IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELI BERMUDEZ,	)	
	)	
Appellant, Employee below,	)	
	)	
v.	)	C.A. No. 05A-11-011-JRS
	)	
PTFE COMPOUNDS, INC.,	)	
	)	
Appellee, Employer below.	)	
	)	

Date Submitted: May 5, 2006
Date Decided: August 16, 2006

Upon Appeal from the Industrial Accident Board.
AFFIRMED.

ORDER

This 16th day of August, 2006, upon consideration of the appeal of Eli Bermudez from the decision of the Industrial Accident Board denying his Petition to Determine Compensation Due,[1] it appears to the Court that:

1. On March 16, 2005, Eli Bermudez ("Bermudez") was a machine operator at PTFE Compounds, Inc. ("PTFE") when he allegedly injured his back while

[1] Docket Item ("D.I.") 3, Industrial Accident Board ("Board") Decision, at 10.

working.[2] Bermudez notified his supervisor of the injury and, in accordance with company policy, his supervisor advised him to seek medical treatment from Christiana Care, Occupational Health Services Department at Wilmington Hospital ("Occupational Health").[3]

2. That same day, Bermudez reported to Occupational Health and was examined by Dr. Josette Covington. Dr. Covington noted that Bermudez presented with complaints of pain and appeared to be in a lot of distress. Her examination revealed tenderness in the midline of his lower back and limited mobility - however, he had no spasms and the results of the straight leg raise test were negative. Dr. Covington opined that Bermudez had suffered an acute back injury because an x-ray of the area indicated no evidence of a chronic injury. Her diagnosis was lumbar sprain. Dr. Covington recommended physical therapy and that Bermudez refrain from working until his next scheduled visit to Occupational Health.[4]

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[2] As a machine operator, Bermudez was responsible for moving Teflon powdered trays (each weighing 15 to 20 pounds) onto a drum, rolling the drum to a sifter machine, and adding the powder to the sifter. He was engaged in this activity at the time of his alleged injury. *Id.* at 2-3.

[3] Occupational Health contracts with various employers to provide medical treatment for injured employees. PTFE has such a contract with Occupational Health. *Id.*, Dr. Covington Dep., at 4.

[4] *See id.* at 2-8.

3. On March 22, 2005, Bermudez returned to Occupational Health and met with Betsy Ekey, a physician's assistant. Ms. Ekey noted that Bermudez continued to complain of pain and a limited range of motion. She recommended that Bermudez perform only light duty work with a five pound lifting restriction and minimal bending and twisting. Bermudez met with Ms. Ekey on two subsequent occasions that same month. Her recommendation remained the same in that Bermudez was to limit himself to light duty work.[5]

4. On March 28, 2005, Bermudez returned to work at PTFE. He was assigned to light duty work that accommodated his work restrictions, such as washing trays and equipment. However, according to his supervisor (Jonathan White) and the owner of PTFE (Raymond White), Bermudez was continually lifting more than five pounds in violation of his work restrictions. As a result, on April 8, 2005, they provided Bermudez with an "Employee Warning Notice" which stated that Bermudez was in violation of his work restrictions and that he would "'be suspended from work until his condition is restored to full duty.'" [6] Bermudez refused to sign the notice and did not return to work after that day. Thereafter, PTFE sent Bermudez a letter terminating his employment citing job abandonment for not returning to work with

[5] D.I. 6 at 7-10.

[6] *Id.* at 10.

the signed notice and failure to communicate.[7]

5. On April 22, 2005, Bermudez filed a Petition to Determine Compensation Due with the Board. He sought temporary partial disability from May 12, 2005 (the day after he was permitted to resume full duty work) because his new job had a lower compensation rate than he had been receiving at PTFE.[8] Bermudez claimed that PTFE recognized the injury as work related because it sent him to Occupational Health for treatment and paid all associated medical bills. PTFE argued that Bermudez did not sustain a work injury on the day in question (March 16, 2005) and that PTFE's practice of sending employees to Occupational Health for treatment is not evidence of its acceptance of a work injury.[9]

6. On June 24, 2005, prior to the Board hearing, Dr. Andrew Gelman examined Bermudez. Dr. Gelman also reviewed Bermudez' records from Dr. Covington, Ms. Ekey, Christiana Physical Therapy, and x-rays. He opined that there were no objective symptoms, other than muscle spasms, that would indicate an injury had

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[7] *See id.*; D.I. 3, Board Decision, at 3; D.I. 9 at 5-6. During this same time period, Bermudez continued with physical therapy and treatment at Occupational Health until he was released to full duty/regular work in early May. *See* D.I. 6 at 12.

[8] May 12 is also the day PTFE notified Occupational Health and Bermudez' physical therapy provider that it would no longer be accepting invoices for the medical treatment of Bermudez given that he was reinstated to regular work status. *See* D.I. 3, Board Decision, at 2; D.I. 6 at 12.

