IN THE SUPERIOUR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

RICKY STANLEY,	)	
	)	C.A. No. 02A-11-002 JTV
Claimant-Below/	)	
Appellant,	)	
	)	
v.	)	
	)	
PERDUE FARMS, INC.,	)	
	)	
Employer-Below /	)	
Appellee.	)	

Submitted: December 12, 2003
Decided: April 30, 2004

Anthony M. Frabizzio, Esq., and Cheryl A. Ward, Esq., Heckler & Frabizzio, Wilmington, Delaware. Attorney for Employer /Appellee- Below.

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Claimant Below-Appellant.

Upon Consideration of Appellant's Appeal
From Decision of the Industrial Accident Board
AFFIRMED

VAUGHN, Resident Judge

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. Ricky Stanley, the appellant, ("claimant") appeals from a decision of the Industrial Accident Board ("Board") which denied his petition for an order authorizing certain medical treatment at the expense of his former employer, Perdue Farms, Inc., under the workers' compensation law. The Board concluded that the claimant failed to establish that his current complaints are caused by a work accident which occurred on March 26, 2001. The claimant contends that the Board's decision is not supported by substantial evidence.

2. The court's function on appeal is to determine whether the Board's decision is supported by substantial evidence and free from legal error.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4]

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

2 *Oceanport Ind. V. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp*., Del. Super., 517 A.2d 295, 297 (1986), *appeal dism*., Del. Supr., 515 A.2d 397 (1986).

3 *Johnson* at 66.

4 29 *Del. C.* § 10142(d).

3. The claimant's job for Perdue Farms was to drive a truck to chicken farms and unload feed from the truck into feed bins. On March 26, 2001, while going into a feed bin, he tripped over a pole and hurt his low back.

4. After seeing Dr. Joseph Black at the Perdue Wellness Center initially, he went to see Dr. Glen Rowe on April 12. Dr. Rowe diagnosed the claimant as having low back strain and left sacroiliac inflammation, as well as lumbar radiculopathy, caused by the March 26 fall. Herniated disc was ruled out. Dr. Rowe gave the claimant a cortisone steroid shot. He also prescribed medication and physical therapy. He restricted the claimant to sedentary duty. Dr. Rowe next saw the claimant on April 26. He found that the claimant's condition was improving and released him to regular work duty. Shortly thereafter, the claimant left Perdue, explaining that he could not work within what he believed to be his work restrictions.

5. The claimant was scheduled for a follow-up visit with Dr. Rowe for May 25, but did not keep that appointment. He also missed his last four physical therapy sessions for his low back scheduled for April 27, May 3, May 8 and May 11.

6. On May 20, 2001, the claimant was involved in an automobile accident in which he injured his neck and left shoulder. He suffered an evulsion fracture at C5.

7. Dr. Sternberg treated the claimant for his injury from the automobile accident. There is no mention in Dr. Sternberg's records of any low back problem. Dr. Sternberg first saw the claimant for this injury on June 1. He prescribed medication and physical therapy. There were two follow-up visits on June 22 and September 4.

8. Between May 2001 and February 2002, the claimant worked at least briefly as a car hauler, which is described in the record as a strenuous activity.

9. On February 28, 2002, ten months after last seeing Dr. Rowe, he returned to Dr. Rowe's office complaining of low back pain. The claimant reported that his low back pain had leveled off and was essentially unchanged since April 2001. He reported that he was trying to find something that would not irritate his back, but could not find a job that his back would allow him to do. He reported that his new job was unbearable because it was outside his restrictions. Dr. Rowe was unsure of any restrictions to which the claimant was referring. The claimant also reported that he was between jobs and thus able to afford the time to see Dr. Rowe. Previously he had been working as a truck driver and his work hours did not permit him to go to Dr. Rowe's office during the doctor's office hours. The basic point the claimant reported was that he was not able to do the things that he could do previously and was having a hard time making ends meet. He was returning to Dr. Rowe to see if there was something else that Dr. Rowe could do.

9. During that visit Dr. Rowe conducted a physical examination during which he noted pain to the left sacroiliac and limited range of motion. The doctor noted that it looked like the claimant had aggravated his previous problem because all the same areas that had been there previously were inflamed. When asked whether the low back problem was a continuation of the one which he treated in April 2001, he responded "I believe so. He told me that it had never completely left him."

10. Dr. Rowe again prescribed medication and physical therapy. He saw the claimant again on April 11, August 27 and October 8. At the October 8 appointment,

the claimant stated that his neck was a hundred percent back to normal and his low back was 90 percent. He reported that he had pain with strenuous activity, but felt that he would now be able to pass the physical to perform a job as a truck driver. He stated that pain would come and go in his low back, but he had more movement. On examination by the doctor, the claimant had no pain to any of the sacroiliac joints or the lumbosacral junction. His range of motion was very good and he had good flexion and fair extension. He was still showing some mild limitations of range of motion from the low back injury. The hearing before the Board was held on October 24, 2002. Dr. Rowe was next scheduled to see the claimant on November 21.

