IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELI BERMUDEZ,	§	
	§	No. 479, 2006
Appellant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
PTFE COMPOUNDS, INC.,	§	C. A. No. 05A-11-011
	§	
Appellee Below,	§	
Appellee.	§	

Submitted: March 14, 2007
Decided: March 29, 2007

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

ORDER

This 29th day of March 2007, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Eli Bermudez-Rodriguez ("Bermudez"), appellant below-appellant, appeals from a Superior Court decision denying his Petition to Determine Compensation Due. Bermudez presents two arguments on appeal: (a) the decision of the Industrial Accident Board ("IAB" or the "Board") was not supported by substantial evidence, and (b) the Board was biased against Claimant because he used a Spanish-English interpreter at the hearing. Because the IAB's decision is free from legal error and there is substantial evidence to support its decision, we affirm.

2. Bermudez claims that he injured his back while working as a machine operator for PTFE Compounds, Inc. ("PTFE").[1] PTFE is a family-run business. Its owner is Ray White ("Ray") and its supervisor is his son, Jonathan White ("Jonathan").

3. Bermudez claims that on March 16, 2005, he initially felt pain in his lower back at approximately 8:30 a.m., but did not report his injury to Jonathan until sometime during the ten o'clock hour. In accordance with company policy, Jonathan advised Bermudez to seek medical treatment from Christiana Care, Occupational Health ("CCOH").

4. That same day, Bermudez reported to CCOH and began treatment with Dr. Josette Covington, a specialist in internal medicine and general preventive medicine. Dr. Covington noted that Bermudez presented with complaints of back pain. Her examination revealed tenderness to Bermudez's lower back and a limited range of motion; however, Bermudez had no muscle spasms and the results of his straight leg test were negative. Dr. Covington concluded that Bermudez suffered an acute back injury, which she and diagnosed as a lumbar sprain. She recommended physical therapy and that Bermudez refrain from work until his next scheduled visit with CCOH.

[1] As a machine operator, Bermudez lifted Teflon powdered trays (each weighing less than 25 pounds), onto a drum, rolling the drum over to the sifter machine and adding powder to the sifter. He was performing that duty at the time of the alleged incident.

5. One week later, Bermudez returned to CCOH and met with Betsy Ekey, a physician's assistant. Ms. Ekey noted that Bermudez still complained of back pain and limited range of motion. She recommended that Bermudez perform only light duty work, with a five pound lifting restriction and minimal bending and twisting. Over the next month, Bermudez met twice more with Ms. Ekey, whose recommendations remained unchanged.

6. On March 28, 2005, Bermudez returned to work at PTFE. He was assigned light duty work that accommodated his work restrictions. Despite verbal warnings from his supervisors at PTFE, Bermudez continually violated his restrictions during that week. Accordingly, Bermudez was "suspended from work until his condition is restored to full duty" and was asked to sign an "Employee Warning Notice."[2] Bermudez refused to sign the notice and did not return to work after that day. PTFE terminated Bermudez, citing job abandonment for failure to return to work without further communication.

7. Less than one month later, Bermudez filed his Petition to Determine Compensation Due. He sought temporary partial disability from May 12, 2005 (the day after he was permitted to resume full duty work) because his new job paid

[2] *See* Appellant's Revised Opening Br., Exhibit 4.

a lower compensation rate than PTFE.[3] On June 24, 2005, before the IAB hearing, Dr. Andrew J. Gelman, a board certified orthopedic surgeon, examined Bermudez and reviewed the medical records from Dr. Covington and Ms. Ekey.[4] Although he observed some muscle spasms, he found no other objective symptoms. Dr. Gelman testified that the results of Bermudez's physical evaluation were "completely normal." Dr. Gelman also opined that an intervening event must have caused the spasms during the interval between the alleged injury at PTFE and when the spasms were discovered, because spasms do not normally occur three weeks after an injury. Moreover, Dr. Gelman opined, Bermudez had not suffered an acute injury.

8. On September 27, 2005, the Board held a hearing on Bermudez's petition. Bermudez testified, as did Raymond and Jonathan White. Bermudez testified in Spanish and used a Spanish-English interpreter. The depositions of Drs. Covington and Gelman were read into evidence. After hearing the evidence, the IAB denied Bermudez's petition, finding that Bermudez had not met his burden of proving that his injury occurred at a fixed time and place and was attributable to a clearly traceable incident of his employment.

---

[3] The same day, PTFE notified CCOH that it would no longer accept invoices for Bermudez's treatment.

[4] Dr. Gelman also had Bermudez's physical therapy records and x-rays.

