

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

March 28, 2005

Christine P. O'Connor, Esquire
1220 N. Market Street, 5th Floor
P.O. Box 8888
Wilmington, DE 19899

Clayton E. Bunting, Esquire
Wilson, Halbrook and Bayard
P.O. Box 690
Georgetown, DE 19947

RE: **C.A. No.: 05A-02-002 (THG)**
Laura Ashley-Fry v. Bayhealth Medical Center

Dear Counsel:

In June 1999, Claimant Laura Ashley-Fry (hereinafter "Claimant") was injured while working as a nurse at Bayhealth Medical Center (hereinafter "Bayhealth"). The injury developed after Claimant was exposed to tuberculosis while treating an HIV positive patient in January 1998. As a result of said exposure, Claimant developed bilateral lower-lobe pneumonia and a right side pleural effusion. She tested positive for tuberculosis and was prescribed certain antibiotics for its treatment. Claimant also underwent a thoracoscopy procedure to remove scar tissue from her lung. She recuperated in the hospital for a period of time and was discharged with a chest tube.

After leaving the hospital, Claimant consulted with Dr. Eugene Godfrey, a pain management specialist. Dr. Godfrey prescribed Oxycontin and Oxy-IR, narcotic medicines intended to alleviate Claimant's thoracic neuralgia, a chronic pain syndrome resulting from Claimant's thoracotomy procedure. Dr. Godfrey eventually increased the amount of Oxycontin dosage he initially prescribed to Claimant, but later he determined that she had become

chemically dependent on the medication and recommended that she attend a detoxification program.

Upon leaving detox, Claimant contacted Dr. William Hurwitz, a doctor of internal medicine practicing in Maryland. Claimant reported to Dr. Hurwitz that the detoxification process resulted in her extreme pain. Dr. Hurwitz prescribed narcotic pain medications to her the day she left the detoxification center. He contends that the continuation of opioid medication was necessary because its cessation in the attempted detoxification caused Claimant's back pain to resume with increased intensity and resulted in her development of pneumonia. Dr. Hurwitz felt that pain medication would prevent Claimant's body from involuntarily limiting itself as a response to the pain and thereby causing pneumonia recurrences.

Claimant subsequently requested Dr. Hurwitz's assistance in obtaining long term disability benefits so that she could return to school. Bayhealth claims that Dr. Hurwitz's records contain no record of abnormalities, other than the presence of surgical scars, in Claimant's recovery. She was later granted long term disability benefits.

When Dr. Hurwitz retired in 2002, Claimant began to see Dr. Gary Nyman, a Maryland psychiatrist affiliated with Johns Hopkins. Dr. Nyman adjusted Claimant's medications to include longer-acting opioids than the ones prescribed by Dr. Hurwitz. The amount of medication required by Claimant continued to be high under his care.

At Bayhealth's request, Dr. Michael Shear, a Board-certified physical medicine and rehabilitation specialist, examined Claimant on July 27, 2003 and made certain findings about the propriety of her prescriptions. Claimant informed Dr. Shear that she experiences a chronic, dull ache in her chest and has trouble performing daily activities such as sitting, standing and

walking without experiencing pain. She also assessed her pain as maximum when without the benefit of pain medication. Dr. Shear was unable to locate any acute pain in the Claimant. He reported that the Claimant's pupils were not dilated during the examination, which is a typical symptom of a high intake of narcotic medication.

Claimant has previously received temporary total and temporary partial disability benefits. She currently receives \$411.11 per week, based on her average weekly wages of \$803.20 at the time of her injury. Bayhealth contends that Claimant's current medication requirements exceed two thousand pills per month. Dr. Shear estimated that the Claimant's reported narcotic intake constitutes more than one gram a day.

Bayhealth conceded the fact that Claimant is entitled to certain medical expenses related to her injury. Its IAB petition merely requested that the reasonableness and necessity of Claimant's prescription requirements be reevaluated. The Board denied Bayhealth's request, finding that the medication scheme was necessary for the management of Claimant's pain. Bayhealth appealed the decision to the Superior Court.

When addressing matters on appeal from the Board, the Superior Court is confined to a narrow standard.¹ The Court does not serve as a trier of fact to determine the credibility of certain testimony or to weigh evidence.² The Court's principal function is to determine whether

¹See *General Motors Corp. v. Edwards*, 2000 Del. Super. LEXIS 117, at *2.

²See *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

the findings of the Board are supported by substantial evidence and to reverse clear errors of law.³ The Court's role is, therefore, a very limited one.

This Court recognizes the narrow standard it must apply to its review of agency decisions. Therefore, this Court is not in a position to weigh the credibility of the doctors who testified in this case or the reasonableness of the medication scheme currently prescribed to the Claimant. The Court's only obligation is to ensure that the IAB substantially supported its decision to deny Bayhealth's request to reduce the Claimant's prescription load.

A Board decision is supported by substantial evidence if it contains "relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴ This evidence must be more than a scintilla, but may be less than a preponderance.⁵ If the Court finds that there is substantial evidence to support the decision, it must affirm the Board's ruling, unless it identifies a clear error of law.⁶

Dr. Hurwitz testified for the Claimant. He claimed that the Claimant's current medication scheme is necessary given the chronic pain she suffers and reasonable considering the tolerance her body has developed to the narcotics. He claimed that a reduction in medication would cause Claimant to suffer withdrawal symptoms, an increased sensitivity to pain and an increased risk of developing pneumonia. He also testified that prescriptions for pain management should be individualized according to a patient's needs. Therefore, despite the fact

³*See id.* at 66-67.

