

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

KENYA WHARTON,)
) C.A. No. 04A-09-004 (JTV)
 Claimant-Below,)
 Appellant,)
)
 v.)
)
 CHANCELLOR HEALTH CARE,)
)
 Employer-Below,)
 Appellee.)

Submitted: June 1, 2005
Decided: October 31, 2005

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware.
Attorney for plaintiff.

Christian G. McGarry, Esq., Elzufon, Austin, Reardon, Tarlov & Mondel,
Wilmington, Delaware. Attorney for defendant.

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

VAUGHN, President Judge

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OPINION

This is an appeal brought by Kenya Wharton ("the employee" or "the claimant") from a decision of the Industrial Accident Board ("the Board") which denied her Petition to Determine Additional Compensation Due. In her petition, she sought authorization for pain management therapy which she alleged was reasonable, necessary, and causally related to a July 2002 work accident. In its decision, the Board concluded that she had not met her burden of proof.

FACTS

On July 10, 2002, while working as a nurse assistant at Chancellor Health Care ("Chancellor" or "the employer"), the employee injured her back by catching a patient who lost his balance and started to fall to the floor.

On July 29, 2002, claimant was seen by Dr. John Hedger who diagnosed her as having a lumbosacral strain. He prescribed anti-inflammatories, muscle relaxants, and physical therapy. Dr. John Greco saw her on September 16, 2002. He noted some restricted motion but no neurological deficits.

Dr. Greco saw her again on December 9, 2002 and noted that she experienced only occasional back pain and pain radiating to the leg. He ordered an MRI as he was not able to find any objective symptoms that would explain the source of pain. Claimant had continued to work during this period.

On February 7, 2003, Claimant was seen by Dr. Greco again. The MRI showed facet arthropathy (early arthritis) which was not related to the accident. The MRI did not reveal any evidence of disk herniation. Dr. Greco's exam showed that all findings

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were normal. The range of motion of the lumbar spine showed no obvious evidence of asynchronous or segmental motion as the patient came into extension. The claimant stated that she had occasional achy pain but it was not a problem and she had begun an exercise program.

Ms. Wharton testified that on March 5, 2003 she had a flare up and was told to go to physical therapy, take Advil, and stay out of work until March 10th. She called Dr. Greco's office on March 13, 2003, claiming she had injured herself at physical therapy. She called the doctor's office on April 11, 2003 with complaints of pain from physical therapy and she was prescribed Vioxx.

On May 16, 2003 the claimant had an office visit with Dr. Greco. The doctor's notes state that "she notes two episodes of re-injury." The doctor also noted she had diffuse tenderness in the low back area, difficulty performing heel-to-toe walking, and mild restriction of range of motion in the spine. He ordered a bone scan to make sure there was no cancer, stress fracture, or infection. The scan revealed there were some degenerative changes in the upper lumbar spine but they did not correlate with the subjective clinical presentation. Dr. Greco stated that he discussed the possibility of lumbar epidural injections. These injections were recommended due to her subjective complaints rather than any objective findings as there weren't any. When she visited his office again on May 30, she described persistent pain and difficulty with returning to work. At this time Dr. Greco recommended follow-up with chronic pain evaluation.

On July 21, 2003, the claimant had another follow-up visit with an associate

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of Dr. Greco. The chart noted an exam similar to previous ones and that she was not interested in pursuing chronic pain evaluation. Ms. Wharton asserted in her testimony that she believed the doctor was recommending injections into the spine which she did not want but claimed she asked him to send her to a pain management doctor. There is no documentation as to treatment the claimant was to pursue. This was the last visit to Dr. Greco's office.

Dr. Greco testified that he believed at that time that her condition and complaints continued to be related to the work injury and believed that pain management consultation was necessary.

On July 21, 2004, Dr. David Stephens evaluated her and reviewed her medical records at the request of the employer. He testified that according to her chart she had made excellent progress with conservative treatment. Based on the notes from Dr. Greco's examination of February 7, 2003, Dr. Stephens stated that it was fair to say that it appeared the claimant had recovered from the incident of July 2002, which is consistent with prior treatment with respect to past incidents of injury in 2000 and 2001.¹

In his examination on July 21, 2004, Dr. Stephens performed a low back exam and found no evidence of a lumbar spine injury. He did not believe that she required any type of chiropractic treatment and would not have recommended pain

¹ Previous injuries from which claimant fully recovered include:

- i. 10/8/00 - lifting incident
- ii. 1/21/02 - wrestling with children
- iii. 4/3/01 - motor vehicle accident
- iv. 12/4/01 - lifting incident

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management therapy. He only indicated in his report that it might be reasonable because Dr. Greco had suggested it.

