IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BRUCE GLANDEN,	:	
	:	C.A. No. 05A-12-004 WLW
Claimant-Below, Appellant,	:	
v.	:	
LAND PREP, INC.,	:	
Employer-Below, Appellee.	:	

Submitted: May 9, 2006
Decided: August 23, 2006

ORDER

Upon Appeal From a Decision of the Industrial Accident Board. Denied.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for the Claimant-Below, Appellant.

Dennis J. Menton, Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorneys for the Employer-Below, Appellee.

WITHAM, R.J.

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

Claimant-below, Appellant, Bruce Glanden ("Mr. Glanden"), filed an appeal with this Court seeking review of a decision of the Industrial Accident Board (the "Board"), which denied his Petition to Determine Additional Compensation Due (the "Petition"). The Petition sought twenty to fifty percent permanent impairment benefits due to an industrial accident that occurred on March 27, 2001, as well as authorization for medical treatment to repair his windpipe. Employer-below, Appellee, Land Prep, Inc. ("Land Prep"), argued that there was no permanent impairment to the brain related to his industrial accident. Land Prep also asserted that it agreed to pay for the windpipe repair more than thirty days before the hearing, so there is no need for an order from the Board.

The salient facts are as follows: On March 27, 2001, Mr. Glanden suffered a significant crush injury to the torso, clavicle and elbow. He developed pneumothorax, became hypotensive, was air-lifted to the Washington Hospital Center in Washington, D.C., given blood transfusions, sedated, intubated, put into an artificial coma, placed on a ventilator and was left with chronic problems. Mr. Glanden underwent several surgeries, including a right thoracotomy, repair of the lung laceration, had his ribs placed back to where they were supposed to be located, repair of an open right elbow fracture and repair of the liver. Mr. Glanden also underwent a tracheostomy due to his respiratory problems.

As of June 2003, Mr. Glanden still had tremendous pain to the upper right

extremity, trouble with respiration and pain radiating in the anterior chest wall and difficulty with concentration and memory. He had shortness of breath, fatigue with walking, anterior chest wall pain and headaches. Mr. Glanden also described emotional disturbances and headaches.

The Board detailed the testimony of the numerous physicians. Those relevant to this appeal are Kishor Patil, M.D. ("Dr. Patil"), a board-certified neurologist, who opined that Mr. Glanden suffers from a fifty percent permanent impairment to the brain. Dr. Patil relied on the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition (the "Guides") to evaluate Mr. Glanden. Dr. Patil based his conclusion on Mr. Glanden's shortened attention span, significant reduction in object recall, hypersomnia, fatigue, sleep-wake cycle disturbances, emotional disturbances, social inhibition and net cognitive impairment. Dr. Patil conducted a mini mental status examination and found cognitive defects. He then worked backwards from the examination and believed from Mr. Glanden's medical history that Mr. Glanden suffered oxygen deprivation.

Stephen J. Rodgers, M.D. ("Dr. Rodgers"), board-certified in occupational medicine, testified that Mr. Glanden suffers from a twenty percent permanent impairment to the brain related to his industrial accident. Dr. Rodgers also relied upon the Guides in making his determination. He performed a screening mental status examination and determined that Mr. Glanden was oriented to time, place and person, could spell the word "world" backwards, did okay with serial sevens and object recall and was very concrete in his interpretations of proverbs and expressions.

Lanny Edelsohn, M.D. ("Dr. Edelsohn"), a neurologist, testified that Mr. Glanden did not suffer a brain injury due to a lack of oxygen to the brain at the time of his accident. Dr. Edelsohn opined that the body adjusts itself to function on lower oxygen levels and lower blood supply, when it experiences trauma. He believed that the care Mr. Glanden received was very sophisticated and effective, therefore, he did not experience the injuries that might have occurred without that kind of care. Dr. Edelsohn, as well as Dr. Rodgers, both testified that there are absolutely no objective findings that Mr. Glanden suffered a brain injury. Dr. Edelsohn disagrees with Dr. Rodgers as to the subjective complaints. Dr. Edelsohn does not believe that they are evidence of a brain injury. In fact, Dr. Edelsohn believes that there are more plausible explanations for his subjective complaints, such as side effects from his medication. Dr. Edelsohn also observed that Mr. Glanden can lay down new memories, which people with brain injuries are not able to do.

