

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

RONALD WYRICK,)
)
 Claimant-Below/Appellant,)
 Cross-Appellee,)
)
)
 v.) C.A. No. 00A-10-002 CHT
)
)
 LEASEWAY AUTO CARRIERS,)
)
 Employer-Below/Appellee,)
 Cross-Appellant.)

OPINION AND ORDER

**On The Employee's Appeal, and the Employer's Cross-Appeal
from the Decision of the Industrial Accident Board**

Date Assigned: February 14, 2002
Decided: April 10, 2002

Andrew D. Rahaim, Esquire, RAHAIM & SAINTS, 2055 Limestone Road, Suite 211 Wilmington, DE 19808, Attorney for the Claimant-Below, Appellant, Cross-Appellee.

Michael R. Ippoliti, Esquire, P.O. Box 2284, Wilmington, DE 19899, Attorney for the Employer-Below, Appellee, Cross-Appellant.

TOLIVER, Judge

FACTS AND PROCEDURAL POSTURE

The Claimant-Below/Appellant/Cross-Appellee, Ronald Wyrick and the Employer-Below/Appellee/Cross-Appellant, Leaseway Auto Carriers ("Leaseway"), have filed appeals of the decision of the Industrial Accident Board ("Board"). That which follows is the Court's resolution of the issues so raised.

On March 17, 1998, Mr. Wyrick injured his lower back when he was lifting piece of equipment during the course of his employment with Leaseway. Mr. Wyrick completed his shift that day, but sought treatment at Leaseway's request the following day at Omega Medical Center. The examination revealed that Mr. Wyrick's lower back was objectively normal but that he suffered from a low back sprain/strain. He returned to Omega on March 23, 1998 and reported that his pain had diminished and Omega released him to return to work at light duty. Mr. Wyrick continued to treat at Omega until April 17, 1998 when he indicated that he had no pain in the lower back. He was

released to go back to work with no restrictions that day. The following day he left work due to a reoccurrence of back pain. Mr. Wyrick returned to Omega to resume treatment. He continued treatment at Omega until May 21, 1998 when he was once again released to return to work without restriction. He has suffered no further work-related incidents that required his absence from work.

On March 27, 2000, Mr. Wyrick filed a petition to determine additional compensation due with the Industrial Accident Board. He sought an award for a thirteen (13%) percent permanent partial impairment to his lower back as well as payment for medical expenses, medical witness fees and attorneys fees.

A hearing was held before the Board on September 11, 2000. Mr. Wyrick testified that he had worked for Leaseway continuously from June, 1969 and had been injured three times resulting in absences from work. One of those accidents took place in 1985 and caused injury to his arm, shoulder, neck and

back. Following that accident, Mr. Wyrick was absent from work for approximately two years.

The record reflects that Mr. Wyrick was also injured in an automobile accident in 1989, which likewise injured his arm, shoulder, neck and back. Significant amongst these injuries was a pinched nerve in his neck, which caused Mr. Wyrick to miss approximately two and one half years of work. It further appears that Mr. Wyrick suffered another work-related accident in July 1997 in which his back was injured. He missed two weeks of work due to this injury.

As a result of the injury that is the subject of the present litigation, Mr. Wyrick testified that he treated at the Omega Center by Dr. Tony Cucuzzella once every three days through October 1999. He has sought no further treatment for his back since that time. He states that he has just learned to live with the pain but takes Darvocet sporadically when the pain is extreme.

When Mr. Wyrick returned to work from the 1998 injury, he

claims that it was at his own request. However, he worked only one day because he claims the pain was too intense to continue. That absence lasted until May 22, 1998 when he was released to return to work without restrictions. He had no further flare ups that necessitated his absence from work from that date to the date of the hearing. Notwithstanding that fact, Mr. Wyrick contends that he still suffers from pain in his back but has learned to tolerate the same while working.

