IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PLAYTEX PRODUCTS, INC.,	:	
	:	C.A. No. 04A-05-001 WLW
Employer-Below/	:	
Appellant,	:	
	:	
v.	:	
	:	
JIMMIE EVANS,	:	
	:	
Claimant-Below/	:	
Appellee.	:	

Submitted: March 24, 2006
Decided: June 30, 2006

ORDER

Upon Appeal from a Decision of the Industrial Accident Board.
Affirmed in part; Reversed and Remanded in part.

J. R. Julian, Esquire of J. R. Julian, P.A., Wilmington, Delaware and Timothy A. Casey, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorneys for Playtex Products, Inc.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for Jimmie Evans.

WITHAM, R.J.

Upon consideration of the parties' briefs and the record below, it appears to the Court:

Defendant-below, Playtex Products, Inc. ("Playtex"), appealed the Industrial Accident Board's ("Board") decision of November 21, 2003 ("Decision") granting Claimant-below, Jimmie Evans' ("Evans"), Petition to Determine Additional Compensation Due.[1] Playtex asserts three grounds for its appeal: (1) Dr. Rodgers' testimony does not satisfy the substantial evidence test, (2) Evans' use of Dr. Rodgers' at the hearing as a result of Dr. Rowe's unfavorable deposition violated public policy against "doctor shopping," and (3) the Board committed errors of fact and law in reaching its conclusions and issuing its decisions. In Evans' response, he refutes all of Playtex's contentions and makes a cross-appeal arguing that the Board erred in failing to award attorney's fees for its decision granting a motion for reargument and attorney's fees for the successful defense of a motion for reargument.

The salient facts are as follows: Evans injured his lower back on June 16, 1999, as a result of lifting heavy display materials. Playtex and Evans entered into several agreements regarding compensation for that injury. However, on June 11, 2003, Evans filed a Petition to Determine Compensation Due, as well as a Petition to Determine Additional Compensation Due. Evans based the Petition to Determine Compensation Due on a disc herniation he alleged occurred as the result of a second work accident on July 1, 2001, in which the forklift he was riding fell through rotted floorboards and dropped about eleven inches. The Petition to Determine Additional Compensation Due

[1]The Decision also denied Evans' Petition to Determine Compensation Due for another alleged work accident. However, that determination is not being appealed.

sought permanent impairment benefits for an 18% loss of use of the lumbar spine based on either the 1999 injury, the 2001 injury, or both.

For the reasons set forth below, the Board's decision is *affirmed* with respect to Playtex's appeal and *reversed* and *remanded* with respect to attorney's fees for the successful defense of Playtex's Motion for Reargument.

Standard of Review

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's finding of fact and conclusions of law.[2] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] Errors of law are reviewed de novo. Absent error of law, the standard of review for a Board's decision is abuse of discretion.[5] The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."[6] Additionally, "this

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[2]*Histed v. E. I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 Del. Super. LEXIS 9; *Robinson v. Metal Masters, Inc.,* 2000 Del. Super. LEXIS 264.

[3]*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (*quoting Consolo v. Federal Mar. Comm'n,* 383 U.S. 607, 620 (1966)).

[4]*Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (*quoting Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

[5]*Digiacomo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

[6]*Willis*, 2003 Del. Super. LEXIS at *2-3.

Court will give deference to the expertise of administrative agencies and must affirm the decision of any agency even if the Court might have, in the first instance, reached an opposite conclusion."[7]

Discussion

Playtex makes three arguments with respect to this appeal, the first of which has three subparts. Evans provides one argument on his cross-appeal. Each will be discussed seriatim below.

I. Dr. Rodgers' Testimony Does Not Satisfy the Substantial Evidence Test.

A. Dr. Rodgers' testimony was based on speculative hunch and failed to rebut or repudiate directly conflicting medical testimony.

Playtex argues that the Board erroneously accepted Dr. Rodgers' testimony instead of Dr. DuShuttle's or Dr. Rowe's testimony because Dr. Rodgers' opinion was based on "possibility"[8] and did not rebut directly conflicting medical testimony. Evans asserts that Dr. Rodgers' opinion regarding his injuries is couched in an acceptable manner and, in fact, conflicts directly with Dr. DuShuttle's opinion.