[9] *See* D.I. 3, Board Decision, at 2.

occurred; all other symptoms were entirely subjective. Dr. Gelman's explanation for the muscle spasms was that an intervening event must have caused the spasms between the time of the alleged injury at PTFE (March 16, 2005) and when the spasms were discovered (April 5, 2005) because spasms do not normally occur three weeks after an injury. He concluded that Bermudez' physical evaluation was completely normal.[10]

7. On September 27, 2005, the Board held a hearing on Bermudez' petition. At the hearing, Bermudez, Jonathan White and Raymond White testified. Drs. Covington's and Gelman's depositions were also read into evidence.[11]

8. The Board ultimately denied the petition. It accepted Dr. Gelman's testimony over that of Dr. Covington, agreeing with Dr. Gelman that Bermudez lacked any objective symptoms of a work injury. The Board also relied upon the testimony of Raymond White who stated that he believed Bermudez had an automobile repair business on the side, and that he had once seen Bermudez coming out of the business carrying tools during the same time Bermudez was out of work from PTFE on account of his alleged work injury. The Board further noted that Bermudez admitted to having towed vehicles between March 16 and May 11, 2005.

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[10] *See id.*, Dr. Gelman Dep., at 4-12.

[11] *See id.*, Hr'g Tr.

Lastly, the Board did not find Bermudez' testimony to be credible. Therefore, the Board concluded that it could not determine that Bermudez' injury occurred at a fixed time and place and that it was attributable to a clearly traceable incident of his employment with PTFE - a fact that Bermudez had the burden to establish by a preponderance of the evidence.[12]

9. Bermudez now appeals the Board's decision to this Court. He contends the Board's conclusion that he failed to establish that his injury occurred at a fixed time and place such that it was attributable to a clearly traceable incident of his employment with PTFE was against the substantial weight of the evidence and the law. As support, Bermudez points to the facts that PTFE: acknowledged it was aware of the accident at the time it occurred; recorded the accident in its internal records; sent Bermudez to Occupational Health for treatment and paid for such treatment; and maintained contact with Occupational Health. These actions by PTFE, Bermudez argues, "should be considered a de facto agreement to pay worker's compensation

[12] *See id.*, Board Decision, at 8-10. *See also Gray's Hatchery & Poultry Farms, Inc. v. Stevens*, 81 A.2d 322, 324 (Del. Super. Ct. 1950) (The evidence must "clearly establish that the injury happened at a fixed time and place and was attributable to a clearly traceable incident of the employment."); DEL. CODE ANN. tit. 19, § 2304 ("Every employer and employee ... shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident *arising out of and in the course of employment*, regardless of the question of negligence and to the exclusion of all other rights and remedies.) (emphasis supplied).

benefits" and, as such, the Board's decision should be reversed.[13]

10. Not surprisingly, PTFE contends that the Board's decision is supported by substantial evidence. PTFE continues to maintain that its practice of sending employees to Occupational Health for treatment, and initially paying for such treatment, is *not* evidence of its acceptance of a work injury and a "de facto agreement" to pay compensation. It also argues that the Board's reliance upon Dr. Gelman's and Raymond White's testimony, as well as its finding that Bermudez was not credible, was appropriate.[14]

11. This Court has repeatedly emphasized the limited extent of its appellate review of the Board's decisions. The Court's review is confined to ensuring that the Board made no errors of law and determining whether there is "substantial evidence" to support the Board's factual findings.[15] Questions of law that arise from the Board's decision are subject to *de novo* review which requires the Court to determine whether the Board erred in formulating or applying legal precepts.[16] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to

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[13] *See* D.I. 6 at 15, 20-21, 31.

[14] *See* D.I. 9 at 11-22.

[15] *Canyon Const. v. Williams*, 2003 WL 1387137, at *1 (Del. Super. Ct. Mar. 5, 2003); *Hall v. Rollins Leasing*, 1996 WL 659476, at *2-3 (Del. Super. Ct. Oct. 4, 1996).

[16] *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990).

support a conclusion."[17] It is "more than a scintilla but less than a preponderance of the evidence."[18] The "substantial evidence" standard of review contemplates a significant degree of deference to the Board's factual conclusions and its application of those conclusions to the appropriate legal standards.[19] In its review, "the Court will consider the record in the light most favorable to the prevailing party below."[20]

12. Applying the applicable standards to this case, the Court is satisfied that the Board's decision that Bermudez failed to meet his burden to establish that his injury happened at a fixed time and place and was attributable to a clearly traceable incident of his employment with PTFE is free from legal error and is supported by substantial evidence.

13. Bermudez' argument that PTFE's actions gave rise to a "de facto agreement to pay worker's compensation benefits" is unconvincing. Bermudez cites no authority, nor can the Court locate any support, for the proposition that an implied agreement was created when PTFE sent Bermudez to Occupational Health and initially paid two of the bills that Bermudez incurred during his treatment at

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

[18] *Id.*

[19] *Hall*, 1996 WL 659476, at *2 (citing DEL. CODE ANN. tit. 29, § 10142(d)).

[20] *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Ct. Aug. 16, 1991).

Occupational Health. The only authority which appears at a glance to lend support to Bermudez' position is *Starun v. All Am. Eng'g Co.*[21] *Starun* is distinguishable, however, in three respects. First, the employer in *Starun* paid the employee's medical bills for three years. Here, PTFE paid *only* two of Bermudez' bills from Occupational Health over a two-month period.[22] Second, the Supreme Court in *Starun* held that the payment of the medical bills operated to toll the statute of limitations. The Court did not address whether payment of medical bills constituted an agreement to pay worker's compensation. The limitations period is not at issue in this case. Third, *Starun* did not present the issue of whether an accident occurred in the course of employment - it was a "[g]iven ... that Claimant was injured in an industrial accident[.]" Here, however, the central issue before the Board was whether Bermudez was injured in the course of his employment at PTFE. Therefore, the Court concludes that while the payment of medical expenses may, in some cases, toll the running of the limitations period, it does not operate as an admission by the employer

[21] 350 A.2d 765 (Del. 1975).

[22] D.I. 9 at 16. *See also Suran*, 350 A.2d at 768 (citing *Bryan v. Divita*, 315 C.A. 1972 (N.C.C.)) (*no* implied agreement created when claimant sought to have limitations period tolled because of a single payment of $7.00 made two and a half years after the accident).

of the occurrence of a compensable accident.[23]

14. Likewise unconvincing is Bermudez' contention that there is not substantial evidence to support the Board's decision. The Board is free to accept the testimony of one expert over the opinion of another, so long as it is supported by substantial evidence.[24] Here, the Board's acceptance of Dr. Gelman's testimony over that of Dr. Covington was supported by substantial evidence. As stated by the Board, it agreed with Dr. Gelman's assessment that Bermudez had only subjective symptoms, except for the muscle spasms which did not occur until three weeks after the date of the alleged injury. It also accepted Dr. Gelman's assessment that an intervening event must have occurred from the time of the alleged injury (March 16, 2005) to the time when the spasms were first discovered (April 5, 2005). There being substantial evidence to support Dr. Gelman's opinions, based upon his examination of Bermudez

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[23] *See Garcia v. E.I. DuPont deNemours & Co.*, 2000 WL 1211308, at *2 (Del. Super. Ct. 2000) (affirming the Board's denial of claimant's petition even though the Board allegedly failed "to consider whether the payment of medical bills for over four years constituted an implied agreement to provide compensation"). *See also* DEL. CODE ANN. tit. 19, § 2344(a) ("If the employer and the injured employee ... reach an agreement in regard to compensation or other benefits in accordance with this chapter, a memorandum of such agreement signed by the parties in interest shall be filed with the Department and, if approved by it, shall be final and binding unless modified as provided in § 2347 of this title. Such agreement shall be approved by the Department only when the terms thereof conform to this chapter.").

[24] *See DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982) ("As we view the case, the evidence was definitely in conflict and, the substantial evidence requirement being satisfied either way, the Board was free to accept the testimony of Dr. Vates, the employer's expert neurologist, over contrary opinion testimony."); *Carpenter v. Mattes Electric*, 1997 WL 528044, at *3 (Del. Super. Ct. Apr. 9, 1997) (same).

and a review of a portion of his medical records, the Board could appropriately accept Dr. Gelman's testimony over that of Dr. Covington's.

15. The Board's finding that Bermudez was not credible also was supported by substantial evidence. "It is the function of the Board to determine the demeanor and credibility of witnesses and the weight to be accorded their testimony, and [it is] not the function of the Superior Court to substitute its judgment for that of Board members."[25] The Board properly identified the factors upon which it concluded that Bermudez was not believable. The Board found that Bermudez likely was towing vehicles while at his automobile repair business (according to Raymond White) during the time of his alleged injury. He also did not report back to work at PTFE for two weeks after the alleged injury, even though Dr. Covington only removed him from work for one week. What further cast doubt on Bermudez' credibility was his need for an interpreter at the hearing even though the evidence showed that Bermudez was capable of reading English and graduated from a Delaware public high school. The Board's assessment of Bermudez' credibility was appropriate and its finding that he was not believable was supported by substantial evidence.

16. Accordingly, the Board's decision that Bermudez failed to meet his burden to establish that his injury occurred at a fixed time and place and that it was

[25] *Bender v. Am. Appliance*, 1996 WL 527282, at *3 (Del. Super. Ct. Jul. 16, 1996).

attributable to a clearly traceable incident of his employment with PTFE was supported by substantial evidence and will not be disturbed by this Court.[26]

17. Based on the foregoing, the decision of the Board denying Bermudez' Petition to Determine Compensation Due is **AFFIRMED**.

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary

[26] Bermudez also argues on appeal that he is entitled to loss of wage benefits for the period between the alleged accident and the date when he was released to return to work without restrictions. *See* D.I. 6 at 22-30. The Court need not address this argument, however, because of its finding that the Board's decision is free from legal error and supported by substantial evidence.