IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Janet Goldsborough,	)	
	)	
Employee-Appellant,	)	
	)	
v.	)	C.A. N10A-01-013 JRJ
	)	
New Castle County,	)	
	)	
Employer-Appellee.	)	

Date Submitted: December 10, 2010
Date Decided: January 5, 2011

Upon Appeal from the Industrial Accident Board: **AFFIRMED.**

OPINION

Michael R. Ippoliti, Esquire, 1225 King Street, Suite 900, Wilmington, Delaware 19801, Attorney for Appellant.

Wilson B. Davis, Esquire, Assistant County Attorney, 87 Read's Way, New Castle, Delaware 19720, Attorney for Appellee.

JURDEN, J.

INTRODUCTION

Appellant, Janet Goldsborough (hereinafter "Claimant"), files this appeal from the Industrial Accident Board's (the "Board") decision to deny her Petition for Additional Compensation. For the reasons explained below, the Court finds that the Board's decision is supported by substantial evidence and is free from legal error. Accordingly, the Board's decision is **AFFIRMED.**

FACTS AND PROCEDURAL HISTORY

Claimant worked for New Castle County (hereinafter "Employer" or the "County") as a mailroom clerk from 1966 until 1984. Claimant's job entailed lifting heavy boxes, sorting and stamping bills, walking and lifting, and sometimes driving the mail truck. On February 16, 1983, Claimant sustained a compensable industrial injury to her neck and low back. In 1986 she was awarded total disability from August 23, 1985. The Board awarded her an additional 5% permanency in January 1988 and an additional 5% permanency in 1991. Claimant filed a Petition for Additional Compensation in July of 1997, seeking payment for medical expenses. The Board found Claimant had reached maximum medical improvement as of September 21, 1995, and that further treatment was unnecessary. However, the Board awarded Claimant medical expenses for costs incurred prior to September 21, 1995. In 1999, the Superior Court and Supreme Court affirmed the 1997 Board decision.[1]

In 2003, Claimant again petitioned for additional compensation. At the Hearing, Claimant's experts opined that her worsening injuries were related to the 1983 accident, while Employer's expert claimed the deteriorating condition was related to degenerative arthritis. The Board found Employer's expert more persuasive and denied Claimant's Petition.

[1] *Goldsborough v. New Castle County*, 1999 WL 464002, at *1 (Del. Super. May 28, 1999), *aff'd*, 1999 WL 1193045 (Del. Nov. 29, 1999).

On September 15, 2008, Claimant filed a Petition to Determine Additional Compensation, alleging a recurrence of total disability following neck surgery performed by Dr. Reginald Davis.[2] A Pretrial Conference was held on November 6, 2008, and the Petition was scheduled for a Hearing on February 19, 2009. On November 14, 2008, James Robb, Esq. (hereinafter "Robb"), entered his appearance on Employer's behalf. On December 24, 2008, New Castle County Assistant Attorney Wilson Davis, Esq. (hereinafter "Davis"), was formally substituted as Counsel of Record. Robb became the County's "Acting Risk Manager."[3]

The Parties agreed to reschedule the Hearing for April 14, 2009. On March 11, 2009, Employer completed and filed its portion of the Pretrial Memorandum. Robb prepared the Employer's portion and signed it as "Attorney for the Employer/Carrier". In the Pretrial Memorandum, Employer named two witnesses: "Dr. Steven Friedman" and "Dr. Alan Fink." Employer listed several defenses including, *inter alia,* statute of limitations and estoppel worded as: "[p]rior decisions have decided these issues and are Law of the Case."[4]

On March 13, 2009, Employer filed a Motion to Dismiss, arguing the Petition was time barred pursuant to 19 *Del. C.* § 2361(b), the applicable Statute of Limitations. On March 17, 2009, Davis wrote a letter to Claimant,[5] informing her of the statute of limitations defense, and submitted an 11 page payment log ("First Payment Log"), which documented the County's history of payments in relation to Claimant.[6] Included in the First Payment Log, was an invoice relating to a payment made near the expiration of the limitations period. The invoice established