In *Jepsen v. University of Delaware*,[9] the Court considered the legal standard necessary for medical testimony. Specifically, the Court opined, "since 1960 the Delaware Supreme Court has consistently held that expert medical testimony in terms

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[7]*Collins*, 1999 Del. Super. LEXIS at *9.

[8]The Board stated, "Dr. Rodgers opined the continuous use of the back by Claimant in the forklift operator job over more than a two-year period of time following the 1999 work accident was a possible mechanism of injury for the disc herniation." *Evans v. Playtex Prods., Inc.*, IAB Hearing Nos. 1231043 & 1147310 (November 21, 2003), at 16.

[9]2003 Del. Super. LEXIS 320.

of 'possibility' supplemented by other creditable testimony is sufficient to meet the claimant's burden of proof in worker's compensation cases."[10] Additionally, "the Court has specifically held that medical expert testimony that an injury is 'consistent with' claimant's statements or 'could have' resulted therefrom, when considered in light of all of the evidence, is 'sufficient to establish the requisite causal connection' to sustain an award of worker's compensation benefits."[11] Such is the case *sub judice*. The Board has clearly found that in light of Dr. Rodgers' opinion, Evans' testimony, the work required by Evans' job and the diagnosis reached by all three physicians, "the weight of the evidence supports a causal connection between Claimant's initial 1999 work injury and the recurrence of his back complaints in 2002."[12] Thus, Dr. Rodgers' opinion is not based on speculative hunch.

Dr. Rodgers' opinion also refutes the directly conflicting medical testimony of Dr. DuShuttle. Dr. DuShuttle opined that Evans' disc herniation was unrelated to his 1999 work accident, and was, in fact, an acute injury caused by a recent traumatic event. Conversely, Dr. Rodgers testified that the effect of Evans' working as a forklift operator for two years after the 1999 injury was a possible cause of the herniated disc. Thus, there was directly conflicting medical testimony and this argument warrants no further discussion.

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[10] *Id*. at *6-7.

[11] *Id*. at *7.

[12] *Evans*, IAB Hearing Nos. 1231043 & 1147310, at 15-16.

B. The Board erred by improperly weighing the testimonies of Dr. DuShuttle and Dr. Rowe, the treating physicians.

Playtex contends that the Board erred by accepting the opinion of Dr. Rodgers over that of Dr. DuShuttle and Dr. Rowe. Particularly, Playtex asserts that Dr. DuShuttle and Dr. Rowe's opinions should be given more weight because they were the treating physicians, they are both orthopedic surgeons, and although Dr. Rodgers agreed with the major analysis of Dr. DuShuttle and Dr. Rowe, his opinion was in direct conflict with the testimony of Dr. DuShuttle and Dr. Rowe. Evans counters by arguing that Dr. DuShuttle was not a treating physician, but was actually a witness for Playtex. Evans bases this assertion on the fact that he was referred to Dr. DuShuttle by Playtex after the 1999 accident, Playtex instructed Evans to return to Dr. DuShuttle in February of 2002, Dr. DuShuttle reviewed Evans' chart with representatives from Playtex in April of 2002 and Dr. DuShuttle testified on behalf of Playtex in this case. Evans also argues that it is entirely proper for a medical expert to agree with another doctor's diagnosis and treatment, yet disagree with the cause of the condition.

In *Jepsen*, the Court also addressed the issue of the Board's decision to accept certain testimony over that of other witnesses. The Court stated, "[t]reating physicians have great familiarity with a patient's condition and their opinions should be given 'substantial weight.' However, as finder of fact, the Board is entitled to discount the testimony of any witness on the basis of credibility, provided it states specific, relevant reasons for doing so."[13]

In the case *sub judice*, there are two justifications for upholding the Board's

[13] *Jepsen*, 2003 Del. Super. LEXIS 320, at *6.