Dr. Steven J. Rogers testified for Mr. Wyrick. Dr. Rogers stated that based on his examination of Mr. Wyrick and review of his medical records, the March 17, 1998 work-related injury resulted in a thirteen percent (13%) permanent impairment to Mr. Wyrick's lower back. He specifically stated that none of this impairment is attributable to the 1985 or 1997 industrial accidents or the 1989 automobile accident.

Leaseway's only witness was Dr. Andrew Gelman who testified via deposition taken on September 5, 2000. Dr. Gelman examined Mr. Wyrick on January 29, 1999 and August 1,

2000. He also reviewed his past medical records in conjunction with those examinations. Based on that information, Dr. Gelman opined that Mr. Wyrick suffers from a seven percent (7%) permanent impairment to his low back. However, this impairment is attributable to the injuries sustained in the 1985 work-related accident and the 1989 automobile accident, but not to the 1998 work-related incident.

Following the presentation of all the evidence, the Board issued its decision on September 27, 2000. It held that Mr. Wyrick did not meet his burden of establishing that he suffered from a permanent impairment of his back and explicitly rejected the testimony of Dr. Rodgers and Dr. Gelman in that regard. That rejection was based in part upon Dr. Gelman's 1990 report that Mr. Wyrick's injuries from the 1985 work-related accident and the 1989 automobile accident had resolved and because Dr. Rodgers' testimony conflicted with the evidence in the record. Lastly, the Board awarded

Mr. Wyrick \$235.00 in medical expenses which they found to be reasonable, necessary and related to the 1998 industrial accident. Based upon that award of medical expenses, the Board also awarded Mr. Wyrick medical witness fees pursuant to 19 Del. C. §2320(e) and attorney's fees pursuant to §2320(g). Wyrick v. Leaseway Auto Carriers, IAB Hearing No. 1122869, (September 27, 2000). Both sides appealed to this Court.

On appeal, Mr. Wyrick contends that the Board committed several errors. First he claims that the Board abused its discretion in finding that Mr. Wyrick did not suffer a permanent impairment and that the Board failed to state the reasons for that decision. Specifically, because both medical experts testified that Mr. Wyrick had some level of impairment, the Board had no option but to award him some type of permanent disability. Furthermore, the Board failed to articulate it's reasons for finding no disability. Second, Mr. Wyrick claims that the board based its decision on evidence not in the record. Specifically, because the Board's

decision mentioned that Mr. Wyrick was able to sit through the entire hearing in apparent comfort, Mr. Wyrick argues that the Board considered evidence not in the record and thereby committed legal error. In response, Leaseway asserts that the Board's decision is supported by substantial evidence in the record that Mr. Wyrick sustained no permanent impairment to his lower back. The evidence showed the absence of any structural, neurologic or orthopedic damage or impairment. In addition, Leaseway alleges that it is in fact permissible for the Board to take into consideration the claimant's physical appearance in reaching its decision.

Leaseway's cross-appeal is limited to the Board's finding that medical expenses were awarded in the absence of any expert medical testimony indicating that they were reasonable and necessary. They contend that expert medical witness testimony is required to make such an award. Given this error regarding the medical expenses, it follows that any award of attorneys fees and medical expert witness fees is likewise

unwarranted.

Mr. Wyrick claims that the Board properly exercised its discretion in awarding the above mentioned medical expenses, attorneys fees and medical expert witness fees. More specifically, there was evidence presented that a reasonable mind might have found as adequate to support the Board's decision because the medical services provided were directly related to the industrial accident and he sought this treatment at the request of his employer. Furthermore, while the evidence used by the Board in arriving at its conclusion may have been based on the lay testimony of Mr. Wyrick, Leaseway counsel withdrew its objection to the admission of this evidence. Consequently the Board's action cannot now be challenged.

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). This Court does not weight 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). A evaluation of the Board's decision in light of these standards requires this Court to reverse that decision.

Mr. Wyrick's Appeal

The Board stated that Mr. Wyrick did not carry his burden of establishing a permanent impairment because he failed to show any significant signs of radiculopathy as is required to substantiate a permanent impairment of the low back. The diagnostic studies performed on Mr. Wyrick were negative for radiculopathy and there was no evidence of any objective findings of radiculopathy in Mr. Wyrick's medical records since July of 1999. Moreover, there was no evidence of a loss of reflexes and any atrophy suffered was not sufficient for a finding of permanent impairment.

Contrary to Mr. Wyrick's position on this matter, if the Board chooses to reject one medical expert's opinion, it is not required to accept the testimony of another testifying

medical expert by default. All that is required in rejecting the testimony of a medical witness is that the Board "provide specific relevant reasons for doing so." Turbitt v. Blue Hen Lines, Inc., 711 A.2d 1214, 1215 (Del. 1998). The Board sufficiently stated it's reasons for rejecting both expert's opinions on Mr. Wyrick's permanency.

Dr. Rodgers' testimony was found to be unpersuasive because the evidence presented with respect to certain test results conflicted with his findings of a permanent impairment. Specifically, the Board stated that it found no medically significant signs of radiculopathy or the requisite level of atrophy to support a Category III impairment. Therefore, the Board rejected Dr. Rodgers' testimony in total. Dr. Gelman's testimony was found to lack credibility because he stated that Mr. Wyrick's impairment was attributable to the 1985 and 1989 accidents. The Board found this testimony conflicted with a 1990 report prepared by Dr. Gelman himself that stated that these injuries had completely resolved.

As a result, the Board was left with no evidence upon which to find *any level* of permanency and it aptly awarded none. In so finding, the Board correctly stated that the burden was Mr. Wyrick's; and he failed to carry that burden.

Mr. Wyrick places great weight on the one sentence in the Board's decision in which it states that Mr. Wyrick sat through the entire hearing in apparent comfort. He claims that the board erroneously based its decision on this "evidence". When read in conjunction with the two sentences that immediately precede that sentence, it is clear that this observation is given simply to buttress it's finding that Mr. Wyrick's testimony, that he currently suffers from low back and hip pain, lacks credibility.

In spite of this almost innocuous statement, the "meat", so to speak, of the board's analysis was succinctly stated previously in it's decision. It is clear that with or without the Board's observations of Mr. Wyrick, it would have rendered the same decision based upon the testifying medical experts.

As a result, any error made by the Board with respect to Mr. Wyrick's demeanor before or after he testified is harmless. The Board's credibility findings as they relate to the medical experts' testimony on Mr. Wyrick's permanency may not be disturbed by this Court. Consequently, the Board's denial of Mr. Wyrick's petition is supported by substantial evidence.

Leaseway's Cross Appeal

When an injury is internal, it is the claimant's burden to establish through expert medical testimony that the injury in fact occurred and the extent of this injury. Schuh v. State, Del. Super., C. A. No. 99A-08-001M, Witham, J. (Jan. 7, 2000) (Mem. Op. at 5). "Disputes over the reasonableness of medical expenses are factual questions for the Board to decide." Adams v. Shore Disposal, Inc., Del. Super., C. A. No. 96A-10-001, Lee, J. (July 29, 1997) (Mem. Op. at 14-15). In resolving any such dispute, the Board shall decide upon the credibility of the medical testimony. Santiago v. Radisson

Hotel, Del. Super., C. A. No. 94A-08-5, Herlihy, J. (Feb. 28, 1995) (Mem. Op. at 5).

Here, Leaseway asserts that it is reversible error for the Board to have found the medical expenses compensable absent expert medical testimony. The Court agrees. The only evidence offered of the reasonableness and necessity of the treatment was that of Mr. Wyrick. He stated that he received no treatment from Omega or from Dr. Cucuzzella other than for the 1998 industrial accident. While the Board obviously found his testimony credible, this Court finds that lay testimony cannot establish the reasonableness and necessity of the treatment rendered. As a result, Mr. Wyrick is not entitled to the medical expenses in questions or the attorney's fees and medical witness fees based on the award of those expenses.

CONCLUSION

Based upon the foregoing, the decision of the Industrial Accident Board is **affirmed** in part and **reversed** and **remanded** in part for proceedings consistent with this decision.

IT IS SO ORDERED.

Toliver, Judge