9. The standard of review for decisions of the IAB is limited to whether the decision is supported by substantial evidence[5] and is free from legal error.[6] On appeal from the Board, the reviewing "court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[7] Those functions are reserved for the Board. Absent errors of law, the standard of review of the Board's decision is abuse of discretion.[8]

10. Bermudez contends that there was not sufficient evidence to support the Board's denial of his petition. Specifically, he disputes the IAB's conclusion that he did not meet his burden of proving his claim that an accident occurred while he was working at PTFE.[9] In essence, Bermudez's claim is that the IAB erred in not believing him. Bermudez cites no case law to support his contention that the Board was obligated to believe him. Rather, he points to other evidence that raises issues of credibility. For instance, Bermudez notes that he told Ray White the

---

[5] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Oceanport Indus. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

[6] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

[7] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

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

[9] For an injury to be compensable under 19 *Del. C.* § 2304, the injury must have arisen out of the employment and must have occurred in the course of the employment. *Ross v. Cadillac Fairview Shopping Ctr. Prop., Inc.*, 668 A.2d 782, 786 (Del. Super. 1995).

location of the accident and that it occurred while he was doing his work.[10] Additionally, Bermudez faults the IAB for relying on Dr. Gelman's testimony rather than that of Dr. Covington.

11. It is well-settled that on appeal from the decision of an administrative agency, our review is limited, especially in determining questions of credibility. Simply stated, "[w]e will not substitute our judgment for that of the members of the Board as to credibility."[11]

12. As for Bermudez, the IAB did "not find Claimant believable."[12] In support of its conclusion, the IAB noted the inconsistency between Bermudez's subjective complaints of pain and his ability to be present at his auto repair

---

[10] Appellant's Revised Opening Br. at 14. He also points to PTFE's internal documentation of the incident, its direction to send Bermudez to CCOH and its subsequent payment of Bermudez's treatment at CCOH. However, PTFE contends its payment of Bermudez's medical bills was an accounting error. Bermudez also cites these facts to argue that they create "a de facto agreement to pay worker's compensation benefits." This argument is unconvincing. As noted by the Superior Court, "Bermudez cites no authority, nor can this Court locate any support, for the proposition that an implied agreement was created when PTFE sent Bermudez to CCOH and initially paid two of the bills that Bermudez incurred during his treatment." Moreover, this argument was not properly before the Board and accordingly, the Board rendered no such decision. *See Bermudez v. PTFE Compounds, Inc.*, 2006 WL 2382793 *3 (Del. Super. Aug. 16, 2006).

[11] *Air Mod Corp. v. Newton,* 215 A.2d 434, 438 (Del. 1965).

[12] *Bermudez v. PTFE Compounds, Inc.*, IAB Hearing No. 1267189 at 9 (Sept. 27, 2005).

business.[13] Moreover, Bermudez did not report to work at PTFE for two weeks even though Dr. Covington removed him from work for only one week. Also casting doubt on Bermudez's credibility was his testimony that he was not driving his tow truck while working for PTFE. Raymond White testified, however, that Bermudez drove the truck to work most days.[14]

13. Bermudez challenges to the IAB's decision to accept the testimony of Dr. Gelman over that of Dr. Covington, must fail. The Board is free to choose between conflicting medical expert opinions, and either opinion constitutes substantial evidence for purposes of appeal.[15]

14. Lastly, Bermudez contends that the Board's reliance on his use of an interpreter in determining his credibility was improper.[16] But, the Board did not

---

[13] Raymond White testified that he saw Bermudez coming out of Bermudez's repair shop carrying "a lot of keys in his hand and a rag, like a mechanics rag, walking towards a car parked perpendicular to the entrance." This incident occurred on March 21, 2005, a day during which Dr. Covington had ordered Bermudez not to work.

[14] In fact, the IAB actually found that Bermudez was likely towing vehicles while at his automobile repair business during the time of his alleged injury.

[15] *DiSabatino Bros. Inc., v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

[16] Bermudez directs the Court's attention to Delaware Supreme Court Administrative Directive 107 (1996) which states:

> This Court seeks a fair trial for all regardless of the language a person speaks and regardless of how well a person may, or may not, use the English language. Bias against or for persons who have little or no proficiency in English, or because they do not use English is not allowed. The fact that any party requires an interpreter must not influence you in any way. . . . Treat the interpretation of the witness's testimony as if the witness had spoken English and no interpreter was

question Bermudez's credibility based his use of the interpreter. Rather, the Board questioned whether he needed an interpreter at all. There was evidence of record that showed Bermudez, who graduated from a Delaware public high school,[17] was capable of reading English and, in fact, often interpreted for other Spanish-speaking PTFE employees.

15. The IAB articulated the factual basis for its conclusion that Bermudez failed to meet his burden to establish that his injury occurred while he was working at PTFE. There is substantial evidence in the record to support that conclusion, and we affirm.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

---

present. Do not allow the fact that testimony is given in a language other than English to affect your view of the witness's credibility.

[17] *Bermudez v. PTFE Compounds, Inc.*, IAB Hearing No. 1267189 at 10 (Sept. 27, 2005).