decision to accept the testimony of Dr. Rodgers over that of Dr. DuShuttle and Dr. Rowe. First, Evans' contention that Dr. DuShuttle was not a treating physician in the typical sense is persuasive. Second, and more importantly, the Board clearly stated its reasons for finding Dr. Rodgers' testimony more persuasive. Specifically, with respect to Dr. Rowe, the Board determined, "[t]he Board does not find Dr. Rowe's opinion that he could not relate Claimant's complaints in 2002 to the 1999 work accident or the July 2001 work incident to be problematic based on Claimant's testimony, concerning the nature of his work and his ongoing symptoms, the fact that he continued working as a forklift operator, and the expert opinion provided by Dr. Rodgers. The employer takes the employee as it finds him." As for Dr. DuShuttle, the Board noted:

> The Board rejects Dr. DuShuttle's opinion that the L4-5 disc herniation cannot be related to the 1999 work accident. There is no medical evidence pinpointing when the disc herniation actually occurred. While Dr. DuShuttle opines that the herniation is an acute, rather than a chronic injury, based on the absence of deterioration, calcification or desiccation in the MRI findings, he also inconsistently concludes that it cannot be related to the July 2001 work incident. However, he does not address the issue that the herniation may have occurred at some later date, or at any point in time, following the first MRI, as a result of Claimant's rigorous use of the back while performing the forklift operator job, as Dr. Rodgers suggests.[14]

The reasons provided by the Board for rejecting the opinions of Dr. Rowe and Dr. DuShuttle are specific and relevant. Thus, the Board was proper in its decision to accept the opinion of Dr. Rodgers and Playtex's second argument fails.

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[14] *Evans*, IAB Hearing Nos. 1231043 & 1147310, at 17.

C. The Board failed to comprehensively and analytically identify the subordinate factual foundations on which the decision was based as required by *Cotter*.[15]

Playtex lists the four factual foundations it believes to be the basis of the Board's decision. They are: (1) it is not unusual to have flare-ups or exacerbations with chronic lumbosacral strain, (2) Dr. DuShuttle noted in August 1999 that Evans may need to "bid out of his job", (3) there is no evidence to suggest that Evans sustained any further injuries from a trauma or accident outside the workplace, and (4) Dr. DuShuttle's opinion was inconsistent. Regarding these factual foundations, Playtex asserts that they are all illusory. In response, Evans argues that they are supported by substantial evidence and are consistent with the requirements in *Cotter*.

In *Cotter*, the Court opined, "[i]n our view an examiner's findings should be as comprehensive and analytical as feasible and, where appropriate, should include a statement of subordinate factual foundations on which ultimate factual conclusions are based, so that a reviewing court may know the basis for the decision."

Accepting that the factual foundations outlined by Playtex are those upon which the Board based its decision, this Court finds that they meet the standard established in *Cotter*. In particular, the Board observed, "Dr. DuShuttle, Dr. Rowe and Dr. Rodgers opined that it is not unusual to have flare-ups or exacerbations with chronic lumbosacral strain, the undisputed diagnosis among all the physicians, for Claimant's condition following the 1999 work accident."[16] As for the August 1999 note, Dr. DuShuttle

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[15]*Cotter v. Harris*, 642 F.2d 700 (3d Cir. 1981).

[16]*Evans*, IAB Hearing Nos. 1231043 & 1147310, at 16.

agreed, and the medical records document, that he suggested that Evans bid out of his job and perform only light duty work with no repetitive lifting.[17] The Board clearly concluded that "[t]here is no evidence to suggest that Claimant sustained any further injuries from a trauma or accident outside the workplace."[18] Lastly, as mentioned earlier, the Board was troubled by Dr. DuShuttle's opinion that the injury was acute, but concluded that it was not related to the July 2001 work accident and his failure to address whether the herniation could have occurred at a later date as a result of Evans rigorous use of the back while performing his job as a forklift operator.[19] All four of these factual foundations are reasonable and substantiated and, therefore, result in appropriate findings and conclusions. Consequently, this argument is unsuccessful.

II. Evans' Use of Dr. Rodgers at the hearing as a result of Dr. Rowe's unfavorable deposition violated public policy against "doctor shopping."

