

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROSE L. PARKE,	§	
	§	No. 82, 2005
Employee Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
SUNRISE ASSISTED	§	
LIVING, INC.,	§	No. 04A-03-004
	§	
Employer Below,	§	
Appellee.	§	

Submitted: June 15, 2005

Decided: June 29, 2005

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

ORDER

This 29th day of June 2005, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The employee-appellant, Rose L. Parke (“Parke”), appeals a judgment of the Superior Court upholding a decision of the Industrial Accident Board (the “Board”) in favor of the employer-appellee, Sunrise Assisted Living, Inc. (“Sunrise”). The Board granted in part and denied in part Sunrise’s request to terminate disability payments to Parke. We find that the Superior Court did not err as a matter of law

when it affirmed the decision of the Board. Accordingly, we affirm.

(2) Parke worked as a Certified Nurse's Aide for Sunrise from January 25, 2001 until April 24, 2003. On the latter day, while performing her routine duty of lifting a patient into a chair, Parke was knocked backward, falling onto her lower back and posterior. Consistent with the compensation agreement with Sunrise, Parke began receiving total disability benefits at the rate of \$339 per week based upon her average weekly wage of \$508.50 at the time of the work-related injury.

(3) Subsequent to the accident, Parke sought treatment at Concentra Medical Care for right low back pain to the hip and groin area. This pain continued into May 2003 when Parke began treatment with Doctor Senu-Oke of the Pain & Rehabilitation Center. During treatment, Doctor Senu-Oke conducted several diagnostic tests including both an EMG and an MRI scan. The EMG was positive for a right radicular pain, while the MRI was also positive for a central disc herniation. Parke had undergone a previous MRI scan in March 1993 after one of her prior accidents which produced similar findings.

(4) Sunrise filed a petition for termination of benefits with the Board on October 2, 2003. Sunrise alleged that Parke was physically capable of returning to work and no longer in need of disability payments. A hearing was scheduled for February 4, 2004 at which time the Board heard testimony from both Doctor Senu-

Oke and Sunrise's medical expert Doctor Willie Edward Thompson, who had examined Parke on July 7, 2003 and again on December 29, 2003.

(5) Doctor Senu-Oke testified that the results from Parke's more recent 2003 MRI were strikingly different from those of the previous 1993 MRI. In Doctor Senu-Oke's analysis, the 1993 MRI revealed only mild degenerative changes at the disc levels with only a minimal central bulging disc. In his opinion, the herniations and protrusions shown in the 2003 MRI were clearly different from and more serious than those shown in the 1993 MRI. Doctor Senu-Oke concluded that these differences were directly attributable to the industrial accident suffered on April 24, 2003. Conversely, Doctor Thompson testified that Parke had sustained soft tissue injuries with no positive findings. He opined that Parke was capable of full-time work without restriction.

(6) After hearing all testimony, the Board found that Parke was no longer physically disabled and that after December 29, 2003 she was no longer entitled to any ongoing loss of earning capacity benefit. The Board awarded a limited claim of partial disability benefits for the period from October 2, 2003 through December 29, 2003. Parke appealed to the Superior Court, which affirmed the Board's decision. This appeal followed.

(7) Parke's sole argument is that the Superior Court erred when it affirmed the

decision of the Board because the Board erred in accepting the testimony of Doctor Thompson. Parke argues that Dr. Thompson ignored objective findings as well as diagnostic testing and that he lacked legally adequate support for his findings and opinion. An appellate court reviews the legal conclusions of the Board *de novo*,¹ and reviews the Board's factual findings to determine whether they are supported by substantial evidence.² Substantial evidence is more than a mere scintilla, but less than a preponderance of the evidence.³

(8) Doctor Thompson testified that he made no objective findings whatsoever during his physical examination of Parke. Instead, he found Parke to be perfectly fit to return to work. Doctor Thompson's opinion was also supported by the findings of Doctor Kalamchi, who had examined Parke three weeks after the accident and who came to the very same conclusion. The only objective findings made by a doctor were those of Doctor Senu-Oke and even those were limited to muscle tightness and a decreased range of motion. Doctor Senu-Oke himself testified that there were numerous possible causes for the muscle tightness other than the accident, including something as simple as a lack of stretching. Doctor Thompson also discounted Doctor Senu-Oke's range of motion finding, pointing out that it lacked objectivity because

¹ *Scheers v. Independent Newspapers*, 832 A.2d 1244, 1246 (Del. 2003) (citations omitted).

² *A. Mazzetti & Sons, Inc. v. Ruffin*, 437 A.2d 1120, 1122 n.2 (Del. 1981) (citation omitted).

³ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

it was based entirely on the patient's report of pain.

(9) Doctor Thompson provided evidence directly challenging the reports of the EMG and MRI. Doctor Thompson noted that an MRI is nothing more than a computer generated image and is not an actual likeness. According to Doctor Thompson, the analysis accompanying the test is based solely on what the computer generates and a false positive is always possible. Doctor Thompson further noted that even if the results were accurate, it is certainly possible to have the condition without any symptomatology. Doctor Thompson testified that if Parke did have a nerve root compression as the MRI revealed, she would have shown signs of muscle wasting/weakness, depressed reflexes and atrophy. Yet, he noted that none of those symptoms were present in Parke's physical examination. Doctor Kalamchi provided similar testimony. Doctor Thompson also questioned the findings of Doctor Grossinger, who had conducted the EMG, pointing out that there was no clinical evidence supporting the diagnosis of chronic nerve impairment. This too was supported by Doctor Kalamchi. Doctor Thompson opined that even if Parke was suffering from a chronic nerve impairment, that condition would have been present for six to twelve months, thereby pre-dating the industrial accident.

(10) Even if the Board had accepted Doctor Senu-Oke's testimony that Parke was suffering from an injury to her cervical and lumbar spine regions, the causal

connection between the injury and the April 2003 accident was also disputed. Prior to the April 2003 accident, Parke had been involved in five industrial and automobile accidents , each involving strains and sprains of the lumbar and cervical spine. These accidents include a 1992 workplace accident, a 1995 motor vehicle accident in which Parke was thrown and twisted to the right, two more motor vehicle accidents in 1996, and a 1998 work-related motor vehicle accident in which her car flipped over. The Board noted that the 1993 and 2003 MRI's were sufficiently similar to support a diagnosis of only lumbar sprain with no evidence of radiculopathy arising from the April 2003 work accident. Any significance that could be attributed to the 2003 MRI predated the 2003 work accident and was a degenerative result of one of Parke's previous work accidents.

(11) By refuting the objective findings as well as the EMG and MRI testing, Doctor Thompson's testimony provided sufficient evidence for the Board to conclude that Parke no longer suffered from an injury directly related to the industrial accident. The Board, after weighing the testimony of Doctor Senu-Oke against that of Doctor Thompson, found Doctor Thompson's testimony to be more convincing. Since the record supports the Board's findings, the appellate court must accept them even if it might have reached a different conclusion on its own. Here, the Superior Court did not err when it affirmed the Board's decision.

NOW, THEREFORE, IT IS SO ORDERED that the judgment of the Superior Court is ***AFFIRMED***.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice