

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

STEPHEN MILLER,)
Claimant - Appellant,)
)
v.) C.A. 04A-02-007 PLA
)
THE TIRE RACK,)
Employer - Appellee.)
)

Submitted: November 23, 2004
Decided: December 14, 2004

UPON APPEAL FROM A DECISION OF
THE INDUSTRIAL ACCIDENT BOARD
AFFIRMED.

Memorandum Opinion

Kenneth F. Carmine, Esquire, Potter, Carmine, Leonard & Aaronson, P.A.,
Wilmington, Delaware, Attorney for Employee - Appellant

Colin M. Shalk, Esquire, Casarino, Christman & Shalk, P.A., Wilmington,
Delaware, Attorney for Employer - Appellee.

ABLEMAN, JUDGE

On appeal from a decision by the Industrial Accident Board (“IAB” or “Board”), the Court finds that the Board’s denial of benefits was supported by substantial evidence. The Board’s decision is therefore **AFFIRMED**.

Facts

Appellant Stephen Miller worked for Appellee The Tire Rack (“TTR”), stacking tires and doing other manual labor. On April 9, 2003, a steel beam fell on his head, causing him to fall several feet into a stack of tires. TTR agreed to pay Miller disability for several months while he recovered, and actually did so.

On July 25, 2003, Miller filed for total, permanent disability. Miller detailed a variety of symptoms related to back and neck injury that he claimed were getting worse with time. TTR contested Miller’s claim, resulting in a Board hearing on January 16, 2004.

Miller presented evidence from Dr. Grossinger, a neurologist. Dr. Grossinger saw Miller off and on from July 2003 to September 2003, after being recommended by Miller’s lawyer. Dr. Grossinger believed that the symptoms Miller described were caused by the accident, because Miller said he had no such symptoms prior to then. Dr. Grossinger also diagnosed a brachial plexopathy, which is a type of nerve strain.

Dr. Grossinger prescribed physical therapy, which Miller found to be inconvenient and almost immediately quit. Miller then told Dr. Grossinger his

symptoms were worsening, without telling him that he had discontinued therapy.

Dr. Grossinger wrote a diagnosis of total disability for Miller without re-examining him to determine why, or if, his condition continued to deteriorate.

TTR presented expert testimony from Dr. Morris, a general practitioner. Dr. Morris examined the report of Dr. Varipapa, the neurologist who had originally treated Miller before his lawyer told him to see Dr. Grossinger instead. Dr. Varipapa had noted Miller had a full range of motion in all planes, and that his complaints did not match his injuries. Dr. Morris also examined Miller himself, and agreed with Dr. Varipapa. To the limited extent that Dr. Morris found back problems, his opinion was that they were more adequately explained by Miller's obesity (six feet tall and 324 pounds) rather than attributable to the injury in question.

Dr. Morris also disagreed with the brachial plexopathy diagnosis. In his opinion, Miller does not exhibit the telltale symptoms of that ailment, sensory loss. If Miller actually does have this type of nerve strain at all, Dr. Morris believes it stemmed from a pulmonary infection rather than the accident. Miller had pneumonia, the coughing from which is a frequent cause of brachial plexopathy, in both 2002 and 2003.

The Board made an express factual finding that Miller completely lacked credibility. The Board found that Miller took a lackadaisical attitude toward his

recovery, discontinuing therapy, missing doctor's appointments, and going for long periods without treatment, suggesting either that there was nothing wrong with him or that he did not want to get better. The Board also found that Miller lied about being able to lift weights and do yard work, contradictions pointed out through testimony by his own mother.

This finding colored the Board's consideration of Dr. Grossinger's testimony. The Board expressed concern that nearly all of Dr. Grossinger's findings were based upon Miller's report of his symptoms, the veracity of which was highly dubious. The Board seemed particularly rankled that Dr. Grossinger gave Miller a disability determination without even examining him to determine why the treatment he had prescribed was not working. Reading between the lines, it seems that the Board believed Dr. Grossinger's opinions to be driven by litigation, rather than treatment, concerns.

These findings resulted in the Board denying Miller's disability claim on January 30, 2004. Miller promptly and properly appealed.

Standard of Review

This Court's review of an IAB decision is the familiar substantial evidence standard.¹ The Court must judge whether the Agency had any reasonable basis for

¹ *Mellow v. Board of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1988), *aff'd*, 567 A.2d 422 (Del. 1989).

reaching the conclusion that it did²; it may not weigh the evidence, determine questions of credibility, or make factual findings.³ This review is often phrased as determining whether the evidence upon which the Board relied was legally adequate to support its findings.⁴

Discussion

The Court has little trouble upholding the Board's decision in this case. The behavior that led to the determination that Miller is not credible was amply explored and mostly undisputed. The Board made the common-sense finding that a person experiencing the agonizing pain that Miller described would diligently seek treatment to alleviate it, not just occasionally go to a doctor to support his legal complaint. The Court would be hard pressed to offer a circumstance where such a finding could be termed erroneous, let alone unsupported by substantial evidence.

Miller's only argument to the contrary is that Dr. Grossinger is a neurologist, and therefore more qualified to make a nerve strain diagnosis than Dr. Morris, a general practitioner. This reasoning fails for many reasons. First, general practitioners may testify as experts even in cases involving conditions within a

² *Id.* at 954 (citing *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct. 1980)).

³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1995).

⁴ DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002).

particular medical specialty.⁵ Second, Dr. Morris relied in part upon Dr. Varipapa's report, and Dr. Varipapa is a neurologist. The Board therefore did not have to choose solely between a neurologist and a family doctor, but rather between two competing neurological diagnoses. Finally, the Board had adequate reason to question Dr. Grossinger's credibility, a matter consigned solely to its discretion. Under these circumstances, the Court cannot say that the Board's decision is unsupported by substantial evidence.

Conclusion

Because the Court has found substantial evidence supporting the appealed judgment, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Kenneth F. Carmine, Esquire
Colin M. Shalk, Esquire, Esquire
Industrial Accident Board
Prothonotary

⁵ *Delmarva Power and Light v. Stout*, 380 A.2d 1365 (Del. 1977).