[2] Claimant originally filed a Petition to Determine Additional Compensation on June 2, 2008, but withdrew the petition and re-filed on September 15, 2008.
[3] It appears as though Robb continued as assistant counsel on behalf of the County. He signed the Pretrial Memorandum and initiated legal hearings before the Board.
[4] *See* Appellant's Opening Brief at Ex. 3.
[5] *Id*. at Ex. 5.
[6] *Id*. at Ex. 6.

that the payment was made for the deposition of Dr. Alan Fink, Employer's expert medical witness.[7]

Robb, on behalf of the Employer, requested a legal hearing before the Board to consider Employer's Motion to Dismiss, and the hearing was held on March 24, 2009. At the hearing, Robb testified that he was the Acting Risk Manager for Employer, and confirmed the payment log was a County business record that listed payments related to Claimant's work injury. After argument, the Board reserved its decision on the Employer's Motion to Dismiss, and ordered the parties to brief the Statute of Limitations issue.

On April 8, 2009, Robb requested another continuance of the Hearing date, claiming Employer had not been able to procure the deposition of its medical expert, Dr. Friedman. The next day a Hearing was held before the Board where Employer moved to continue the Hearing on the merits and requested reimbursement of cancellation fees regarding Dr. Friedman's deposition. Claimant cross-moved to preclude the testimony of Dr. Friedman and to "freeze the record." The Board entered an Order dated April 9, 2009, which: (1) granted the Employer's motion for continuance; (2) denied the County's motion for cancellation fees; (3) denied Claimant's motion to preclude Dr. Friedman's testimony; and (4) limited both parties "to calling those witnesses identified on the Pretrial Memorandum."[8] The Hearing was rescheduled for June 13, 2009.

On April 24, 2009, the Board issued its order on the Employer's Motion to Dismiss. The Board held that "the statute of limitations issue has not been adequately developed to permit a fair decision at this time," and therefore, the Motion to Dismiss was denied. The Board held that the parties should engage in more complete discovery because Employer did not produce the

[7] Appellee's Answering Brief at Ex. C.
[8] Appellant's Opening Brief at Ex. 6.

First Payment Log (which established that the statute had run) until a few days prior to the hearing and did not identify a witness who could lay a proper foundation for the log's admittance until the day of the hearing. The Board held that Employer was permitted to raise the statute of limitations defense at the full hearing.

On May 8, 2009, Employer wrote a letter to the Board, copying Claimant, informing the Board of Employer's intention to re-raise the limitations defense. The letter went on to state that Employer intended to have Robb testify regarding the payment log.[9] Enclosed with that letter was an 11 page payment log ("Second Payment Log")[10] and all invoices documenting entries made after the start of the limitations period. Robb certified these payment documents as being "compiled on May 7, 2009 under his direction by the Department of Risk Management of New Castle County; and . . . kept in the course or regularly conducted activity of the Department of Risk Management."[11] Claimant took no action in response to the County's May 8th letter and never moved to exclude Robb's testimony.

The July 13, 2009 Board Hearing

At the Hearing, Employer moved to re-raise its Motion to Dismiss based on the statute of limitations defense. Claimant objected, arguing the record had been frozen as of April 9, 2009, thereby precluding either side from offering testimony of witnesses not identified as of April 9th, including Robb.[12] Furthermore, Claimant argued that it would be inappropriate for Robb to testify because he had regularly acted as Employer's counsel even after Davis was substituted for Robb.[13] The Board allowed Robb's testimony and permitted introduction of payment logs

[9] *Id.* at Ex. 9.
[10] The first and second payment logs are substantively the same. The Second Payment Log is in chronological order and includes additional payments made between March 17, 2009 and May 8, 2009.
[11] Appellant's Opening Brief at Ex. 10.
[12] Transcript – 3 (hereinafter "T – __").
[13] T – 4.