Dr. Edelsohn also strongly disagreed with Dr. Patil's finding of fifty percent permanent impairment. According to Dr. Edelsohn, a person with fifty percent permanent impairment would need constant supervision, would not be able to dress himself, would have difficulty with personal hygiene and might be wheelchair-bound. Dr. Edelsohn noted that in Dr. Patil's mini mental status examination, Mr. Glanden was unable to spell "world" backwards, for which he lost points. However, in subsequent tests with Dr. Rodgers and Dr. Edelsohn, Mr. Glanden successfully spelled "world" backwards. Thus, he believes that it is a skill that Mr. Glanden can do and if he had brain damage, he would continue to have difficulty with that task.

Albert A. Rizzo, M.D. ("Dr. Rizzo"), board-certified in pulmonary medicine, critical care medicine and sleep medicine, opined that Mr. Glanden's symptoms are likely caused by sleep apnea. Dr. Edelsohn agreed with Dr. Rizzo on this diagnosis. Dr. Rizzo recommended an overnight polysomnogram on at least two occasions, but Mr. Glanden refused to go through with the study, despite the fact that Land Prep has already acknowledged compensability for the polysomnogram.

As a result of the foregoing testimony, the Board found that Dr. Edelsohn was the most persuasive of all the physicians and accepted his testimony that Mr. Glanden did not suffer any permanent impairment to the brain related to his industrial accident.

For the reasons set forth below, Mr. Glanden's appeal of the decision of the board denying his Petition is *denied*.

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.[1] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] This Court will not weigh the evidence,

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[1]*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.

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

determine questions of credibility, or make its own factual findings.[3] Errors of law are reviewed de novo. Absent error of law, the standard of review for a Board's decision is abuse of discretion.[4] The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."[5] Additionally, "this 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."[6] "Only where no satisfactory proof exists to support the factual finding of the Board may the Superior Court overturn it."[7]

Discussion

Mr. Glanden advances seven arguments with respect to his appeal. They will be addressed seriatim below.

1. <u>The Board Erred as a Matter of Law Because the Doctrines of *Res Judicata* and Collateral Estoppel Bar Relitigation of the Issue of Mr. Glanden's Injury</u>:

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

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

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

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

[7]*Jules-Hall v. Cash Systems, Inc.*, 2006 WL 1679572 (Del. Super.).

Mr. Glanden argues that *res judicata*[8] and collateral estoppel bar relitigation of the issue of his injury. Specifically, Mr. Glanden asserts, "[b]ecause the Board determined in two prior proceedings the nature, extent and cause of the Claimant's injuries, it is barred under the doctrines of collateral estoppel and *res judicata* from revisiting those issues of fact and conclusions of law."

Mr. Glanden cites to *Whalen v. State*[9] as support for his proposition. In *Whalen*, the Superior Court determined that the Board may modify a compensation agreement between a claimant and an employer if there is mutual mistake. In that case, the mutual mistake concerned the amount of compensation the claimant was entitled to under certain statutes. *Whalen* is inapposite to the case at bar. Here, the Board was not modifying a compensation agreement. Instead, the Board was considering the issue of whether some of Mr. Glanden's problems were caused by a brain injury from the industrial accident. The Board noted:

> Previously, the Board simply found that Claimant's history of concentration and memory problems were substantiated by the medical testimony of Dr. Viloria. In the current matter before the Board, no one denied that Claimant has concentration and memory problems, the issue involves whether those problems are caused by a brain injury from the

[8]"Under the doctrine of *res judicata,* a party is foreclosed from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties." *See Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000). "Similarly, where a court or administrative agency has decided an issue of fact necessary to its decision, the doctrine of collateral estoppel precludes relitigation of that issue in a subsequent suit or hearing concerning a different claim or cause of action involving a party to the first case." *See Id.*

[9]1994 WL 636915 (Del. Super.).

industrial accident.[10]

This Court agrees with the Board's assessment of the situation and, therefore, concludes that the issue of whether Mr. Glanden's problems are caused by a brain injury from the industrial accident is not barred by either *res judicata* or collateral estoppel.

