

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**DENISE HENSON** )  
 ) CIVIL ACTION NUMBER  
 Appellant )  
 v. ) **04A-06-003-JOH**  
 )  
**KEN-CREST SERVICES** )  
 )  
 Appellee )

*Submitted: September 25, 2004*

*Decided: December 17, 2004*

***MEMORANDUM OPINION***

*Appeal from a Decision of the Industrial Accident Board - AFFIRMED*

*Appearances:*

Christopher J. Sipe, Esquire, of Bailey & Wetzel, Wilmington, Delaware, attorney for claimant-below, appellant

Christopher T. Logullo, Esquire, of Chrissinger & Baumberger, Wilmington, Delaware, attorney for employer-below, appellee

HERLIHY, Judge

Denise Henson appeals the latest decision of the Industrial Accident Board denying her petition for benefits. This Court reversed the Board's earlier denial on the grounds that the Board had failed to address objective evidence in the record. The Court noted also that the Board had not clearly stated whether it found there had or had not been a work-related incident which caused the symptoms of an injury contained in the medical records.

The Board has now decided there was no work related injury and has addressed the issue of objective evidence. Henson, of course, challenges those findings as unsupported by substantial evidence.

The Court finds that the Board's findings are supported by substantial evidence and are free from legal error. The decision of the Board is AFFIRMED.

### *Facts*

The background underlying Henson's current appeal was summarized in this Court's prior decision reversing her appeal the Industrial Accident Board's denial of her claim for benefits and medical expenses:

Henson is a Certified Nursing Assistant and was employed by Ken-Crest Services as a Residential Advisor at Ken-Crest's group home for mentally retarded adults. Her duties included assisting clients with all functions that they were not able to accomplish on their own.

On the evening of October 13, 2002, Henson was the only employee working during her shift due to Ken-Crest being short-staffed that night. She was, therefore, in charge of caring for four mentally retarded adults. That evening, she helped a female patient into the bathroom and onto the toilet. She left. Upon her reentry into the bathroom, she says she slipped on water or urine that was on the floor and fell landing on her buttocks. She also struck her head on the wall or a railing as she fell. There were no witnesses

to this incident. Henson acknowledged that there was no water or urine on the floor when she and the patient initially entered the bathroom. Margaret Gardley, the Delaware Director of Ken-Crest, testified that the toilets in the bathroom in question had not been repaired since the accident occurred and were not leaking.

Henson immediately reported the accident to her immediate supervisor, Felicia Beasley, via telephone. She completed an incident report per Beasley's instructions. Subsequent to this incident, Beasley left Ken-Crest's employ and moved to Michigan. There was no testimony from her put before the Board. Henson worked the rest of her shift until 11:00 p.m., and Beasley transported her to Newark Emergency Center. During her stay in the emergency room, she acknowledged that she never lost consciousness in the fall and that she was in no acute distress. Henson was found to have good range of motion and she was released to return to work without restrictions. Apparently, the entire Newark Emergency Center's emergency room record was not placed before the Board. A portion of it or a bill, was and whatever was indicated Henson was suffering from a muscle spasm in her back.

On the following day, October 14, 2002, Henson received treatment at the Omega Medical Center. Upon examination, it was noted that she was in no distress, that she could do full weight bearing on each side, that there was no visible asymmetry, no swelling, and no bruising in her neck and back. It was further noted that her range of motion was almost full with some subjective stiffness and discomfort and that she had no neurological findings. Henson was released to return to work in a light duty capacity.

On October 23, 2002, Henson, however, visited Dr. Craig Sternberg for treatment. He was not her family doctor. He diagnosed Claimant with soft tissue strains and sprains and issued a no-work slip. He also found on palpation muscle tightening in her back. During the time period between October 14 and October 23, Henson went on a one-week bus trip to Detroit, Michigan.

On December 9, 2002, Henson underwent carpal tunnel surgery performed by Dr. David Sowa. Claimant's carpal tunnel medical condition was unrelated to her October 13, 2002 work accident and the surgery she underwent did not affect Dr. Sternberg's decision to totally disable Claimant from working.

She saw Dr. Sternberg on December 11, 2002 and January 8, 2003. His diagnosis remained the same during these visits. However, on the March 12, 2003 visit, Dr. Sternberg released Henson to light duty work. Dr. Sternberg testified by deposition, that she was totally disabled from October 23, 2002 until March 5, 2003 as a result of the work injury. He also stated that the medical treatment has been reasonable, necessary and related to the work accident.