submitted by the County in its May 8th letter to the Board.[14] The Board ruled that its April 9th Order, precluding either side from calling additional witnesses, addressed only matters related to medical testimony and not Robb's testimony regarding the statute of limitations defense.[15] The Board also stated that Employer had in effect modified its Pretrial Memorandum and identified Robb as a witness at the March 24th Hearing.[16]

Robb testified he was the County's Acting Risk Manager, and his office processed worker's compensation claims, payments and payments made in relation to claims.[17] The Risk Management Office ("RMO") "regularly keeps receipt of the documentation evidencing payments made on a worker's compensation case as well as electronic computer based records."[18] Robb identified the Second Payment Log as reflecting payments and receipts made by the County on Claimant's behalf. Robb indicated that the payment logs were created from the County's records and were kept in the regular and ordinary course of business.[19] The Second Payment log was submitted into evidence as Employer's Exhibit #1.[20]

Following opening statements, Claimant called Dr. Pierre LeRoy as her expert medical witness, the same expert who testified on her behalf in 2003. Dr. LeRoy testified that he is a Board Certified Delaware neurosurgeon and was Claimant's primary care physician for her neck and back injuries for more than 20 years.[21] Dr. LeRoy opined that Claimant's neck condition was caused by the 1983 work accident.[22] On February 29, 2008, Claimant underwent a cervical

[14] T – 10.
[15] T – 11.
[16] T – 12-13.
[17] T – 15.
[18] T – 16.
[19] T – 17.
[20] *Id.*
[21] T – 30-31.
[22] T – 43.

discectomy and fusion by Dr. Reginald Davis.[23] Claimant reported significant relief of her neck and arm pain following the surgery.[24] Dr. LeRoy testified that the surgery was not designed to address non-work related arthritis and the surgery was reasonable and necessary to treat the neck condition caused by the 1983 accident.[25] On cross, Dr. LeRoy acknowledged that his opinion as to the cause of Claimant's condition had not changed since 2003.[26]

The County offered the deposition testimony of Dr. Friedman in its case-in-chief. Dr. Friedman opined that Claimant suffered from "spondylothesis," which was related to "an idiopathic degenerative or developmental condition."[27] Dr. Friedman did not examine the Claimant's neck and expressed no opinion about her neck, other than to state that Claimant told him her neck felt much better after surgery.[28] The County rested, and both parties presented their summations.

Board's Ruling

The Board held that "(1) the five year statute of limitations began to run by the end of 2002 with the last payment to Claimant's treating medical provider, and (2) the receipt signed by Claimant in December, 1999 provided her with adequate notice of the applicable limitations period."[29] The Board concluded that since Claimant's petition was filed on September 12, 2008, it was outside the limitations period.

Additionally, the Board concluded that even absent the statute of limitations, the claim was barred by the doctrine of collateral estoppel.[30] The Board reasoned that "the causation issue underlying Claimant's petition for additional benefits was already addressed and decided by a

[23] T – 44-45.
[24] T – 45.
[25] T – 47-48.
[26] T – 50-51.
[27] T – 90.
[28] T – 91, 94.
[29] Industrial Accident Board Decision at 9, December 30, 2009 (hereinafter IAB Decision").
[30] *Id.*

Hearing Officer in the August 27, 2003, IAB decision denying an increase in permanency."[31] "Claimant had a full and fair opportunity to litigate the causation issue in 2003, but did not prevail."[32] The Board found that "the evidence and opinions regarding causation for the spondylolisthesis in Claimant's cervical spine have not changed since 2003."[33] Therefore, the requirements for collateral estoppel were satisfied and Claimant's petition was denied.

Claimant requested and was granted oral argument, which was heard on December 10, 2010.

