IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BEATRIZ HERNANDEZ,	)	
	)	
Appellant-Employee,	)	
	)	
v.	)	C.A. No. 04A-05-009-FSS
	)	
BOSTON MARKET, INC.,	)	
	)	
Appellee-Employer.	)	

Submitted: September 24, 2004
Decided: January 26, 2005

MEMORANDUM OPINION

Upon Appeal from the Industrial Accident Board - - ***AFFIRMED***

Michael D. Bednash, Esquire, Kimmel Carter Roman & Peltz, P.A., P.O. Box 1070, Bear, Delaware, 19701. Attorney for Employee-Appellant.

Christine P. O'Connor, Esquire, Marshall Dennehey Warner Coleman & Goggin, 1220 N. Market Street, P.O. Box 130, Wilmington, Delaware, 19899. Attorney for Employer-Appellee.

SILVERMAN, J.

This is an appeal from the Industrial Accident Board's finding that extended chiropractic treatment following on the job accidents was unreasonable and unnecessary. Appellant-Employee, Beatriz Hernandez, contends that she needed the treatment to reduce pain caused by her injuries. A medical expert, however, opined on behalf of Appellee-Employee, Boston Market, that while the chiropractic treatment was reasonable initially, Employee eventually received maximum therapeutic benefit and the disputed treatment was merely palliative. Finding that over-the-counter medicines and applied heat were alternatives to the chiropractic, the Board denied benefits for the contested treatment.

The parties largely agree about what happened. They clash over the facts' legal significance. Employee argues, in effect, that as long as chiropractic treatment reduced her pain, it was reasonable and she was entitled to compensation. Employer contends that once the chiropractic treatment was no longer curative, and simpler alternatives would be effective, continued chiropractic was unreasonable, unnecessary and, therefore, non-compensable. And so the dispute primarily concerns a question of law: To what extent does non-therapeutic, palliative treatment justify worker's compensation benefits?

As discussed below, Delaware's worker's compensation law approaches

palliative treatment like most other states. As the Board correctly held, palliative treatment for on the job injuries is compensable, but only so long as it is necessary and reasonable.[1] The fact that treatment helps reduce an injured worker's pain, however, does not establish by itself that the treatment is necessary and reasonable. The Board found that even though the chiropractic was palliative, home remedies would work as well. Therefore, it was non-compensable.

I.

Preliminarily, the court observes that the parties couch this appeal in terms of whether the Board's decision is supported by substantial evidence. Actually, it has more to do with how the Board applied the law to the facts. The court recognizes, however, that the distinction between the way the Board deduced the facts from the evidence and the way it applied the law to the facts is a fine one. That is especially true where, as here, a mixed question of law and fact is concerned.[2]

II.

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[1] *Keil's Wholesale Tire v. Marion*, 518 A.2d 91 (Del. 1986) ("Marion II"); *Marion v. Keil's Wholesale Tire*, Del. Super., C.A. No. 84A-MR-12, Balick, J. (Apr. 22, 1986), Letter Op. at 3-4 ("Marion I"); *Goldsborough v. New Castle County*, Del. Super., C.A. No. 98A-03-002, Silverman, J. (May 28, 1999).

[2] *Scharf v. Edgcomb Corporation*, Del. Supr., __A.2d__, No. 153, 2004, Holland, J. (Dec. 7, 2004) (in mixed questions of law and fact, the issue is whether the rule of law, as applied to the facts, is or is not violated).

Hernandez filed a Petition to Determine Additional Compensation Due on October 10, 2003. Boston Market disputed the compensation sought by Hernandez for outstanding expenses, claiming that they were not for reasonable and necessary medical treatment.

Hernandez's petition was heard by the Industrial Accident Board on April 13, 2004. The Board denied the petition and Hernandez filed a timely appeal. The Superior Court has appellate jurisdiction under the Delaware Code.[3]

III.

In reviewing an appeal from the Industrial Accident Board, the court must determine whether the Board's decision is supported by substantial evidence and free from legal error.[4] Substantial evidence is enough evidence to support a conclusion.[5] It is more than a scintilla, but not necessarily as much as a preponderance.[6] An appellate court does not weigh evidence, determine credibility,

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[3] DEL. CODE ANN. tit. 29 §§ 10142 & 10161(a)(8) (2003).

[4] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. V. Jarrell*, 493 A.2d 978, 980 (Del. Super. Ct. 1985).

