

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

WASTE MANAGEMENT,)
)
 Appellant, Employer below,)
)
 V.) C.A. No. 04A-10-005-JRS
)
 KEITH BRAINARD,)
)
 Appellee, Claimant below.)

Date Submitted: March 18, 2005
Date Decided: June 29, 2005

On Appeal from the Industrial Accident Board.

AFFIRMED.

ORDER

This 29th day of June, 2005, upon consideration of the appeal of Waste Management from the decision of the Industrial Accident Board (the “Board”) granting Keith Brainard’s Petition to Determine Compensation Due, it appears to the Court that:

1. On April 1, 2004, Mr. Brainard filed a Petition to Determine Compensation Due relating to an August 21, 2003 injury. The Board heard Mr. Brainard’s Petition on September 3, 2004.

2. In January, 2002, Mr. Brainard sustained a compensable right ankle injury while he was employed by Waste Management.¹ As a result of that injury, Mr. Brainard received medical treatment as directed by Waste Management's physician, including physical therapy, leading up to surgery performed in September, 2002 by Dr. Victor Kalman.² By March of 2003, he had returned to work with no restrictions.³

3. On August 21, 2003, Mr. Brainard developed swelling and pain in his right ankle while working, which he attributed to climbing in and out of the trash truck.⁴

Mr. Brainard reported his condition and subsequently returned to the Waste Management office.⁵ Because of the pain and swelling, he was unable to complete work that day.⁶ He was advised by Waste Management to see his own doctor.⁷ On August 27, 2003, Mr. Brainard was examined by Dr. Kalman.⁸ Dr. Kalman diagnosed Mr. Brainard's injury as a sprained right ankle, ordered an MRI of the right ankle, and

¹D.I. 3, at 20. Mr. Brainard was employed by Waste Management as a trash truck driver for approximately two and a half to three years. *Id.*

²*Id.* at 21-23.

³*Id.* at 23.

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷*Id.* at 25.

⁸*Id.* at 10.

recommended that he not return to work.⁹ Subsequently, the MRI revealed an injury to the cartilage and the bone of the right ankle joint and a separation that resulted in a loose fragment.¹⁰ After reviewing the MRI, Dr. Kalman extended Mr. Brainard's "no work" status and prescribed a walking boot.¹¹ A few weeks later, on September 23, 2003, Dr. Kalman approved his return to light duty or a "sitting job."¹² Waste Management provided Mr. Brainard with a light duty job where he would ride in the trash truck and map out routes.¹³

4. While working light duty, Mr. Brainard was paid his full salary by Waste Management.¹⁴ In addition, he received total temporary disability benefits from Waste Management's insurance carrier.¹⁵

5. On subsequent visits, Dr. Kalman noted that Mr. Brainard's pain was aggravated from his continued climbing in and out of the trash truck and ultimately

⁹*Id.* at 10-11.

¹⁰*Id.* at 11.

¹¹*Id.* at 12.

¹²*Id.*

¹³*Id.* at 29.

¹⁴D.I. 11 Ex. B, at 3.

¹⁵*Id.* The parties stipulated that Waste Management was entitled to a credit for any benefits paid for lost wages for the period beginning August 21, 2003 through October 16, 2003. *Id.* at 2 n.1. The Board's decision reflects this agreement. *See id.* at 2 n.1, 10.

removed him from work on October 30, 2003.¹⁶ Mr. Brainard's condition remained unchanged and, on June 15, 2004, Dr. Kalman performed arthroscopic surgery on the right ankle to excise the loose fragment.¹⁷

6. In addition to his own testimony, Mr. Brainard presented the testimony of Dr. Kalman at the hearing. Dr. Kalman confirmed Mr. Brainard's treatment and diagnosis.¹⁸ Dr. Kalman also testified that Mr. Brainard's August 21, 2003 injury was a new and separate injury to his right ankle caused by his repeated climbing on and off the trash truck.¹⁹ Dr. Kalman concluded that this was a new injury because in his opinion Mr. Brainard's first injury had fully healed.²⁰

7. Waste Management presented no medical testimony to counter Dr. Kalman's opinion that Mr. Brainard's August 21, 2003 injury was a new and separate injury. Waste Management did, however, provide testimony concerning Mr. Brainard's reporting of the injury. First, Stephen Masterson, a Waste Management district manager, testified regarding Waste Management's policy for reporting work-related accidents. This policy which requires injured employees immediately to

¹⁶D.I. 3, at 13.

¹⁷*Id.*

¹⁸*See id.* at 6-16.

¹⁹*Id.* at 11.