STANDARD OF REVIEW

On appeal, this Court determines whether the Board's decision is supported by substantial evidence and is free from legal error.[34] Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion.[35] This Court does not act as the trier of fact, nor does it have authority to weigh the evidence, decide issues of credibility, or make factual conclusions.[36] The Court's review of conclusions of law is *de novo*.[37] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[38]

THE PARTIES' CONTENTIONS

Claimant's Arguments

On appeal, Claimant argues the Board denied her due process by allowing Robb's testimony, the only non-hearsay evidence which would substantiate Employer's statute of

---

[31] *Id.*
[32] *Id.* at 12.
[33] *Id.*
[34] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. Super. 1964); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. Super. 1960).
[35] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. Super. 1994).
[36] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Super. 1965).
[37] *Reese v. Home Budget Center*, 619 A.2d 907 (Del. Super. 1992).
[38] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

limitations defense.[39] Claimant asserts that because Robb was not identified in Employer's portion of the Pretrial Memorandum, permitting Robb to testify at the Hearing was legal error. Additionally, Claimant argues the Board committed legal error by allowing Robb to testify, allegedly in violation of the Board's April 9th Order.[40] Furthermore, Claimant contends Robb's testimony violates Delaware Rule of Professional Conduct 3.7.[41] Claimant argues that it was "inappropriate for Mr. Robb to act as a witness, since he had been the attorney of record and, notwithstanding the substitution of counsel, continued to act as the County's legal counsel."[42] Claimant contends the Board abused its discretion by permitting Robb's testimony because he was not included as a witness on the Pretrial Memorandum as required by Industrial Accident Board (hereinafter "IAB") Rule 9. Claimant again attacks the propriety of Robb's testimony, arguing that the Board violated the Law of the Case Doctrine by allowing his testimony, allegedly in violation of the Board's April 9th Order, which precluded either party from offering the testimony of any witness not identified in the Pretrial Memorandum.

Claimant argues that by holding the petition barred under the doctrine of collateral estoppel, the Board denied Claimant due process by permitting an affirmative defense that was never asserted by the County.[43] Claimant argues that because Employer never asserted collateral estoppel in its Pretrial Memorandum, the Board should not have found the claim barred by collateral estoppel.

---

[39] Robb's testimony was the only non-hearsay evidence offered by the Employer to substantiate its statute of limitations defense. Without a foundation to offer payment logs into evidence, the Board could not have found the claim time-barred. *See Mullin v. W.L. Gore & Assocs.*, 2004 WL 1965879, at *1 (Del. Super. Aug. 4, 2003) ("By relying on the Payment Log without sworn testimony establishing a proper evidentiary foundation for that evidence, the Board abused its discretion.").

[40] The April 9, 2009 Order stated: "At the hearing, both parties will be limited to calling those witnesses identified on the Pretrial Memorandum on file with respect to this petition.").

[41] The Court will not address allegations of professional misconduct which are within the purview of the Office of Disciplinary Counsel.

[42] Appellant's Opening Brief at 24.

[43] *Id*. at 22, 26.

Finally, Claimant argues the Board abused its discretion by permitting the County to introduce the Second Payment Log because it was not timely produced as required by IAB Rule 11.[44]

Employer's Contentions

Employer asserts that allowing Robb to testify did not violate due process because Claimant received adequate notice, on at least three occasions, that Robb would testify at the July 13, 2009 Hearing. Employer argues that the Board's April 9, 2009 Order did not preclude Robb from testifying because Claimant cannot challenge the Board's determination that Employer modified the Pretrial Memorandum at the March 24, 2009 Hearing. Additionally, Employer contends, and the Board agrees,[45] that the April 9th Order was limited to issues related to the County's medical testimony, and not the statute of limitations defense.

Employer argues the Board did not deny Claimant due process in holding the claim collaterally estopped because Employer asserted this defense in the Pretrial Memorandum and argued the defense at the Hearing. In the Pretrial Memorandum Employer included a defense of

---

[44] Industrial Accident Board Rule 11, titled "Discovery And Production of Documents And Things For Inspection, Copying, Or Photographing," provides:

> (A) After a petition has been filed, any party may serve on any other party a request to produce and permit the party making the request, or someone acting in his/her behalf, to inspect and copy or photograph, any designated documents which constitute or contain evidence relating to any matter which is relevant to the subject matter involved in the pending hearing and not otherwise privileged and which are in the possession, custody or control of the party upon whom the request is served.
>
> (B) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.
>
> (C) The party upon whom the request is served shall serve a written request within 15 days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order from the Board compelling discovery with respect to any obligations to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. The Board shall rule upon any such motion after notice and argument.