On January 22, 2003, Dr. John Townsend examined Henson per Ken-Crest's request. Upon examination, Dr. Townsend noted that she had decreased range of motion and tenderness in her lower back, but noted no objective signs of injury. Dr. Townsend also testified at the hearing that Claimant sustained a cervical and lumbar strain as a result of the work accident based on her recitation of the events and her complaints. It was his opinion that she would have been totally disabled for six weeks following the accident, again based on her complaints. After these six weeks, she would have been capable of light duty work with restrictions on lifting. Dr. Townsend further testified that there was some evidence during his examination of Henson that she was embellishing the severity of her condition. He testified that the medical treatment she received was reasonable, necessary and related to the accident.

Margaret Gardley testified by deposition, on behalf of Ken-Crest, that prior to the work accident Henson had several disciplinary problems in August, September and October 2002 and that she was about to be terminated from employment. Henson was not terminated, however, due to her going on disability following the accident. Gardley further testified that she did not have knowledge of and was not shown the incident report that Claimant completed until the day of the Board hearing. Henson denied being aware she was close to termination or on notice she was facing termination.

Claimant's disciplinary problems included two instances of unauthorized use of a work van without permission, two instances of changing her work schedule without notifying her supervisor, one instance of misappropriating a resident's funds, and one instance of calling out without giving proper notice.<sup>1</sup>

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<sup>1</sup> *Henson v. Ken-Crest Services*, C.A. No. 03A-05-008, Herlihy, J., (December 8, 2003), at 1- 5.

When reaching the first decision to deny benefits to Henson, the Board failed to address the Newark Emergency Room (“NER”) record showing spasm was found. Also, the Board did not address Dr. Sternberg’s findings on October 23, 2002, of palpable muscle tightening.

On remand, the Board heard additional testimony from Henson, Dr. Sternberg, and Dr. Townsend.

In looking at the NER report muscle spasm, the Board noted that Henson was not in acute distress and had good range of motion. In addition, the Board continued there was no notation that Henson was not to return to work. The records from her visit the next day to Omega again indicated Henson was not in acute distress. The records do not include notes as to any visible bruising, asymmetry, or swelling. She had almost full range of motion with only some stiffness and discomfort at the full range of motion. She was permitted to return to light duty work.

Dr. Sternberg testified that he believed the spasm notation on the Newark records indicated the examiner found tightness or firmness to the muscle that was not present in other areas. Dr. Sternberg also found tightness during his October 23, 2002, examination of Henson. From Henson’s history, Dr. Sternberg believed the spasms were a result of her fall at work on October 13, 2002.

On cross-examination, Dr. Sternberg agreed that the medical records from Henson’s personal physician contained no mention of the fall. He also agreed that spasm could be

caused by several different things including an injury, such as, turning the neck the wrong way, sleeping the wrong way or overuse.

The Board also heard Dr. Townsend testify at the remand hearing that he believed, based on Henson's history, she sustained a cervical and lumbar strain as a result of a work accident. He also indicated that he found that Henson embellished some of her symptoms during his range of motion examination. Dr. Townsend also testified that, under the *A.M.A. Guides to Evaluation of Permanent Impairment* Fifth Edition, "tightness" is not really defined or included with spasm. He could not equate tightness with spasms. He stated that a fall was competent to produce Henson's neck and back injury.

The Board found there were inconsistencies in the evidence and found that Henson did not suffer a work accident on October 13, 2002.

Based on the additional testimony the Board this time clearly concluded that Henson had not suffered a work-related injury. It noted that it had not found her credible at the initial hearing and on remand saw no reasons to change that view. Its reasons were (1) lack of other eye witness testimony to the incident, (2) no reported problems of the toilet leaking, and (3) a series of disciplinary problems a few months prior to the incident and upcoming termination (of which Henson denied knowledge).

The Board also addressed the NER record of a spasm but noted the record also said Henson was in no acute distress and had good range of motion. The NER record did not say Henson was excused from work. Several subsequent records indicated Henson was

in no acute distress, with no signs of swelling, bruising, or asymmetry. She had full range of motion but some stiffness was noted. Dr. Townsend also noted some embellishment.

