IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PLAYTEX PRODUCTS, INC.	)	
	)	
Employer - Below	)	
Appellant	)	
	)	
v.	)	**C.A. No. 03A-10-003 HdR**
	)	
LORRAINE HARRIS	)	
	)	
Claimant - Below	)	
Appellee.	)	

Submitted: May 18, 2004
Decided: August 31, 2004

J. R. Julian, Esq., Wilmington, Delaware for Appellant.

John S. Grady, Esq., of Grady & Hampton, Dover, Delaware for Appellee.

O P I N I O N

Appellant' s Appeal from the Decision of the Industrial Accident Board

AFFIRMED

RIDGELY, Justice*

* Sitting by special designation pursuant to Delaware Constitution Article IV, Section 13(2).

Playtex v. Harris
C.A. No. 03A-10-003
August 31, 2004

O P I N I O N

This is an appeal by the Employer from a decision of the Industrial Accident Board. The Employer contends that the testimony of Claimant's treating physician does not satisfy the substantial evidence test. I conclude that the decision of the Board is supported by substantial evidence and free of legal error. Accordingly, it is affirmed.

FACTS

In June 2001, the Claimant, Lorraine Harris, was injured at her job at Playtex while lifting totes. In January 2002, the Industrial Accident Board (" IAB") held a hearing and found that Ms. Harris' injuries were compensable. In September 2003, another IAB hearing was held to determine whether additional medical bills were compensable. These additional bills totaling $35,674.59, related to surgery performed by Dr. Edward F. Quinn in January 2002. Playtex argued that Ms. Harris had been paid for the cervical strain and that disk surgery was not needed for the injury and thus not related to the June 2001 injury. Playtex refused to pay for the surgery. The Claimant argued that such surgery was necessary for the pain she suffered in her neck and shoulders as a result of the work related injury. Dr. Quinn, testified by deposition, that it was possible to have both a cervical sprain and a disk injury at the same time. Playtex presented the deposition testimony of Dr. Richard DuShuttle to opine that the surgery on Ms. Harris was unnecessary and not appropriate treatment, alleging that the degeneration of the Claimant's disks was

due to aging. Dr. DuShuttle opined that the proper treatment of Ms. Harris would be physical therapy. Additionally, Playtex presented the deposition testimony of Dr. Andrew P. Robinson to support its view that surgery was unnecessary and not compensable. Another physician, Dr. Hari Kuncha, agreed with Dr. Robinson as to treatment. It was Dr. Kuncha who referred the Claimant to Dr. Quinn. The Claimant has been fired from Playtex.

The Board held that the surgery performed by Dr. Quinn on January 9, 2002 was causally related to Harris' industrial injury of June 23, 2001 and ordered the payment of the expenses related to the surgery as well as witness and attorney' s fees. It is from this decision that Playtex appeals to this Court.

DISCUSSION

Standard of Review

On appeal, this Court in reviewing the decision of the Industrial Accident Board must determine whether the decision is supported by substantial evidence and free from legal error.[1] Substantial evidence is such relevant evidence that a reasonable mind might accept it as adequate to support a conclusion.[2] Substantial evidence is defined as " more than a scintilla but less than a preponderance of the

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[1] *State of Delaware v. Stevens,* 2001 WL 541473, at *3 (Del. Super. Ct. 2001), *aff' d* 784 A.2d 1081 (Del. 2001).

[2] *Jenkins v. News Journal,* 1994 WL 319013, at *3 (Del. Super. Ct. 1994).

evidence."[3] Where the only evidence presented to the Board is testimonial, this Court must determine if there is enough substantial evidence to support the IAB's decision.[4] The IAB, not the Court, must resolve conflicts in testimony, issues of credibility and decide what weight to give the evidence presented.[5] A discretionary ruling of the Board will not be disturbed on appeal unless clearly unreasonable or based on capricious grounds.[6] All questions of law are reviewed *de novo*.

This Court on appeal does not sit as the trier of fact to weigh the evidence and determine witness credibility.[7] Where there is conflicting medical testimony, it is well established under Delaware law that the IAB may rely on the opinion of either expert and such evidence constitutes substantial evidence for the purpose of the IAB's decision.[8] Determinations of credibility are exclusively reserved for the IAB."[9] Any objections to an expert's testimony must be made at the time the

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Christiana Care Health System v. Taggart,* 2004 WL 692640, at *10 (Del. Super. Ct. 2004).

[7] *Stevens,* 2001 WL 541473, at *3.

[8] *State of Delaware v. Steen,* 1999 WL 743326, at *3 (Del. Super. Ct. 1999).

[9] *Simmons v. Delaware State Hospital,* 660 A.2d 384, 388 (Del. 1994).

testimony is offered and not on appeal.[10] An employer cannot object to a medical expert's testimony after the claimant's expert has testified before the IAB.[11] " Allowing such a belated motion would defeat the purpose of a *Daubert* challenge, that is to prevent the trier of fact from considering unreliable or irrelevant expert testimony."[12] Playtex did not object to the testimony of Dr. Quinn either at deposition or at the IAB hearing choosing instead to rely on the testimony and credibility of its own witnesses. Determinations as to the weight of the evidence is the function of the IAB and will not be disturbed by this Court if there is substantial evidence to support the IAB's decision.[13]

Dr. Quinn has been an orthopedic surgeon for over thirty years. His decision to operate was based upon extensive testing involving an MRI, EMG nerve studies, myelogram and post myelogram CT. Dr. Quinn stated in his deposition that he reviewed Ms. Harris' medical history as well as taking his own history of her injury, reviewing a prior MRI and ordering additional testing such as a bone scan and the above mentioned tests.[14] In his deposition testimony, Dr. Quinn refuted Playtex's allegation that Ms. Harris' disk problem was the result of normal aging

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[10] *Christiana Care,* 2004 WL 692640, at *17.

[11] *Id.*

[12] *Id.*

[13] *Id.* at *18.

[14] Dr. Quinn's Deposition Tr. at 9, 14.

degeneration changes and not the industrial accident by stating that mere aging changes do not cause pain and cannot be fixed.[15] Additionally, Dr. Quinn explained that his diagnosis was different from other physicians in his practice group because his specialty is the spine and while the other physicians are orthopedic surgeons this is not their specialty.[16] Even though Dr. DuShuttle did not recommend surgery for the conditions found by Dr. Quinn, opining that there was no disk problem but merely a cervical strain, the resolution of this conflicting medical testimony is that of the Board and not this Court.[17]

Here the Board found the Claimant and her treating physician, Dr. Quinn to be credible. The Board accepted Dr. Quinn's his testimony over that of Dr. DuShuttle regarding the reasonableness, necessity and causal relationship of the cervical spine surgery. The Board accepted Dr. Quinn's opinion that the Claimant had exhausted all other methods of treatment, finding no relief, and that the only remaining treatment was the surgery he performed.

CONCLUSION

I find that the decision of the Board is supported by substantial evidence and free of legal error. Accordingly, the Board's decision is ***affirmed***. Claimant's motion to strike Playtex's reply brief is denied as ***moot***.

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[15] *Id.* at 61.

[16] *Id*. at 63-65.

[17] *Jenkins,* 1994 WL 319013, at *3.

Playtex v. Harris
C.A. No. 03A-10-003
August 31, 2004

IT IS SO ORDERED.

/s/ Henry duPont Ridgely

Justice

oc: Prothonotary
xc: Order Distribution