2. <u>The Board's Failure to Decide the Issue of Permanent Impairment is an Error of Law Requiring Reversal</u>:

Mr. Glanden next contends that the Board should be reversed because in *Lindsay v. Chrysler Corp.*,[11] the court determined that the Board erred as a matter of law when it failed to address the issue of permanency by not "articulat[ing] a standard for determining permanence or otherwise address[ing] the issue." Conversely, Land Prep argues that the Board accepted Dr. Edelsohn's testimony and also based its decision on specific factual findings of Mr. Glanden's medical condition as testified to by Dr. Edelsohn.

This Court has reviewed *Lindsay* and finds it is distinguishable from this case. Specifically, in *Lindsay*, the Board only wrote one cursory paragraph explaining that it was accepting the testimony of the employer's physician based on a lack of objective test findings to support the employee's subjective complaints. Here, the Board's goes into extensive detail as to why it accepted the testimony of Dr. Edelsohn

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[10] *Glanden v. Land Prep., Inc.*, IAB Hearing No. 1187374 (December 5, 2005), at 19.

[11] 1994 WL 750345, at *4 (Del. Super.).

over that of Drs. Patil and Rodgers. For example, with respect to its decision to accept Dr. Edelsohn's testimony that Mr. Glanden does not suffer from any permanent impairment to the brain, the Board states, "[t]here are other more likely explanations for Claimant's symptoms including medication side effects and/or sleep apnea. . . . The Board also accepts Dr. Edelsohn's testimony that fatigue, lethargy, headaches, and sleepiness are not symptoms of brain damage, and that the Claimant's complaints are the kind that are most commonly seen related to medication." The Board also noted that Mr. Glanden is able to lay down new memories, and that patients with brain injuries from low oxygen or blood supply have deficits at the beginning and show improvement over time, which did not occur in this case.

In *Lindsay*, the court states, "[h]aving carefully considered the record below, the Court cannot determine, 'whether the Board proceeded upon a correct theory of law, or whether its findings are based upon competent evidence,' and therefore reverses the decision below and remands the case to Board." Such is not the case here. I find that the opinion of the Board is articulate, well-reasoned and clearly addresses the issue of permanent impairment. Thus, Mr. Glanden's second argument fails.

3. <u>The Board's Reliance Upon Medical Records of Doctors Who Never Testified is Plain Error and An Abuse of Discretion</u>:

Mr. Glanden asserts that the Board's reliance on medical records from Washington Hospital is plain error and an abuse of discretion because the records are inadmissible hearsay since the doctors who created those records never testified. Mr.

Glanden cites two cases wherein the Superior Court reversed the Board for relying on hearsay in determining a pivotal issue.[12] Land Prep argues that Mr. Glanden is incorrect in saying that the Board's reliance on the information garnered from the medical records establishes a pivotal issue. I agree with Land Prep.

Both parties correctly observed that evidentiary rules are relaxed in hearings before the Board.[13] In *Morris*, the court opined, "to have relied solely on hearsay evidence to establish a pivotal issue constitutes plain error and an abuse of discretion."[14] In *Reliable Corp.*, the court determined that the decision regarding surgery was beyond the expertise of the physician who testified and, consequently, "[the Board's] findings on critical medical issues cannot simply be based upon the reading into the record of a doctor's report or the third party reporting of oral comments made by the doctor who was the decision maker as to the surgery in dispute."

In the case *sub judice*, both cases are clearly distinguishable. Here, the Board relied on the medical records from Washington Hospital to determine if anyone at the hospital ever suggested that Mr. Glanden had mental or cognitive problems. The only reason that inquiry was relevant was based on Dr. Edelsohn's testimony that patients with brain injuries have deficits in the beginning of the injury, which slowly improve

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[12]Those cases are *Morris v. Gillis Gilkerson, Inc.*, 1995 WL 562132 (Del. Super.) and *Reliable Corp. v. Sierra*, 1999 WL 743879 (Del. Super.).