While not explicitly addressing it in its findings, the Board heard testimony from Dr. Townsend that muscle tightness is not a medical term and is not viewed as objective.

### *Parties Claims*

Henson claims the decision of the Board is not supported by substantial evidence from which the Board could reach the conclusion that she did not suffer a work accident on October 13, 2002. Henson continues that she provided un rebutted information as to the work accident. She asserts she discharged her burden of showing a work accident caused her injury by presenting (1) her personal testimony as to the work accident, (2) a detailed description about how the work accident occurred, (3) the incident report presented to her supervisor who transported her to Newark after her shift concluded, and (4) her medical records. Henson contends that the Board came to a factually unsupported conclusion because it did not focus on the objective signs of injury but on the signs and symptoms she did not exhibit.

Ken-Crest counters that the Board's decision is supported by substantive evidence whereby reasonable minds could find that Henson did not meet her burden of proof. Ken-Crest contends that she did not prove there was an accident.

### *Standard of Review*

On appeal from a decision of the Board, this Court's role is limited to determining whether the Board's decision is supported by substantial evidence and is free from legal error.<sup>2</sup> Substantial evidence means, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>3</sup> The credibility of witnesses and the factual inferences to be drawn are for the Board to determine.<sup>4</sup> Even though the Court may have reached a different result, if the Board's decision is supported by substantial evidence, the Court does not substitute its judgment for that of the Board.<sup>5</sup>

### *Discussion*

This Court reversed and remanded the Board's first decision for it to consider the evidence of two objective signs of injury, namely, NER's report of spasm and Dr. Sternberg's note or testimony on muscle tightness.<sup>6</sup> The Court also asked the Board to clarify about whether it rejected Henson's claim because no work-related accident occurred, or one occurred, but she was not injured.<sup>7</sup>

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<sup>2</sup> *Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>3</sup> *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

<sup>4</sup> *Keeler v. Metal Masters Equipment Co. Inc.*, 712 A.2d 1004, 1006 (Del. 1998).

<sup>5</sup> *Delaware Alcoholic Beverage Control Comm. v. Alfred I. DuPont School Dist.*, 385 A.2d 1123, 1125 (Del. 1978).

<sup>6</sup> *Henson v. Ken-Crest Services*, Del.Super., 03A-05-008, Herlihy, J. (Dec. 8, 2003), at 10.

<sup>7</sup> *Id.*, at 9 - 10.



As the moving party at a Board hearing, Henson, even on remand, still bore the burden of proving there was an injury and that the injury was work-related.<sup>8</sup> Henson needed to establish by probative evidence that she suffered an injury that was a result of an accident which took place in the course of her employment.<sup>9</sup> In addition, the accident must be established by proof with a definite referral to time, place and circumstance.<sup>10</sup>

### *The Board's Findings*<sup>11</sup>

The Board held no additional evidence was presented to persuade it to change its original determination and now find Henson credible.<sup>12</sup> The Board did not believe that Henson slipped and fell while assisting a Ken-Crest resident on the evening of October 13, 2002.<sup>13</sup> The Board did not hear any testimony from a person able to testify who witnessed her fall. There were no reported problems with the toilet leaking in the bathroom in question. In answer to this Court's query, the Board found that no work-related accident occurred and, therefore, Henson was not injured in a work-related accident.

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<sup>8</sup> *Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del.1985).

<sup>9</sup> *Johnson v. Chrysler Corporation*, 213 A.2d 64,66 (Del. 1965).

<sup>10</sup> *Faline v. Guido & Francis DeAscanis & Sons*, 192 A.2d 921, 923 - 24 (Del. 1963).

<sup>11</sup> All information is taken from the Decision on Remand of the Industrial Accident Board, dated May 12, 2004.

<sup>12</sup> Board decision, May 13, 2004, at 6.

<sup>13</sup> Board decision, May 13, 2004, at 6.

The Court will now turn its attention to the Board's consideration of the two objective signs of injury; NER's record and Dr. Sternberg's note or testimony concerning muscle tightness.

The Board in looking at the NER report of muscle spasm noted that Henson was not in acute distress and had good range of motion. In addition the Board continued there was no notation that Henson was not to return to work. The records from her visit the next day to Omega again indicated Henson was not in acute distress. The records do not include notes as to any visible bruising, asymmetry, or swelling. She had almost full range of motion with only some stiffness and discomfort at the full range of motion. She was permitted to return to light duty work.

