IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FRANKLIN LLOYD	)	
	)	CIVIL ACTION NUMBER
Appellee	)	
v.	)	
	)	04A-09-015-JOH
DART, INC.	)	
	)	
Appellant	)	

Submitted: January 6, 2005
Decided: January 28, 2005

MEMORANDUM OPINION

Upon Appeal from the Industrial Accident Board -
REVERSED and REMANDED

Bayard Marin, Esquire, of Wilmington, Delaware, attorney for Appellee

John J. Klusman, Esquire, of Tybout Redfearn & Pell, Wilmington, Delaware, attorney for Appellant

HERLIHY, Judge

Franklin Lloyd, a DART Paratransit driver has appealed the decision of the Industrial Accident Board denying his claim for benefits. Lloyd claims while helping a handicapped passenger, he slipped and fell hurting his lower back.

The Board indicated that it accepted his testimony that something happened but rejected his testimony about the nature and extent of his fall. In so many words, it found he failed to meet his burden of proof of the extent of injury. Basically, Lloyd's injury complaints were subjective and medical opinions about injury rose or fell on Lloyd's credibility.

His appeal does not challenge the Board's right to determine credibility nor its right to believe one medical expert over another. This appeal focuses on one discrete issue: cross examination of Lloyd about his report of 2002 auto accident, especially indications or suggestions he filed a fake claim. Lloyd's contention is the questioning was improper and unfairly prejudiced the Board's view of his credibility.

The rules of evidence are not strictly enforced in Board proceedings. The Court finds, however, that despite this less strict standard, that the Board abused its discretion in admitting the evidence. Further, since the evidence was unfairly prejudicial and that this claim rose or fell on Lloyd's credibility, the Court is not convinced that it played an insignificant role in the Board's decision. For that reason, the Board's decision is reversed and remanded for new proceedings.

Factual Background

Lloyd was employed by DART as a driver of a Paratransit bus on February 25, 2004. His duties included escorting passengers to their doors after they exited the bus. On that day, Irene Davis was a passenger. As Lloyd left the bus to escort Davis to her front door, he testified that he slipped after taking two steps. He grabbed the bus to prevent a fall. After remaining there for a short period of time, Lloyd returned to the driver's seat without escorting Davis to her front door. He did not know what caused him to slip. The time was about 5:30 p.m. Davis testified that she did not hear Lloyd call out in pain and that she did not see him slip and grab hold of the bus. She added, however, that Lloyd always walked her to the front door but that day he did not do so.

Kelley Ranney, a passenger in the bus at the time Lloyd stated that he slipped and fell, testified that she did not see Lloyd slip or fall and did not hear him cry out in pain. But she stated that when Lloyd returned to his seat he was rubbing his knee.

Lloyd claims that in the slip he injured his hip and groin. He sought treatment the following day when the pain did not subside overnight. He was treated by Dr. Stephen Diamond, Dr. Maria Michell, and by Dr. Arnold Glassman. He did not return to work until May 2004.

Dr. Diamond examined Lloyd on February 26, 2004 and sent him to therapy for one week. Lloyd returned and saw Dr. Diamond again. On March 18, Dr. Diamond released Lloyd to return to work effective March 15. As he did not feel better, Lloyd then

went to see Dr. Michell who sent him to Dr. Arnold Glassman to continue therapy. On March 18, 2003, Dr. Michell released Lloyd to return to work on either April 7 or April 9. Lloyd also went to see Dr. Barr, a chiropractor, who treated Lloyd with medications for the pain.

Dr. Glassman first saw Lloyd on April 1, 2004. He observed that, although Lloyd's gait was not intact, it was not painful and that his movements were guarded. At the initial consultation, Dr. Glassman noted signs of injury; a flattening to his lumbar lordotic curve, tightness or abnormal findings on palpation almost borderline spasm and range of motion limited by pain. A MRI was performed in March 2004 indicating that Lloyd suffered from spinal stenosis, a congenital condition. This was compared to an MRI done in May 2002. There was, however, no indication of any change or progression over that time. When Lloyd's condition did not improve with therapy, Dr. Glassman sent Lloyd to Dr. Emanuel DeVotta, an anesthesiologist, for consultation about the possibility of an injection. A sacraliliac block was performed at the end of May. Two weeks later Lloyd was able to return to work.