[13]*See Morris*, 1995 WL 562132, at *5.

[14]*Id.*

over time. I do not find this to be a pivotal issue. The Board's decision to accept Dr. Edelsohn's testimony is based on several reasons, only one of which is implicated by this argument. *Reliable Corp.* has no relevance at all because Dr. Edelsohn did not read into the record the medical reports from Washington Hospital, nor was he a third party reporting oral comments by another doctor. Because I determined that this was not a pivotal issue, *Morris* is inapplicable as well. Therefore, this contention is unsuccessful.

4. The Board's Finding that Mr. Glanden Refused Treatment is Not Supported by Substantial Evidence and is An Abuse of Discretion:

Mr. Glanden asserts that the Board committed reversible error because it stated, "Claimant refuses to undergo the polysomnogram and blood tests."[15] Mr. Glanden claims that he did not refuse to undergo either the polysomnogram or blood tests. Mr. Glanden also asserts that if sleep apnea is present, or the medications are causing his problems, under *Reese v. Home Budget Center*,[16] such impairments would be the result of the work accident and a proper basis for a permanency award. Land Prep explains that Dr. Rizzo recommended the tests as part of the differential diagnosis of Mr. Glanden's condition, that those tests constituted reasonable medical treatment, and that the tests were never administered.

As for Mr. Glanden's argument under *Reese*, it seems as though he has missed

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[15] *Glanden*, IAB Hearing No. 1187374, at 23.

[16] 619 A.2d 907 (Del. 1992).

the point. If Mr. Glanden's problems are, in fact, the result of sleep apnea or a side effect of his medication, that is further evidence that he does not have a permanent impairment to his brain. It would mean that the differential diagnoses suggested by Dr. Rizzo, and supported by Dr. Edelsohn, were correct. While it may give rise to another petition for further compensation, it would not be reversible error on the part of the Board.

It is the opinion of this Court that the statement contested by Mr. Glanden does not affect the Board's ultimate decision. Even if that particular statement is inaccurate, it does not amount to an abuse of discretion. The Board's decision clearly rests on its acceptance of Dr. Edelsohn's testimony over that of Dr. Patil and Dr. Rodgers. Moreover, while the Board's use of the word "refuses" might be strong, there is evidence that Dr. Rizzo suggested these tests, that Land Prep has acknowledged the tests as compensable, yet Mr. Glanden has not had either a polysomnogram or blood tests performed. The Board's determination that Mr. Glanden does not have a permanent impairment of his brain related to his industrial accident did not rely on its belief that Mr. Glanden refused to undergo a polysomnogram or blood tests. Thus, there is no abuse of discretion.

5. The Board Erred as a Matter of Law When it Disregarded Undisputed Medical Testimony that Mr. Glanden was Confused:

Mr. Glanden contends that because Dr. Rodgers testified that Mr. Glanden had a twenty percent impairment to the brain because of his confusion, and there was no testimony disputing that Mr. Glanden was confused, the Board erred as a matter of

law in disregarding his testimony. Land Prep argues that the Board was free to accept the opinion Dr. Edelsohn and reject the opinion of Dr. Rodgers.

Confusion was a subjective complaint on which Dr. Rodgers based his conclusion that Mr. Glanden suffered from a twenty percent permanent impairment to his brain. While Dr. Edelsohn also considered confusion a subjective complaint, he determined that Mr. Glanden did not, in fact, suffer a permanent impairment to his brain. Delaware case law clearly establishes that the Board is entitled to choose between conflicting medical opinions, and that its decision will constitute substantial evidence for the purposes of appeal.[17] That is precisely what the Board did here; it chose to accept the testimony of Dr. Edelsohn, a decision which constitutes substantial evidence. While the doctors may have agreed on some subjective complaints, they ultimately reached different opinions. The Board chose to accept the opinion of Dr. Edelsohn. This does not amount to disregarding undisputed medical testimony. It was the doctors' respective opinions that were pertinent, not what subjective complaints they observed. Therefore, the Board did not err as a matter of law as Mr. Glanden suggests.