Dr. Sternberg testified again at the remand hearing that he believed the spasm notation on the NER records indicated the examiner found tightness or firmness to the muscle that was not present in other areas. Dr. Sternberg also found tightness during his October 23, 2002 examination of Henson. From Henson's history, Dr. Sternberg believed the spasms were a result of her fall at work on October 13, 2002.

On cross-examination, Dr. Sternberg agreed that the medical records from Henson's personal physician contained no mention of the fall. He also agreed that spasm could be caused by several different things including an injury, turning the neck the wrong way, sleeping the wrong way or overuse.

In its decision on remand, the Board stated, “Dr. John Townsend testified that based on (Henson’s) history, he believed she sustained a cervical and lumbar strain as a result of the work accident.”<sup>14</sup> In isolation, the Board’s characterization of Dr. Townsend’s remand testimony creates an inconsistency with its finding that there was no work-related accident. But Dr. Townsend’s actual testimony, though poorly and inartfully summarized by the Board is not as characterized. It is, therefore, not inconsistent. The doctor said in response to a question from Henson’s counsel:

Counsel: Doctor, would you agree that these medical records make reference to Ms. Henson having spasms in her neck and in her back on this evening?

Dr. Townsend: It does suggest that, yes.

Counsel: Would you agree that spasms are an objective sign that there’s been a recent traumatic injury to the spasm in the body party?

Dr. Townsend: No, I think I noted previously that it doesn’t have to be an acute injury per say but just something that is different about you, the patient’s posture, it can be an injury, it doesn’t have to be, but it generally suggests that something acute has gone on although certainly there are lots of people that will have intermittent spasms even in the chronic state of their complaints.

Counsel: And that patient’s history here was that she had fallen at work about five hours earlier, is that right?

Dr. Townsend: That was the Patient’s history. It would be very hard to fake spasm in the neck and the back.

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<sup>14</sup> Board decision, May 13, 2004, p. 5.

Counsel: And as far as those medical records, there's an objective reference to spasm on the night of the work accident. Is that correct?

Dr. Townsend: There was mention of spasm the night of the incident.

Counsel: Based on a reasonable degree of medical probability the spasms that Dr. Hurwitz was appreciating in the Emergency Room on the night of the accident, would you agree that those are causally related to the work accident?

Dr. Townsend: Assuming that there was a work accident, what the Patient described would have been competent to produce a complaint of neck and back pain and spasm.<sup>15</sup>

Dr. Townsend was questioned about the NER records showing spasm. He agreed it is an objective symptom. But the point remains, was whether that symptom was an objective manifestation of injury from a work-related incident. The Board said it was not, rejecting Henson's testimony as not credible. By doing so, it was capable of rejecting a medical opinion based on patient subjective statement.<sup>16</sup>

What Dr. Townsend said, in sum, was that if there were a work-related injury, he would agree that Henson suffered a cervical and lumbar strain as a result. The Board's inartful characterization of what he said does not undercut its ultimate finding or indicate there is no substantive evidence to support that finding.

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<sup>15</sup> *Henson v. Ken-Crest Services*, Industrial Accident Board Hearing, No. 1221483, April 19, 2004.

<sup>16</sup> *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).

In fulfilling its sole function on appeal, this Court finds that there was substantial evidence supporting the Board's holding that Henson did not suffer a work-related injury on October 13, 2002. When she was examined at NER almost six hours after the purported fall, the only symptom noted was spasm. There was no indication of bruising, swelling or any other symptom. There was no notation that she was unable to move with full range of motion.

The next day when Henson was examined, there were no symptoms other than tightness, which may or may not have been spasms. Again, there were no bruises, no distress, no asymmetry and almost full range of motion. She walked with a steady gait. No swelling was found.

Henson has asked this Court to weigh the evidence presented to the Board and find that the Board did not have the sufficient evidence to support its decision. This Court is not empowered to do so and will not do so. The Court finds there is more than a scintilla of evidence to support the conclusion of the Board that Henson did not suffer a work-related injury. The Board has also adequately addressed the medical issues identified in this Court's earlier remand decision.

### *Conclusion*

For the reason herein stated, the decision of the Industrial Accident Board is  
**AFFIRMED.**

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J.