11. Dr. Rowe recommended that the claimant see Dr. Ameer, a pain management specialist, for treatment for his low back, including, possibly, injections. The proposed treatment by Dr. Ameer is the treatment which was the subject of the claimant's petition to the Board. He sought an order determining that the proposal that he see Dr. Ameer would be covered by workers' compensation benefits.

12. At the request of Perdue Farms, Dr. Jerry L. Case examined the claimant on September 20, 2002. Based upon his review of the medical records, he described the March 2001 work accident as causing a relatively mild back sprain that seemed to respond nicely to conservative treatment. He noted that Dr. Sternberg's notes contained nothing to indicate that the automobile accident had aggravated the low back sprain, but found it somewhat difficult to think that an automobile accident that was severe enough to cause an evulsion fracture of the neck would not also cause some back strain. Dr. Case also felt that if a low back sprain caused ongoing symptoms, one would not expect to see a ten month gap without treatment. Dr. Case

examined the claimant and found, with respect to the low back, that he could bend 90 degrees, which is normal, extending to 20 degrees, which is 10 degrees short of normal, and that he had no muscle spasm or tenderness. Dr. Case considered the examination to be normal. The claimant told Dr. Case that he was having occasional back pain, sometimes at night and sometimes in the morning, which would last about an hour. When asked for his opinion as to what may have been the cause of the claimant's complaints, Dr. Case responded that the claimant seemed to be doing quite well until he had the automobile accident, but apparently still had some symptoms; that it seemed unlikely that the trauma which caused a fracture in the cervical spine would not also aggravate the lower back; and that it was more likely that any ongoing symptoms would be related to a combination of the work accident and the auto collision. He also expressed the opinion that the low back problem from the work accident seemed to have resolved itself or at least was significantly better. He also expressed the opinion that at the time he examined the claimant, his condition was normal with minimal complaints, that he, Dr. Case, believed the claimant was capable of returning to full duty work, and saw no need for any significant treatment. Dr. Case did not believe that the claimant was a candidate for epidural injections or nerve root blocks and was not in need of pain management treatment. He believed that any ongoing complaints could be addressed by medication through his family doctor. Finally, he expressed the opinion that any connection between the March 2001 low back injury and the complaints expressed in 2002 would have to be based entirely on the claimant's history of subjective complaints.

13. In its decision denying the claimant's petition for authorization to see a pain management specialist, the Board stated in relevant part as follows:

> When there is a conflict in the medical testimony, the Board must decide which physician is more credible. After studying the testimony, the Board finds Dr. Case's opinion to be more credible than Dr. Rowe's opinion on the issue of causation. Dr. Case believes that Claimant's current symptoms are related to his motor vehicle accident and to his industrial accident, but only if Claimant's subjective complaints and history are believed; otherwise, Dr. Case believes that Claimant's symptoms beginning in February 2002 stem from the motor vehicle accident or his work as a car hauler. The Board finds that Claimant is not credible and discounts his subject complaints and history.
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> Dr. Rowe bases his entire opinion on Claimant's history. Dr. Rowe did not even know that Claimant was involved in an intervening motor vehicle until the day of his deposition. Claimant failed to mention his motor vehicle accident and subsequent medical treatment to Dr. Rowe. Moreover, Claimant has not explained this omission. Given this unexplained failure to disclose highly pertinent information, the Board refuses to credit Claimant's testimony. Since claimant is not credible, his history to Dr. Rowe is not credible and, therefore, Dr. Rowe's opinion is not reliable.
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> The Board accepts Dr. Case's opinion that Claimant's automobile accident was severe enough to cause back pain, since it was severe enough to cause an evulsion fracture in Claimant's back. The Board also accepts Dr. Case's opinion that the ten month gap in treatment for Claimant's back symptoms following his release to full duty work

> indicates that Claimant's initial back problems resolved from his industrial accident. Claimant was released to work in a full duty capacity on April 27, 2001, and did not seek any other treatment for his back until February 28, 2002. The Board finds that if Claimant had persistent, ongoing back pain throughout that period of time, he would have complained to either Dr. Rowe or Dr. Sternberg. Furthermore, the clinical findings support Dr. Case's opinion, since there were no signs of a herniated disc or radiculopathy and Claimant only suffered a back strain in March 2001.
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> Based on the foregoing, the Board finds that Claimant has failed to meet his burden of proof that his current subjective complaints are causally related to his industrial accident.