In sum, Dr. Stephens did not believe that any pain management was causally related to the July 10, 2002 work accident. He also stated that such treatment would be unreasonable and unnecessary as such treatment would be based solely on subjective complaints and he believed that Ms. Wharton had a history of substantial pain magnification.² The gap in treatment also raised questions that there may not be any significant, underlying, objective abnormality related to the low back. Claimant stated that treatment was delayed because she was told by different pain management offices that she would not be seen unless she had approval from the worker's compensation insurance company and she had transportation issues.

Tina Marie Chaivre, director of nursing at Chancellor, also testified at the hearing. Ms. Wharton testified that she left her job at Chancellor because it was not honoring the doctor's recommendation of light duty. Ms. Chaivre stated that claimant was let go because she missed two scheduled shifts which is considered voluntary resignation. There had also been some disagreement as to the facts of her leaving a subsequent position she held at Baker's Taxi.

STANDARD OF REVIEW

This Court's function on appeal is to determine whether the Board's decision

² This opinion was based, at least in part, on evidence of a session which the claimant had with a nurse practitioner on July 12, 2002, two days after he accident.

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is supported by substantial evidence and free from legal error.³ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.⁴ The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings.⁵ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁶

The Board has the 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.⁷ 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.⁸

DISCUSSION

The Board concluded that the claimant failed to establish that pain management

³ *General Motors v. Freeman*, Del. Super., 164 A.2d 686, 688 (1960); *Johnson v. Chrysler Corporation*, Del.Supr., 213 A.2d 64, 66-67 (1965).

⁴ *Oceanport Ind. v. Wilmington Stevedores*, Del.Supr., 636 A.2d 892, 899 (1999); *Battista v. Chrysler Corp.*, Del.Super., 517 A.2d 295, 297 (1986), *appeal disp.*, Del.Supr., 515 A.2d 397 (1986).

⁵ *Johnson* at 66.

⁶ 29 Del. C. § 10142(d).

⁷ *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).

⁸ *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

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therapy for her low back was reasonable, necessary, and causally related to the work accident. It found her not credible and her subjective complaints untrustworthy. It also found that Dr. Stephens' opinion was supported by the medical evidence and was more persuasive than the opinion of Dr. Greco, which it found equivocal.

The claimant asserts that she experienced a flare-up of her condition and that the Board cannot find that it is not causally related to the work accident.⁹ Appellant focuses on the issue of causation and asserts that the Board cannot revisit the causation issue as it is *res judicata*. The claimant also argues that because of the work accident she is now more susceptible to future injury. She also argues that all past injuries she may have suffered are irrelevant. The employer asserts that there is strong, legally-supportable, and competent evidence to support the Board's finding that the pain management therapy is not reasonable, necessary, and causally related to the work accident.

I find no error in the Board's decision to accept the testimony of Dr. Stephens as more persuasive than the testimony of Dr. Greco. Dr. Greco's opinion relies upon the claimant's subjective symptoms whereas there is substantial evidence to support the Board's conclusion that Dr. Stephens' opinion is more reliably based upon the actual medical evidence.

In addition, I find no error in the Board's determination that the claimant is not credible. There is evidence in the record that the claimant gave inconsistent

⁹ See *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *Barkley v. Johnson Controls*, 2003 Lexis 21.

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information about her employment history following her termination from Chancellor and her leaving a subsequent employer. The Board questioned her about her current pain and was in a better position to evaluate her answers and her demeanor. No cause has been offered for my rejecting the Board's conclusion in this regard.

I find that the Board's conclusion that Dr. Stephens' testimony is entitled to greater weight than the testimony of Dr. Greco and its conclusion that the claimant lacks credibility are supported by substantial evidence. These determinations provide substantial evidence to support the Board's ultimate conclusion that the claimant failed to prove that pain management treatment is a reasonable and necessary medical treatment caused by her July 2002 accident. The Board's decision is supported by substantial evidence and is free of legal error.

Therefore, the decision of the Board is **Affirmed**.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
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