During Dr. Glassman's direct examination he stated that, based on the history Lloyd gave him, the injuries of which he complained were the result of the incident on February 25th. Dr. Glassman observed that there were two objective signs of injury which he found on his initial examination: a flattening of Lloyd's lordotic curve and tightness almost borderline spasm.

On cross-examination, DART's counsel asked the following questions about the basis of Dr. Glassman's conclusions which the doctor answered:

> Q: All right. Doctor, I think you stated so much on direct examination, but I want to ask you again: You would agree that your opinions as to causation of the claimant's injuries being related to work are based upon the history that he provided to you?
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> A: That's correct.
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> Q: So that if we go to the hearing tomorrow, scheduled for tomorrow, and the Industrial Accident Board finds the history provided by the claimant was inaccurate, was false, am I correct that your opinion as to causation will similarly be inaccurate?
>
> A: That is correct.[1]

Dr. John Parkerson, on DART's behalf, examined Lloyd on May 11, 2004 and reviewed Lloyd's medical records. He testified that the finding of congenital canal stenosis was incidental as there were no changes in the MRI and there were no findings in the examination to clinically support that he had congenital stenosis. He added that all the symptoms offered by Lloyd were subjective, with no objective findings to support the allegations. On cross-examination, Dr. Parkerson admitted that the injuries that Lloyd suffered were consistent with a slip and fall at work.

DART's counsel's direct examination of his doctor was not without emphasis on Lloyd's credibility, starting with a lengthy answer about why it was unusual for Lloyd not to remember the reason for a 2002 MRI. It continued with a leading question stating to

[1] Glassman deposition p. 17.

the doctor that there were no witnesses to "support his allegation."[2] Of course, the doctor was asked if there were any objective signs of injury of which he said there were none.

During DART's counsel's cross examination of Lloyd, he asked about a 2002 accident claim Lloyd had made:

> Mr. Klusman: And you made a claim to the Hartford Mutual Insurance Company?
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> Mr. Marin: I object. This is irrelevant. We're here talking about his injuries from a previous accident that's legitimate, if we're here talking about any Claims he made regarding this, whether insurance was involved, this is irrelevant and how the accident occurred or anything involved in that, other then his injuries from that accident is irrelevant to this Proceeding.
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> Hearing Officer: Mr. Klusman.
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> Mr. Klusman: Members of the Board, I've got about four or five more questions along this line and it is meant because as it turns out that that Claim was denied and it was found that the accident never even happened.
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> Mr. Marin: That's hearsay and that's irrelevant to this Case, no one is here to testify as to the circumstances of that accident. He presented a Claim, he presented a Claim for injury, if it was denied and denied by an Insurance Company that's hearsay, God only knows that Claims are denied all the time by Insurance Companies, and indeed this one is being denied and that's why we're here on Compensability.
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> Mr. Groundland: Mr. Klusman, any further reply.

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[2] Parkerson deposition p. 14.

Mr. Klusman: Yes, sir, in terms of the Board, it's my position that that accident and circumstances are basically insurance fraud and my point is just to ask the Claimant these questions and if he denies it then we can move on or I can then show him documents to confirm the information but I don't intend to introduce the evidence, I just want it on the record that he had the prior Claim and it was denied and the basis of the denial was that it was found that the accident never occurred and that is important to this Case because it's the same thing that he's doing here.

Mr. Groundland: The Board will overrule the objection and give this testimony the appropriate weight.[3]

In its decision, the Board referred to the testimony about the 2002 accident in this fashion:

> He (Lloyd) also testified on May 9, 2002, that the was involved in a motor vehicle accident when he was hit from behind. He claims that the accident occurred and that he received a check from the insurance company.[4]

In its findings and conclusions, the Board stated:

> The Board accepts Claimant's (sic) in part. Why (sic) the Board is unable to speculate as to the exact incident, the Board finds Claimant's testimony credible to the degree that he describes the fact that something occurred on February 25, 2004. Despite such finding, the nature and extent of the alleged fall remains in question. In reaching this conclusion, the Board found persuasive the fact Claimant normally walks Davis to the door on every drop off. Such did not occur on the date in question. Moreover, Ranney described how Davis entered the bus rubbing his knee when he re-entered the bus. However, the Board did not find the remainder of his testimony persuasive. Although Claimant testified he yelled out in pain,

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[3] Board transcript pp. 24-5.