14. The claimant contends that the Board committed error in relying on Dr. Case's testimony. He contends that Dr. Case's opinions are faulty in that Dr. Case assumed facts not in evidence; specifically, that the claimant injured his back in the automobile accident and that his continuing complaints of a low back problem were the product of a combination of both the work injury and the automobile accident. This conclusion, the claimant contends, ignores the fact that there is no evidence that the claimant injured his low back in the automobile accident, that he never complained that he injured his low back in the automobile accident, that Dr. Sternberg recorded no evidence that the low back was injured in the automobile accident, that Dr. Sternberg did not examine the low back in connection with the automobile accident, and that Dr. Sternberg did not diagnose any injury or condition to the low back in connection with

the automobile accident. Dr. Case, the claimant contends, cannot assume facts not in evidence and thereby reach whatever conclusion he wishes. He further contends that, even if the low back injury was aggravated in the automobile accident, he is entitled to recover under the "previously weakened member" theory.

15. If Dr. Case had expressed only a narrow opinion that the automobile accident, or a combination of the auto and work accident, was the cause of low back pain of which the claimant complained in February 2002, there may be some merit to the claimant's contentions. It is true that there is no evidence in Dr. Sternberg's medical records that the claimant complained of low back pain or that the doctor diagnosed any low back injury arising from the automobile accident. There is, however, much more to Dr. Case's opinion. It is also clear that he was of the opinion that the absence of any treatment for the low back from May 2001, at which time the injury was noted as improving, until February 2002 cast doubt upon any causal connection between the work accident and the low back complaints expressed to Dr. Rowe in February 2002. He testified that any connection between the two would have to be based upon the claimant's history of subjective complaints. He also testified that he found the claimant to be essentially normal and that treatment by a pain management specialist was unnecessary.

16. The Board's assessment of the claimant as not credible was within its discretion as trier of fact. On this record it would seem to be well justified. When the claimant returned to Dr. Rowe in February, he completed an updated medical history form and never mentioned that he had been injured in an automobile accident the previous May. Dr. Rowe was unaware of this fact until much later. The claimant

claimed to be on work restrictions at times that no doctor had imposed any restrictions. The credibility of the claimant's explanation as to why he did not return to Dr. Rowe between May 2001 and February 2002 could also be questioned. These are just to mention three instances that called his credibility into question.

17. The Board has discretion to accept the testimony of one expert over that of another expert when evidence is in conflict and the opinion relied upon is supported by substantial evidence.[12] In addition, when an expert's opinion is based in large part upon the patient's recital of subjective complaints and the trier of fact finds the underlying facts to be different, the trier is free to reject the expert's testimony.[1]

18. The Board's decision to reject the opinion of Dr. Rowe is supported by substantial evidence. The Board was free to reject his opinion linking the March 2001 work-related accident to the February 2002 low back problem because it was based in large part upon the claimant's subjective complaints of his condition and the Board found the claimant not credible.

19. This testimony, considered as a whole, was that a causal link between the work accident and the low back complaints in February 2002 was not supported by the medical records and was established only if one accepted the claimant's description of his complaints. While Dr. Case's testimony that the claimant's later low back pain was

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[12] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *DiSabatino v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *General Motors Corp. v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977) (rev'd on other grounds by *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989)); *Butler v. Ryder M.L.S.*, 1999 Del. Super. LEXIS 29, at *5-6 (Del. Super. 1999).

1 *Breeding v. Contractors – One*, *Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

likely caused by the automobile accident, or a combination of the automobile accident and the work accident, may be subject to some question when considered in isolation from the rest of his testimony, his testimony as a whole constitutes substantial evidence to support the Board's conclusion that the claimant failed to meet his burden as to causation. This is found in his opinion that a causal link would be based entirely on the claimant's history of subjective complaints, which the Board found not credible, and the attendant circumstances, including, but not limited to, the fact that the back pain was improving in April 2001 when the claimant stopped seeing Dr. Rowe, his release to full work at that time, the absence of any documented evidence of back pain for ten months until February 2002, and that the clinical findings supported Dr. Case's opinion. Although the Board's decision may not have been very artfully worded, for the reasons stated I am persuaded that substantial evidence exists to support its conclusion that the claimant failed to establish any causal connection between the work accident of March 2001 and the proposed pain management treatment.

20. The "previously weakened member" theory which the claimant mentions was discussed by the Superior Court in *Groce v. Johnson's Used Cars*[2] and also in *Barkley v. Johnson Controls*[3]. It proceeds on the theory that, at least under some circumstances, a weakened condition stemming from a compensable injury may be deemed the cause of an aggravation of the injury which occurs in a subsequent non-

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2 1997 Del. Super. LEXIS 450 (Del. Super. 1997).

3 2003 Del. Super., LEXIS 21 (Del. Super. 2003).

work related accident, thus making the aggravated injury compensable. In this case, however, the Board concluded that the claimant's work-related low back injury had resolved itself and, by implication, there was no weakened condition.

21. The Board's decision is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
Resident Judge

oc: Prothonotary
cc: Order Distribution
File