[45] T. – 11.

"[p]rior Board decisions have decided these issues and are the Law of the Case."[46] The Employer contends the aforementioned defense put Claimant on notice that Employer intended to raise collateral estoppel.

Employer maintains that Robb's testimony did not violate Delaware Rule of Professional Conduct 3.7 because the Rules of Professional Conduct are not binding on the IAB.

Finally, Employer argues that the Second Payment Log was timely produced because all documentation was submitted to Claimant well before the July 13, 2009 Hearing.

DISCUSSION

Due Process

Claimant was provided adequate notice of Employer's intention to call Robb so as to not offend due process. Parties must be granted meaningful notice before their rights are to be affected.[47] In *McGonigle*, the UCAB denied Claimant unemployment benefits. The UCAB then mailed "notice of appeal" to the wrong address and subsequently denied Claimant's appeal as untimely. The Superior Court reversed the UCAB denial, finding a violation of due process because the UCAB failed to give Claimant meaningful notice of his right to appeal. The instant case differs from *McGonigle* because on several occasions the Claimant was put on notice that Employer intended to call Robb as a fact witness. On March 24, 2009, Robb testified in his capacity as Risk Manager to substantiate Employer's statute of limitations defense. The Board's April 24, 2009 Order referenced Robb's testimony and permitted Employer to re-raise the statute of limitations defense. On May 8, 2009, Employer sent a letter to the Board Administrator, and copied Claimant, which explicitly stated that Employer intended to call Robb as a fact witness. Moreover, IAB Board Rule 9(e) allows any party to modify the Pretrial Memorandum any time

[46] Claimant's Opening Brief, Ex. 3 at 3.
[47] *See McGonigle v. George H. Burns, Inc.*, 2001 WL 1079036 (Del. Super. Sept. 4, 2001).

prior to 30 days before the Hearing. In this case, the May 8th letter put Claimant on notice of Employer's intention to call Robb as a fact witness, in effect modifying the Pretrial Memorandum. Additionally, at the July 13th Hearing, the Board stated that "in effect the Employer did modify their Pretrial Memorandum at the March 24th Hearing and identified Robb as their witness."[48] Claimant was sufficiently on notice that Employer intended to call Robb.

The April 9th Order

Paragraph 3 of the April 9th Order states: "[a]t the hearing, both parties will be limited to calling those witnesses identified on the Pretrial Memorandum." Claimant argues allowing Robb to testify violated the Order. At the July 13th hearing, the Hearing Officer stated that the April 9th Order only concerned issues related to medical testimony and not the statute of limitations defense.[49] The Board reasoned that because there was not sufficient evidence presented at the March 24th Hearing to determine the statute of limitations issue, it would allow Employer to re-raise the limitations defense at the full hearing.

The Board's interpretation of its own rules and orders is within the Board's discretion, as long as the interpretation is reasonable.[50] The April 23rd Order denying Employer's Motion to Dismiss stated that the Board heard testimony from Robb regarding the statute of limitations issue and would allow Employer to re-raise the issue at the full hearing. Implicit in determining that Employer could re-raise the statute of limitations defense is the conclusion that someone would lay a foundation for entering the payment logs. It was not legal error for the Board to interpret the April 9th Order as only relating to medical testimony and not the limitations defense

[48] T – 5.
[49] T – 11.
[50] *See Riley v. Chrysler Corp*., 1987 WL 8273, at *1 (Del. Super. Mar. 6, 1987) ("The Board's interpretation of its own rule is entitled to great weight and I find no justification for reversing the Board's ruling on this issue"), *aff'd,* 531 A.2d 1235 (Del. 1987); *Smith v. Rodel, Inc.*, 2001 WL 755929, at *2 (Del. Super. June 19, 2001) ("The Board's interpretation and application of its own rules is entitled to great deference, and the Court will upset the Board's interpretation only when it determines that 'the Board exercised its power arbitrarily or committed an error of law....'"), *aff'd,* 784 A.2d 1081 (Del. 2001).

because the Board expressly stated that Employer could re-raise the statute of limitations defense.