[4] Board decision dated September 10, 2004, at p. 3.

> neither Ranney nor Davis observed Claimant slip or heard him yell despite the fact both were within close proximity to the alleged fall. Both further testified that Claimant did not mention the accident or his injuries. Ranney actually testified that she first heard of the accident from another driver on a subsequent day. When viewed *in toto*, the Board finds Claimant's testimony less than persuasive on the entire nature and extent of the fall.
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> Having rejected a portion of Claimant's testimony, the Board declines to accept the causative theory offered by Dr. Glassman. In fact, Glassman admits that his theory on causation hinged on the subjective complaints and history of Claimant.[5]

Parties' Claims

Lloyd contends that the erroneously admitted evidence concerning the May 9, 2002, traffic accident was irrelevant and highly prejudicial. He continues that this evidence was improper character evidence supported by extrinsic evidence. Lloyd asserts that the Board's admission of character and hearsay evidence was an abuse of discretion and not harmless error.

DART counters that the Board's decision was free of legal error. It also argues that the Board's decision that Lloyd failed to meet his burden of proof was supported by substantial evidence. It contends the Board made only passing reference to the 2002 accident saying nothing about it playing a role in its credibility determination. It also argues that the evidence about the 2002 accident was not hearsay as it was not admitted for the truth of it.

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[5] *Id.* at p. 7.

Standard of Review

On an appeal from the Board, this Court's role is to determine whether the Board's conclusions are supported by substantial evidence and are free from legal error.[6] This Court does not weigh the evidence, determine questions of witness credibility, or make its own factual findings and conclusions.[7] This Court also looks to whether the Board abused its discretion in the process of reaching its decision.[8]

Discussion

The Board's rule regarding evidence states:

> (B) The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed insofar as practicable; however, that evidence will be considered by the Board which, in its opinion, possesses any probative value commonly accepted by reasonably prudent men in the conduct of their affairs. The Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of its discretion.[9]

Before determining the role of that Rule in this case, it is necessary to first determine if the insurance company evidence about which Lloyd was questioned was hearsay. He argues that it was, and DART argues that it was not.

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[6] *A. Mazzetti & Sons v. Ruffin,* 437 A.2d 1120, 1122 (Del. 1981).

[7] *Johnson v. Chrysler Corporation,* 213 A.2d 64, 66 (Del. 1965).

[8] *Kreshtool v. Delmarva Power and Light Co.,* 310 A.2d 649, 652 (Del. Super. 1973).

[9] Industrial Accident Board Rule 14.

While there were other questions posed to Lloyd about documents from the insurance company file on the 2002 accident, one question specifically included a quote from it:

> Mr. Klusman: Sir, I'm looking at a record from the Claims Examiner to your Attorney and it say, "The Client's vehicle shows signs of aging and our driver is adamant that he did not hit your Client's vehicle" and it say "the damage on your Client's vehicle does not align with the height of our insurer's vehicle". Are you denying the fact that the Claim was rejected because it was found that the accident never occurred?
>
> Mr. Lloyd: That accident occurred, yet, it did occur.[10]

Hearsay is defined as:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[11]

DART's counsel's question shows that (1) the declarant, the adjuster, was not present before the Board and (2) it was not a prior statement of Lloyd.

But DART argues before this Court as it did before the Board that the evidence about the 2002 accident was not being used for the truth of the statement. That argument is specious at best or disingenuous at worst. Counsel told the Board when responding to Lloyd's objection that he wanted to show the 2002 accident never happened and "(t)he

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[10] Board Transcript p. 27.

[11] Delaware Rules of Evidence § 801(c).

basis of the denial was that it (the insurance company) found that the accident never occurred and that is important to this case (sic) because it's the same thing that he's doing here."[12]

That comment says two things. One, it contradicts DART's current argument that the evidence was not being offered for its truth. Two, it put into the Board's mind the strong suggestion that a fraud was being perpetrated in this matter as DART claimed had happened in 2002. Counsel said the evidence was "important to the case."