²⁰*Id.*

notify their supervisor of the injury.²¹ Mr. Masterson further testified that he did not learn of Mr. Brainard's injury until a week after it occurred and that Mr. Brainard never submitted a written report of the injury.²²

8. Waste Management also presented the testimony of Cliff Johnson, a senior residential route manager and Mr. Brainard's supervisor. Mr. Johnson also stated that Mr. Brainard did not report the injury to him or complete a written injury report on August 21, 2003.²³ He did testify that Mr. Brainard provided him with a doctor's note concerning work restrictions, which he assumed was related to a prior injury.²⁴

9. In its September 16, 2004 decision, the Board granted Mr. Brainard's petition and awarded him total disability benefits.²⁵ The Board relied upon the unopposed medical opinion of Dr. Kalman that the August 21, 2003 injury was a separate and new injury.²⁶ Additionally, the Board accepted Mr. Brainard's testimony that he suffered a work injury as he described on August 21, 2003.²⁷ The Board was

²¹*Id.* at 73-74.

²²*Id.* at 77-78.

²³*Id.* at 101-03.

²⁴*Id.* at 103.

²⁵D.I. 11 Ex. B, at 10.

²⁶*Id.* at 6.

²⁷*Id.* at 7.

not persuaded by the testimony of the Waste Management employees regarding how and when Mr. Brainard reported the injury because it found the medical records were consistent with Mr. Brainard's testimony.²⁸ Finally, the Board found that there was no evidence upon which to conclude that Mr. Brainard acted fraudulently by contacting the insurer to restart workers' compensation benefits.²⁹ Waste Management now appeals the Board's findings to this Court.

10. In this appeal, Waste Management argues that the Board's finding that Mr. Brainard was credible was not supported by substantial evidence. Specifically, Waste Management contends that because Mr. Brainard accepted both his regular pay and temporary total disability benefits, he acted fraudulently and therefore was not credible. Further, Waste Management contends that, even if there is substantial evidence to support the Board's finding that Mr. Brainard was credible, the Board abused its discretion by accepting his testimony (which Waste Management claims is inconsistent) over the testimony of other witnesses.

11. In reviewing a decision of the Board, the Court must determine whether it is supported by substantial evidence and free from legal error.³⁰ Substantial

²⁸*Id.*

²⁹*Id.* at 8.

³⁰*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³¹ It is “more than a scintilla but less than a preponderance of the evidence.”³² On appeal from the Board’s decision, the moving party bears the burden of establishing that the Board’s findings were not supported by substantial evidence.³³ When deciding whether the appellant has met its burden, this Court does not sit as the trier of fact to weigh the evidence and determine witness credibility.³⁴ Determinations of credibility and of the weight to be given to the evidence are exclusively within the province of the Board.³⁵

12. Here, Waste Management challenges the Board’s determination that Mr. Brainard was credible and the weight that the Board gave to his testimony. The Court finds that the Board properly performed its fact-finding function under Delaware law. The Board evaluated Mr. Brainard’s testimony and found him credible.³⁶ Moreover, the Board heard conflicting testimony from Waste Management and accepted Mr. Brainard’s testimony over that of Mr. Masterson and Mr. Johnson regarding the

³¹*Breeding v. Contractors-One, Inc.*, 549 A.2d 1102, 1104 (Del. 1998).

³²*Id.*

³³*A.H. Angerstein, Inc. v. Jankowski*, 187 A.2d 81, 86 (Del. Super. Ct. 1962).

³⁴*Playtex Prod., Inc. v. Harris*, 2004 WL 1965985, at *1-2 (Del. Super.)

³⁵*See id.* at *2.

³⁶*See* D.I. 11 Ex. B, at 7.

reporting of Mr. Brainard's injury.³⁷ Such determinations are reserved exclusively for the Board and, accordingly, will not be disturbed by this Court.³⁸ The Board's acceptance of Mr. Brainard's testimony over the testimony of Mr. Masterson and Mr. Johnson, along with Dr. Kalman's unopposed medical testimony, satisfies the substantial evidence requirement. Consequently, Waste Management is unable to meet its burden on appeal.

13. Based on the foregoing, the decision of the Board granting Mr. Brainard's Petition to Determine Compensation Due is **AFFIRMED**.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary

cc: R. Stokes Nolte, Esquire
Sheldon S. Saints, Esquire

³⁷*See id.*

³⁸*See Playtex*, 2004 WL 1965985, at *1-2 ("The [Board], not the Court [on appeal], must resolve conflicts in testimony, issues of credibility and decide what weight to give evidence presented."). *See also Air Mod Corp. v. Newton*, 215 A.2d 434 (Del. 1965)(finding that although it found great inconsistencies in the evidence of record, the Court was bound by the Board's determination of the credibility of witnesses and the weight to be given to the evidence).