[5] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

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

or do fact-finding.[7] If the record supports the Board's findings, the court must accept them even though, acting independently, the court might reach different conclusions.[8]

On appeal, the court merely examines whether the evidence supports the Board's factual findings.[9] Similarly, when applying the substantial evidence standard, the court considers the record in a light most favorable to the appellee, "resolving all doubts in its favor."[10] In considering fact questions, due deference is given to the Board in light of its experience and competence.[11] It is the Board's exclusive function to evaluate witness credibility.[12] Appellate review "[r]equires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."[13]

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[7] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

[8] *H & H Poultry v. Whaley*, 408 A.2d 289, 291 (Del. 1979).

[9] DEL. CODE ANN. tit. 29 § 10142(d) (2003).

[10] *General Motors Corp. v. Guy*, 1991 WL 190491 (Del. Super.) *3, C.A. No. 90A-JL-5, Gebelein, J. (Aug. 16, 1991).

[11] DEL. CODE ANN. tit 29, § 10142(d) (2003); *Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

[12] *Romine, Jr. V. Conectiv Communications, Inc.*, Del. Super., C.A. No.02A-10-005PLA, Ableman, J. (Apr. 22, 2003) (ORDER).

[13] *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct.

(continued...)

A medical expert's opinion "constitutes substantial evidence to support the Board's finding."[14] In a battle of the experts, the Board is free to choose between the opinions and the court's role is limited to determining whether the evidence relied upon is legally adequate to support the Board's findings.[15]

Finally, if the issue involves a purely legal question, the court's appellate review is plenary.[16] Thus, when reviewing the Board's decision, the court must apply the facts as the Board found them to be, if based on substantial evidence, to the law as the court finds the law to be, and in that way decide the appeal.

IV.

An extended statement of the case's background is unnecessary. The Board's decision lays it out. In summary, it is undisputed that Employee hurt her back in two work-related accidents, less than a month apart, in 2001. In the first accident, she was pinned to a table by a rolling cart. In the second accident, she slipped and fell. She immediately sought chiropractic treatment and remained under

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[13](...continued)
1980).

[14] *Lohr v. Acme Markets*, Del. Super., C.A. No. 98A-05-020, Cooch, J. (Feb. 24, 1999) (ORDER), at *2 (*citing DiSabatino v. Wortman*, 453 A.2d 102, 106 (Del. Super. Ct. 1982)), *aff'd*, 734 A.2d 641 (Del. 1999).

[15] *Reese v. Home Budget Center,* 619 A.2d 907, 910 (Del. 1992).

[16] *Brooks v. Johnson*, 560 A.2d 1001, 1002-03 (Del. 1989)

the chiropractor's care for eighteen months. Employer did not dispute the initial chiropractic care; but as presented above, Employer eventually challenged the chiropractic as unreasonable because Employee's condition was not improving.

Even Employee's expert, her treating chiropractor, agreed that by the time the disputed treatment began, Employee's condition had "plateaued" and reached the point of diminishing returns. Conversely, Employer did not challenge Employee's claim that the disputed chiropractic treatment temporarily eased her pain. Accordingly, the true question presented is whether, in light of the largely agreed upon facts, the disputed treatment was necessary and reasonable as a matter of law.

The critical evidence, which went uncontested, came from Employer's medical expert, Jeffrey S. Myers, M.D. He opined that the contested chiropractic maintenance treatment is "the same thing as if Ms. Hernandez takes Aleve or . . . puts heat on her injured back or whatever, it's going to feel good temporarily but after that . . . it's a short term thing."

V.

As the Board held, Delaware authorizes worker's compensation for palliative treatment if the treatment is otherwise compensable and it is necessary. In this case, the Board saw the palliative chiropractic as unnecessary and unreasonable because a medical expert opined that Employee could receive similar relief from

simple alternatives.[17] That opinion was basically unrefuted by Employee's expert. But, as presented above, had Employee's expert challenged Employer's expert, the Board could have chosen between the two, so long as the preferred opinion was potentially reliable.

The Board concluded from the evidence presented that extended chiropractic was unnecessary and unreasonable because Employee could have obtained similar relief from simple, home-remedies. The Board's conclusion that the challenged treatment was unnecessary and unreasonable is legally valid and it justified the Board's denying compensation.

VI.

The Industrial Accident Board's April 26, 2004 decision denying payment of medical expenses is **AFFIRMED**.

Judge

oc: Prothonotary (Civil Division - Appeals Department)

[17] *See*, *e.g., Mills v. Delaware Hospital for Chronically Ill*, Del. Super., C.A. No. 96A-08-001, Terry, J. (Apr. 23, 1997), ORDER (upholding Board's denial of benefits based on conclusion that Appellant had exceeded limits of compensable palliative treatments.)