In short, the evidence of alleged prior insurance fraud was offered for its truth and constituted hearsay. DART does not and cannot cite any exception to the hearsay rule allowing for its admissibility. Even if it could and even if the evidence were not hearsay, in this case, where the lynchpin was Lloyd's credibility and the medical causation opinions were based on it, the palpable unfair prejudice to Lloyd outweighs any probative value. In addition, counsel's methodology of proof was seriously deficient. First, the letter was not written by or to Lloyd. Second, there is no indication, nor did counsel first ask, if Lloyd had ever seen the letter sent to his lawyer. While these are necessary steps, with other requirements too, in this Court for such evidence and may not always be needed in Board proceedings, fundamental fairness should dictate them as necessary foundational questions before the Board.

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[12] Board Transcript p. 25.

The analysis cannot stop there, however. First, it cannot stop because the rules of evidence are more lax before this Board. Second, the Board's opinion does not appear to dwell on this evidence or address its weight.

As to the first point, the Board is allowed to have less formal rules of evidence. But such relaxation of the rules must be consistent with fundamental fairness.[13] The Board may consider hearsay evidence inadmissible in this Court as long as (1) it does not base its decision solely on the inadmissable evidence and (20 the Board does not undermine the procedural protections necessary to a fair hearing.[14]

Nothing in the Board's decision indicates it based its denial solely on the inadmissable hearsay evidence. It makes only a passing reference to the 2002 accident, but its phraseology is curious, "He (Lloyd) claims that the accident occurred and that he received a check from the insurance company."[15] The problem, nevertheless, is that Lloyd's entire claim rested on his credibility. No one witnessed him fall, any objective signs of injury were minuscule at best, and the medical causation opinions relied upon Lloyd's recitation of complaints and his credibility.

The persons present at the time of the incident could neither corroborate or confirm what happened, and Ms. Davis, the passenger he was to help, even undercut his testimony.

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[13] *Jones v. Allen Family Foods,* 672 A.2d 26, 31 (Del. 1996).

[14] *Gehr v. State,* No. 81, 2000, Veasey, C.J. (December 27, 2000)(ORDER).

[15] Board decision at 3.

That is why the Board was apparently unpersuaded of the extent and nature of the "alleged" (its word) fall. From then on, Lloyd's case became a house of cards with the bottom ones pulled out as the medical opinions then were unsupportable.

In this context a significant allegation of insurance fraud assumes a major role in any credibility determination. The Board when admitting it, said it would give it appropriate weight. But its decision does not address what it did with it and makes only a curiously ambiguous comment on the 2002 accident claim. In that sense, the Board's decision is unreviewable, but raises a serious enough concern that the improperly admitted evidence played, in the unique context of this case, too much of a role in the Board's mind. The Board is required to give reasons for its credibility determinations.[16] The Board's decision is silent about the evidence DART introduced concerning the 2002 accident. As noted, the Board refers to the accident, but leaves hanging the serious concern it gave undue weight to the controversial evidence directly relating to Lloyd's credibility.

The Board's evidence Rule, while granting it greater latitude in what it may consider, still must preserve fundamental fairness. What happened here overstepped that line and was an abuse of discretion.

The remedy is not one the Court is happy to direct. This matter has to be reheard. But that rehearing must be before two different Board members. In doing that, the Court does not suggest any implication on or impugn the integrity of the two Board members who heard this case.

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[16] *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998).

The problem is, in the context of this case, the evidence of the 2002 accident is sufficiently damaging to Lloyd that the risk of its echo still resounding perpetuates the prior unfairness. The Court is not saying the evidence may not be admissible if properly introduced, although this Court has doubts it would be admissible in a proceeding in this Court. The slate on remand must be squeaky clean. Any new Board members must be insulated from the prior Board decision, and even the substance of this decision, in order to preserve fairness to Lloyd. In the end, of course, the Board determines witness credibility and not this Court.

Conclusion

For the reasons stated herein, the decision of the Industrial Accident Board denying Franklin Lloyd benefits is **REVERSED** and **REMANDED** for proceedings consistent herewith.

IT IS SO ORDERED.

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J.