Playtex argues that 19 *Del. C.* §§2322 and 2323 render Evans' use of Dr. Rodgers impermissible doctor shopping. In support of that argument, Playtex cites to a few decisions from other jurisdictions that used statutes to prevent doctor shopping. Playtex also asserts that Evans withdrew his first Petition to Determine Additional Compensation Due because of the unfavorable deposition of Dr. Rowe. Evans' response is that he withdrew the original petition because it was only for unpaid medical bills and he wanted to include a claim for permanent partial disability. Additionally,

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[17] *Id.* at 12, 16.

[18] *Id.* at 17.

[19] *Id.*

Evans contends that Playtex's reliance on Sections 2322 and 2323 is inapposite.

Sections 2322 and 2323 "were enacted for the mutual benefit of both the employer and the employee. Their legislative purpose is twofold: (1) to insure the employer against unreasonable charges and against fraudulent claims; and (2) to insure at all times adequate medical assistance to the employee."[20] In the case before me, both of those purposes have been fulfilled. There is no indication that Evans' claims are fraudulent. Especially in light of the fact that the Board found in his favor. Additionally, there are no allegations that Evans did not get adequate medical assistance.

Assuming, *arguendo*, that these sections have the purpose proposed by Playtex, there is still no evidence that Evans' conduct amounted to "doctor shopping." Evans' reason for why he withdrew his original petition is entirely reasonable. Further, Evans' explanation for why he consulted Dr. Rodgers – that he was hired to address Evans' work restrictions, appropriateness and reasonableness of treatment, as well as causation from an occupational medicine viewpoint – is plausible. Thus, Evans did not engage in "doctor shopping."

III. The Board committed errors of fact and law in reaching its conclusions and issuing its decisions.

Playtex cites four reasons to support its argument that the Board erred in reaching its conclusions. The first is that the Board erroneously wrote that Evans saw Dr. DuShuttle in February of 2001 instead of February of 2002. The second argument was that there was no evidence to support the Board's findings that Evans suffered flare-ups

[20] *Hill v. Archie's Thriftway and Indus. Accident Bd.*, 1997 Del. Super. LEXIS 615, at *6.

or that his job required Evans to use his back in a rigorous manner. The third argument is that the Board erred in permitting Evans' attorney to ask leading questions on direct examination. Finally, Playtex asserts that the Board erred in denying its Motion for Reargument based on Playtex's inclusion of affidavits.

Evans argues that the Board simply made a typographical mistake when it said 2001 instead of 2002, because the Board properly noted 2002 at other points in its decision. Evans also contends that the Board was permitted to accept the testimony of Dr. Rodgers over that of Dr. DuShuttle because it is the Board's role to resolve conflicts in the testimony and it may accept one expert's opinion over that of another expert as long as substantial evidence exists. Third, Evans points out that the Board is not subject to the formal rules of evidence[21] and Industrial Accident Board Rule 15 specifically permits leading questions of expert witnesses. Lastly, Evans asserts that the Board properly denied Playtex's Motion for Reargument because Playtex attempted to introduce affidavits of two individuals who were never called as witnesses during the hearing and were, therefore, never subject to cross-examination.

As for Playtex's first argument, clearly the Board made a typographical error, so no further discussion is warranted. The second contention is also unpersuasive because it is within the Board's function to decide the credibility of witnesses, resolve conflicts in the testimony and accept one expert's opinion over that of another expert. Therefore, the Board properly concluded that flare-ups occurred and Evans' rigorous use of his back caused the herniation because such findings were supported by substantial evidence, as noted above. Evans' argument is also more persuasive regarding Playtex's

[21] *See Torres v. Allen Family Foods*, 672 A.2d 26 (Del. 1995).

third contention, especially since Playtex even concedes that counsel may ask leading questions on direct examination of an expert witness when the issues are in dispute. Further, the Board acknowledged that the questions were leading but still found it credible; therefore, Dr. Rodgers' testimony was not tainted as Playtex suggests. Regarding Playtex's last argument, the Board properly denied Playtex's Motion for Reargument. In its decision, the Board reasoned:

> [T]hat the two affidavits offered by the employer are inadmissible. The evidentiary hearing has formally concluded and the affidavits do not constitute "newly discovered evidence." The testimony of the proffered witnesses were discoverable before the hearing with the exercise of due diligence on behalf of the employer. Mr. Cohee was named as a witness on the pre-trial memorandum and could have testified live or by deposition at the hearing. However, Mr. Bryan was not previously named as a witness and therefore would have been precluded from testifying at that time had any objection been raised. In addition, the affidavits are inadmissible since due process requires that the Claimant be afforded the right to confront and to cross-examine witnesses against him. Even if the affidavits were admissible, their contents are cumulative to the testimony of Mr. Nelson, who did testify live, and merely tend to impeach or contradict the testimony of Claimant given at the hearing. Finally, the contents, if admissible, would not change the Board's findings of fact and conclusions of law as to the ultimate result.[22]

Clearly, the Board's decision to deny the Motion for Reargument was proper. First, the Board determined that the affidavits were inadmissible and had support for that decision. In addition, the Board noted that even if the affidavits were admissible, they still would not have affected its decision. Thus, Playtex's final argument is

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[22]*Evans v. Playtex Prods., Inc.*, IAB Hearing Nos. 1231043 & 1147310 (April 8, 2004), at 2-3 (citations omitted).

without merit.

IV. The Board erred in failing to award attorney's fees for its decision granting a Motion for Reargument and attorney's fees for the successful defense of a Motion for Reargument.

On his cross-appeal, Evans argues that the Board erred when it did not award attorney's fees for its decision granting Evans' Motion for Reargument in part and the successful defense of Playtex's Motion for Reargument because counsel secured a benefit for his client. Evans is seeking attorney's fees for one hour in connection with its Motion for Reargument and 5.2 hours in connection with its successful defense of Playtex's Motion for Reargument. Playtex contends that the Board was correct in denying an award of attorney's fees because there was no benefit or change in position for Evans.

An award of attorney's fees is reviewed for an abuse of discretion.[23] "This Court will not find that the IAB abused its discretion unless its decision has 'exceeded the bounds of reason in view of the circumstances.'"[24] 19 *Del. C.* §2320 allows the Board to award attorney's fees when an employee is awarded compensation. "Compensation," with respect to an award of attorney's fees, means "any favorable change of position or benefits, as the result of a Board decision, rather than just being limited to contemporaneous financial gain."[25]

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[23] *See Darnell v. BOC Group, Inc.*, 2001 Del. Super. LEXIS 283, at *28.

[24] *Porter v. Insignia Mgmt. Group*, 2003 Del. Super. LEXIS 360, at *8.

[25] *Willingham v. Kral Music, Inc.*, 505 A.2d 34 (Del. Super. 1985), *aff'd.*, 508 A.2d 72 (Del. 1986).

In the case *sub judice*, Evans did not receive a benefit regarding his Motion for Reargument, even though it was granted in part, because the only change was to correct a typographical error and give Evans the percentage of permanent impairment it intended to award in the first instance. However, Evans did receive a benefit regarding his successful defense of Playtex's Motion for Reargument. Evans was able to cite two separate decisions wherein the Board awarded attorney's fees to claimants for their successful defense of the employers' motions for reargument. Additionally, this Court has personally handled a case where the Board awarded attorney's fees to a claimant who successfully defended against a Motion for Rehearing.[26] This Court wrote, "[c]oncluding that Claimant's counsel had secured a benefit for his client, the Board awarded Claimant attorney's fees, stating, '[C]ounsel for Claimant is entitled to a reasonable attorney's fee assessed as costs against Insignia, pursuant to 19 *Del. C.* §2320(j). Because of Insignia's Motion, Claimant's attorney was required to spend time preparing his response.'"[27] The same reasoning is applicable to this case. As a result of the Board's inconsistent decision to not award attorney's fees for the successful defense of a Motion for Reargument, this Court finds that the Board abused its discretion. However, this decision applies only to the 5.2 hours Evans' counsel spent responding to Playtex's Motion for Reargument. The Board was correct that no benefit was sustained by Evans with respect to his Motion for Reargument.

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[26] *See Id.* at *20.

[27] *Id.*

Based on the foregoing, the decision of the Board is *affirmed* with respect to Playtex's appeal and *reversed* and *remanded* with respect to its decision to deny attorney's fees for Evans' successful defense of Playtex's Motion for Reargument.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R. J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution