Henderson's shoulder injuries were work-related and that the 1999 MRI showed the existence of unrelated degenerative disc disease.

Presenting testimony in person were Mr. Henderson, Lawrence Bruton, a vocational rehabilitation counselor

[4] As noted, this was the date that Eastern filed its petition to terminate the workers' compensation benefits being paid to Mr. Henderson.

employed by the State of Delaware, and Lyle Humpton, the former owner of Eastern.

Mr. Henderson testified that he began working for Eastern in December 1997 and continued his employment there until September 1999, when that employment terminated as a result of the injury upon which this litigation is premised. Prior to his employment with Eastern, Mr. Henderson worked as a laborer for the City of Dover on a seasonal basis and before that, he supported himself by collecting empty cans while he lived in California. He testified that he had completed the eighth grade, but in the interim between his injury and the hearing, he had earned a GED on the advice of a vocational rehabilitation counselor. However, Mr. Henderson admitted that he had not looked for work within the six months prior to the hearing and when questioned about his daily activities, he indicated that he tries to keep busy and occasionally goes to his mother's house.

Mr. Bruton testified that Mr. Henderson first came to see him on April 25, 2000 seeking vocational rehabilitation as a result of the injuries. It was during the course of their interaction that Mr. Henderson indicated on an employment questionnaire that he had completed the tenth grade. Mr.

Bruton also indicated that he received a medical disability form supplied by Dr. West which specified the restrictions which the chiropractor had placed on Mr. Henderson's activities.

Finally, Mr. Humpton confirmed that Mr. Henderson had worked on the Postlethwait job which paid $24.64 on April 19, 1999 as claimed and that his hourly wage was $10.05 when not on a "rate" job. When asked about the date and place of the injury, contrary to the conclusion he reported on the First Report of Occupational Injury or Disease, he could not confirm the date or the place where Mr. Henderson was injured.

The Board released its decision on January 4, 2001. It held that Mr. Henderson did not carry his burden of establishing that the injury occurred on April 19, 1999 as he claimed. Consequently, he was not entitled to a weekly wage based upon the higher paying "rate" job at the Postlethwait School as a result. Instead, the Board agreed with Eastern's calculation of the average weekly wage of $402.00. Again, this figure was calculated by multiplying his "regular" hourly wage, $10.05, times forty, the number of hours in his average work week. That calculation was based upon the Delaware Supreme Court's opinion in Rubick v. Sec. Instrument Corp.,

Del. Supr., 766 A.2d 15 (2000). The Board also found that Mr. Henderson's cervical disc problems were not work-related.

In granting Eastern's petition to terminate Mr. Henderson's benefits, the Board held that Mr. Henderson was not totally disabled nor a prima facie displaced worker. However, the Board did find that Mr. Henderson was partially disabled and awarded him partial disability benefits of $29.14 per week.[5] Further, because Mr. Henderson refused Eastern's settlement offer, and because that offer was of a higher dollar amount than Mr. Henderson was awarded, he was not entitled to attorney's fees. 19 Del. C. §2320(j)(2). However, Mr. Henderson's expert witness fees were taxed as costs to Eastern pursuant to 19 Del. C. §2322(e).

On appeal, Mr. Henderson contends that the Board's finding that he was not a credible witness and therefore failed to establish the date upon which he claimed the injury occurred is not supported by substantial evidence. He also asserts that the Board erred by determining that his benefits

[5] Jose R. Castro, a vocation specialist, also testified on behalf of Eastern. He conducted two labor market surveys for available positions in the Dover and New Castle County areas which would be conducive to Mr. Henderson's restrictions. This testimony was used by the Board to determine that Mr. Henderson was entitled to a partial disability benefit of $29.14 per week. However, this portion of the Board's decision does not appear to be part of the appeal.

should be based upon an average weekly wage of $402.00 and that in doing so, the Board failed to compensate him for the loss of earning capacity he suffered.

As might have been expected, Eastern disagrees. More specifically, it responds that the Board's findings are in fact supported by substantial evidence. Furthermore, the Board's determination concerning Mr. Henderson's average weekly wage was legally correct and does reflect any loss of earning capacity that he suffered as a result of his work-related accident. For those reasons, Eastern argues that the decision must be affirmed.

DISCUSSION

This Court is bound by the Board's findings if supported by substantial evidence and absent abuse of discretion or error of law. Ohrt v. Kentmore Home, Del. Super., C. A. No. 96A-01-005, Cooch, J. (Aug. 9, 1996)(Mem. Op. at 8). "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Anchor Motor Freight v. Ciabattoni, Del. Super., 716 A.2d 154, 156 (1998); and Streett v. State, Del. Supr.,

669 A.2d 9, 11 (1995). It "is more than a scintilla and less than a preponderance" of the evidence. City of Wilmington v. Clark, Del. Super., C. A. No. 90A-FE-2, Barron, J. (March 20, 1991) (Mem.Op. at 6). When reviewing the Board's decision for abuse of discretion or alleged errors of law, the Court's review is de novo. Betsy Ross Pizza v. Singleton, Del. Super., C. A. No. 00A-07-004, Witham, J. (Jan., 18, 2001)(ORDER). This Court does not weigh the evidence, determine questions of credibility or make its own findings of fact. Johnson v. Chrysler, Del. Supr., 213 A.2d 64, 66 (1965). It's function is to determine if the evidence is legally adequate to support the factual findings below. 29 Del. C. §10142(d).

Insofar as his first contention is concerned, Mr. Henderson is simply wrong. Notwithstanding Mr. Humpton's later equivocation on the subject, he did initially conclude that the injury did take place on April 14, 1999. On that date, the record reflects that Mr. Henderson was being paid at his "regular" rate of $10.50 per hour. In finding that Mr. Henderson failed to otherwise establish the date upon which the accident occurred, the Board noted that the only evidence in support of the date advocated by Mr. Henderson was offered by him. Furthermore, prior to March 27, 2000, the date of Mr.

Henderson's first visit with Dr. West, he had not claimed anything other than that the accident took place in "April, 2000".

In reviewing that testimony, the Board noted the discrepancies relative to the extent of Mr. Henderson's education that he had offered on different occasions, his vague employment history prior to his work with Eastern and his inability to convey what he did on a daily basis while allegedly unable to return to work. Also questioned were Mr. Henderson's integrity based on failing to inform Eastern when he was overpaid and the apparent lack of any real effort to find employment within his capabilities or vocational/rehabilitative assistance prior to the filing of Eastern's petition to terminate on April 11, 2000. Nothing more was required of the Board.

To the extent that the Board was less than clear as to its ruling on when the injury occurred, the Court is able to discern that information from both the evidence presented and the conclusions reached by the Board. To do so does not fatally undermine the integrity of the decision rendered. See State v. Langrell, Del. Supr., 568 A.2d 1072 (1989); and Bd. of Pub. Edu. v. Rimlinger, Del. Supr., 232 A.2d 98 (1967). In

addition, the Board was free to accept or reject some or all of the testimony proffered by Mr. Henderson. Joiner v. Raytheon Constructors. Inc., Del. Super., C. A. No. 00A-04-009-RCC, Cooch, J. (July 31, 2001)(Mem. Op. at 5). Judging the credibility of witnesses is clearly a function of the Board which it carried out. The Court can not, in the absence of an abuse of discretion, substitute its judgment for that of the Board. Whaley v. Shellady, Del. Supr., 161 A.2d 422 (1960). Mr. Henderson's second challenge is directed at the Board's finding that his average weekly wage was $402.00. That finding was in turn based upon the determination that his hourly wage at the time of the accident was $10.05 and not the $24.64 that he claimed. The Board erred in that regard. Mr. Henderson claims entitlement to the higher average weekly wage based upon the higher hourly wage attendant to a "rate" job. Alternatively, he argues that because the Board failed to make an appropriate finding as to the exact date of the accident, he is entitled to the average weekly wage based upon his yearly earning up to last day that he worked for Eastern.

As indicated above, the Board did not err in failing to accept Mr. Henderson's version of when and where he was

injured, and that he was not entitled to the higher hourly wage as a result. Nor can the method of calculating Mr. Henderson's average weekly wages be adopted. To do so would be contrary to the law.

More specifically, the Board relied upon the Delaware Supreme Court's decision in Rubick. In that case, the Supreme Court, reversing the decision of the Superior Court, held that the correct method of calculating the average weekly wage via 19 Del. C. §2303 in the case of an hourly worker, was as follows:

> [a]n hourly employee must be compensated on the basis of his/her hourly rate at the time of the accident even if that rate is significantly above or below the employee's average hourly rate. . . . Weekly wages, for an employee who is paid by the hour or day, are determined by multiplying the hourly or daily rate by the number of hours or days in the employer's average work week.

Rubick at 17. Here the Board, having stayed this case pending the resolution to the Rubick appeal, calculated Mr. Henderson's wages according to that decision based upon the evidence before it. No other response is legally tenable and Mr. Henderson's contentions in this regard must be rejected.

CONCLUSION

For the reasons set forth above, the Decision by the Industrial Accident Board must be, and hereby is **affirmed.**

IT IS SO ORDERED.

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Toliver, Judge