"Law of the Case" with Respect to Robb's Testimony

"The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."[51] However, "[u]ntil the rendition of the final judgment, the interlocutory judgment remains within the control of the court."[52] Because it is within the Board's discretion to interpret its own rulings, the Board did not commit legal error in interpreting its Order as only applying to medical testimony, and not to Robb's testimony regarding the statute of limitations defense.

Robb's Testimony and IAB Rule 9

Robb's testimony did not violate IAB Rule 9 even though he was not named on the Pretrial Memorandum. IAB Rule 9(e), allows either party to modify the Pretrial Memorandum anytime 30 days before the full hearing.[53] At the latest, on May 8th, 35 days before the Hearing, Employer provided written notice of its intent to call Robb as a fact witness. This communication in effect modified the Pretrial Memorandum.

Board's Collateral Estoppel Holding

The Board did not commit legal error by holding that Claimant's petition was collaterally estopped. Claimant alleges Employer failed to assert collateral estoppel as a defense in the Pretrial Memorandum, and thus, the Board was prohibited from holding the claim barred pursuant to collateral estoppel. "It is settled in Delaware that before the Board can consider an issue, the issue must be raised sufficiently in advance of the hearing to provide the parties notice

[51] *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990).
[52] *Yerkes v. Dangle*, 33 A.2d 406, 408 (Del. Super. April 30, 1943).
[53] *Muziol v. DaimlerChrysler Corp.*, 2002 WL 819139, at *4 (Del. Super. April 30, 2002).

and an opportunity to be heard."[54] "The trial judge's focus should be on whether the issue could have been, but was not, raised pre-trial in some form. . . ."[55] Collateral estoppel was raised by Employer. The defense of "[p]rior Board decisions have decided these issues and are law of the case" was included in the Pretrial Memorandum.[56] The Court is satisfied that the defense asserted by Employer adequately put Claimant on notice that Employer intended to rely on a collateral estoppel defense.

The Second Payment Log

The Board did not commit an error of law by admitting the Second Payment Log into evidence. Claimant argues that because the log was not timely produced, the Board committed an error of law by allowing the County to introduce the Second Payment Log. Employer provided the First Payment Log on March 17th and the Second Payment Log on May 8th. The two payment logs are substantively the same and the most noteworthy difference is that the Second Payment Log is in chronological order and identifies payments made to medical providers with regard to the litigation between March 17, 2009 and May 8, 2009. The Claimant was on actual and/or constructive notice of payments to her providers. Moreover, the Claimant had clear notice of the Employer's statute of limitations defense and was given at the least 35 days to review the Second Payment Log. The Board complied with IAB Rule 11.[57]

CONCLUSION

For the aforementioned reasons, the decision of the Industrial Accident Board is **AFFIRMED**.

---

[54] *Murphy Steel, Inc. v. Brady*, 1989 WL 124934, at *2 (Del. Super. Oct. 3, 1989).
[55] *Alexander v. Cahill*, 829 A.2d 117, 128-29 (Del. 2003).
[56] Claimant's Opening Brief, Ex. 3 at 3.
[57] *See Yellow Freight Sys., Inc. v. Berns*, 1999 WL 167780, at *4 (Del. Super. Mar. 5, 1999) ("While the Board's procedural rules are promulgated for 'more efficient administration of justice,' this Court will not force the Board to impose a literal and hyper-technical interpretation of the rules where the Board itself has chosen not to do so.").

IT IS SO ORDEDED.

Jan R. Jurden, Judge