6. <u>The Board's Reasons for Preferring Dr. Edelsohn's Testimony Over Dr. Rodgers' are Unsupported by Substantial Evidence and Contrary to Law</u>:

Mr. Glanden argues that pursuant to *Diamond Fuel Oil v. O'Neal*[18] and *Hinckle*

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[17] *See Id.* at 910.

[18] 734 A.2d 1060 (Del. 1999).

v. Short Enterprises, Inc.,[19] Dr. Edelsohn's testimony amounted to speculation and, consequently, did not amount to substantial evidence on which the Board could reject the opinion of Dr. Rodgers.

The Board specifically addressed this argument of Mr. Glanden in its decision. The Board stated:

> The Board finds that Dr. Edelsohn's opinion amounts to substantial evidence in this case. This case is distinguishable from *O'Neal* in that Dr. Edelsohn had a clear medical explanation that Claimant's complaints are not indicative of a brain injury in this case and that if Claimant had a brain injury related to the decreased oxygen and blood flow, he would not be able to lay down new memories. Claimant is able to lay new memories and has proven that ability during several conversations with Dr. Edelsohn and other physicians. Since Claimant is lacking that particular symptom, which is indicative of a brain injury as he proposes, the Board finds that Dr. Edelsohn's opinion is sufficient to be considered substantial evidence on which to base its decision. Dr. Edelsohn did not simply state that Claimant did not have brain damage from the industrial accident without further explanation, as was the situation in *O'Neal*, or that it was caused by some other non-existent accident, as in *Hinkle v. Shorts Enterprises, Inc.* (sic) Dr. Edelsohn supported his opinion with medical principles and more reasonable potential causes for Claimant's symptoms. (citations omitted).

I concur with the Board. Dr. Edelsohn concluded that Mr. Glanden did not suffer from permanent impairment to the brain. He reached this opinion based on a mini mental examination and neurological findings. He specifically ruled out low oxygen and low blood supply as causing permanent impairment to Mr. Glanden's

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[19] 2004 WL 1731142 (Del. Super.).

brain. He also provided plausible explanations for Mr. Glanden's subjective complaints. Consequently, Dr. Edelsohn's testimony is not speculation, the Board was free to accept his testimony, and such acceptance constitutes substantial evidence for the purposes of this appeal.

7. <u>The Board Abused its Discretion When it Considered a Purported Offer of Settlement Made by Land Prep</u>:

Mr. Glanden's final argument is that the Board should be reversed because it incorrectly determined that Land Prep's letter dated September 23, 2005 was an offer of settlement. Mr. Glanden argues that it does not meet the requirements of 19 *Del. C.* §2320(10)(b).[20] Land Prep asserts that the letter clearly acknowledged its responsibility for medical treatment and expenses relating to repair of Mr. Glanden's windpipe by a thoracic surgeon. Also, Land Prep observes that, based on Mr. Glanden's testimony during the hearing, the Board considered that portion of his Petition withdrawn.

In its decision regarding medical treatment, the Board explains, "during the hearing, Claimant testified that he no longer has a problem with feeling as if he is choking and the medical testimony presented indicated that Claimant does not intend to see the surgeon. Therefore, the Board finds that Claimant has actually withdrawn

[20]Section 2320(10)(b) reads, in relevant part, "[i]f multiple issues are pending before the Board, said offer of settlement shall address each issue pending and shall state explicitly whether or not the offer on each issue is severable. The written offer shall also unequivocally state whether or not it includes medical witness fees and expenses and/or late cancellation fees relating to such medical witness fees and expenses."

this portion of the petition."

As a result of the Board's determination that Claimant withdrew the portion of his Petition relating to his windpipe repair, I find that I do not have to address whether the letter was actually an offer of settlement. Such a discussion is moot. The Board's decision that Mr. Glanden was no longer seeking compensation for his windpipe repair is sufficient, and any discussion after that determination was irrelevant. Thus, Mr. Glanden's final argument is unsuccessful.

Based on the foregoing, Mr. Glanden's appeal of the Board's decision is *denied*. IT IS SO ORDERED.

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

WLW/dmh
oc: Prothonotary
xc: Order Distribution