⁴*See Schuh v. State*, 2000 Del. Super. LEXIS 54, at *2.

⁵*See Olney v. Cooch*, 425 A.2d 610, 614 (Del. Supr. 1981).

⁶*See Edwards*, 2000 Del. Super. LEXIS 117, at *2-3.

that Claimant's daily narcotics dosages far exceed the recommended levels by the Physician's Desk Reference, he contended that the Claimant's particular condition necessitates the abnormal prescription regimen.

Dr. Shear disagreed that Claimant's diagnosis is so "unique" that it necessitates the extreme level of narcotics she is prescribed. He ultimately found that the Claimant's current level of narcotics is dangerous and exceeds the reasonable and necessary prescription for pain management. He recommended that she undergo detoxification for her dependency on narcotic medication.

Bayhealth specifically claims that the IAB failed to consider whether Claimant's current prescriptions are reasonable, as well as necessary. The IAB specifically cited the necessity of the medication scheme in its decision, but failed to address the reasonableness of the prescriptions. Bayhealth claims that 19 *Del. C.* § 2322 requires a two-pronged test of necessity AND reasonableness to permit the continuation of medical treatment, and that the IAB's failure to find both constitutes a clear error of law, reversible by this Court.⁷ But Delaware courts have previously been "unable to discern any meaningful distinction between medical treatment that is unreasonable as opposed to unnecessary."⁸ By finding that Claimant's treatment plan is necessary, the IAB implicitly approved the reasonableness of the same. This Court finds that the IAB correctly applied the test set forth in 19 *Del. C.* § 2322 because there is no indication that the

⁷19 *Del. C.* § 2322 (a) states that "[d]uring the period of disability, the employer shall furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services, medicine and supplies...as and when needed unless the employee refuses to allow them to be furnished by the employer."

⁸*Charles v. Gateway Restaurant*, 1994 *Del. Super.* LEXIS 31 (Del. Super. Ct. 1994).

IAB is required to make independent findings as to the reasonableness and necessity of Claimant's current prescriptions.

The IAB also rejected any further detoxification attempts based on Dr. Hurwitz's testimony regarding the potential effects of withdrawing Claimant's pain medications. It based its finding on the fact that Drs. Hurwitz and Shear concurred that "long acting narcotics, the treatment program [Claimant] is now on, constitutes a more effective and better way of avoiding drug seeking behavior than short acting narcotics."⁹ Therefore, the IAB found any detoxification attempt unnecessary, but encouraged "Claimant to investigate and be amenable to other possible methods of pain management control besides her present regimen."¹⁰

Bayhealth also argues that the IAB's acceptance of Dr. Hurwitz's opinion as more persuasive than Dr. Shear's proffered testimony was not supported by substantial evidence. It claims that Dr. Hurwitz had not been personally acquainted with Claimant's case since his retirement in 2002 and that he was not certified in the area of pain management. It argues that Hurwitz's designation as a specialist, and the coinciding weight given to his testimony by the IAB, amounts to legal error. Under Delaware law, a physician's testimony is admitted as expert testimony regardless of whether he is a specialist in that particular condition.¹¹ A physician may

⁹*Laura Ashley-Fry v. Bayhealth Medical Center*, IAB Hearing No. 1227958 (January 30, 2004).

¹⁰*See id.* at 14.

¹¹"It is settled in Delaware that an experienced practicing physician is an expert, and it is not required that he be a specialist in the particular malady at issue in order to make his testimony as an expert admissible." *Di Sabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982) citing *Delmarva Power & Light v. Stout*, 380 A.2d 1365, 1369 (Del. 1977).

proffer expert testimony in the area of medicine.¹² When medical testimony between two physicians conflict, the IAB is permitted to rely more heavily on one physician's proffer than the other.¹³

The IAB weighed the credibility of the physicians' opinions. It ultimately regarded Hurwitz's opinion as more persuasive. Dr. Hurwitz's prior treatment of the Claimant, his familiarity with his case, as well as his review of her current treatment by Dr. Nyman combined with his experience in the area of pain management provided substantial evidence for the Board's findings. Furthermore, the Board based its findings on Dr. Hurwitz's explanations regarding the medical consequences of reducing Claimant's prescription load. The Board was within its power to accept Dr. Hurwitz's testimony as more persuasive, finding that even though "Claimant's current levels of opioid therapy are high compared to the normal medical population...they are warranted at this time in her case."¹⁴ The Board based its finding not only on Dr. Hurwitz's testimony, but also the personal testimony of Claimant. Both Drs. Hurwitz and Shear agreed that the amount of pain medication prescribed to a patient may vary according to their particular medical history, condition and other variants. All of these factors constitute relevant, reliable and substantial evidence upon which the Board based its decision. It is not within the power of this Court to second guess its determination of credibility.

¹²*See id.*

¹³*General Motors v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977).

¹⁴*Laura Ashley-Fry v. Bayhealth Medical Center*, IAB Hearing No. 1227958, at 13 (January 30, 2004).

The Court recognizes that the patient's current medication scheme appears extreme. The Court echoes the IAB's encouragement in recommending that Claimant seek alternative methods of pain management besides narcotic medication. This Court is not, however, in a position to overrule the IAB's findings. The issues presented by Bayhealth are primarily factual and appellate review is limited. Its decision was based on substantial, credible and relevant evidence provided at the hearing and the Court has found no legal error therein.

For the foregoing reasons, the IAB decision is AFFIRMED.

Very truly yours,

T. Henley Graves

THG/jfg

oc: Prothonotary

cc: Industrial Accident Board