

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHNSON CONTROLS,)	
)	
Employer-Appellant,)	C.A. No. 07A-12002 JRS
)	
v.)	Industrial Accident Board
)	Appeal No.: 1277951
VICTOR HALL,)	
)	
Claimant-Appellee.)	

Date Submitted: October 10, 2008

Date Decided: January 26, 2009

Upon Appeal from Industrial Accident Board.

AFFIRMED.

This 26th day of January, 2009, upon consideration of the appeal filed by Johnson Controls (“Johnson”) from the decision of the Industrial Accident Board (“the Board”) granting Victor Hall’s (“Mr. Hall”) Petition to Determine Additional Compensation Due, it appears to the Court that:

1. Mr. Hall, age 52, worked at Johnson as a physical laborer for over thirty years. In 2005, Mr. Hall’s position as a “throw away” required him to haul batteries, each weighing approximately 20-40 pounds, from one conveyer belt to another. During an eight-hour work day, Mr. Hall typically handled an average of 4500-5000 batteries.

2. On November 29, 2005, Mr. Hall suffered compensable injuries to his lower back while working for Johnson. During the course of performing his job, Mr. Hall developed sharp pain, burning, and tingling in his lower back, buttocks, groin, and left leg. Mr. Hall notified both his supervisor and area manager at Johnson. He also filed a claim for workers' compensation, which was initially contested by Johnson. However, Mr. Hall and Johnson eventually reached a compensation agreement. Under this agreement, Mr. Hall received prior wage replacement benefits based on his average wage of \$1,156.26 per week at the time of the accident.

3. On November 29, 2006, Mr. Hall filed a Petition to Determine Additional Compensation Due ("the Petition") in which he sought permanent impairment benefits for a 21% loss of use of the lumbar spine. Johnson opposed the Petition on the ground that the 2005 accident caused Mr. Hall zero permanent impairment. Johnson's position was that Mr. Hall has only a 7% loss of use to the lumbar spine due to a pre-existing degenerative condition. The parties stipulated to having a Workers' Compensation Hearing Officer decide the matter, pursuant to 19 Del. C. §2301(B)(a)(4).

4. The Board held a hearing on May 21, 2007. In addition to Mr. Hall's own testimony, Dr. Stephen Rodgers ("Dr. Rodgers") testified on Mr. Hall's

behalf. Johnson presented the testimony of Dr. Stephen Archer (“Dr. Archer”) by deposition. Neither doctor was Mr. Hall’s treating physician. Rather, both were physical medicine and rehabilitation specialists who had examined Mr. Hall solely for the purpose of offering opinions at the Board hearing.

5. At the hearing, Mr. Hall testified that he had no history of back injuries prior to the date of his work accident. Mr. Hall had never had an MRI prior to his work injury, nor had he been treated by a doctor for any lower back problems. Following his injury, Mr. Hall missed time from work and was ultimately unable to return to his job hauling batteries. Initially, he went to a clinic for an evaluation of his injury. The clinic prescribed medications and sent him to physical therapy. Eventually, Mr. Hall began to see Dr. Ganesh Balu, who has since been treating his back injury with, *inter alia*, facet joint injections, steroid injections, and epidural injections approximately every six weeks.

6. Mr. Hall now performs “light duty” jobs for Johnson. Although less physically strenuous than his former position, according to Mr. Hall’s hearing testimony, his reassigned position requires a significant amount of standing and walking on a cement floor, bending, reaching, and twisting. Mr. Hall testified that he suffers from ongoing pain as a result of his injury. He rated his pain to be at a level five on a ten-point scale. He would rate his pain even higher if not for the

fact that he takes Vicodin in the morning before he goes to work and every few hours throughout the day to make the pain more manageable. Nevertheless, after several hours of working, his lower back and left leg begin to hurt. According to Mr. Hall, he is no longer able to perform house and yard work duties. His injury also prevents him from engaging in recreational activities.

7. Dr. Rodgers examined Mr. Hall on November 7, 2006. He also reviewed Mr. Hall's medical records from Dr. Ganesh Balu. A post-accident MRI showed significant abnormalities at two or more disc levels. In Dr. Rodgers' pre-examination interview, Mr. Hall told him that he awakens with stiffness in his back every morning. Although the symptoms decrease over the course of the day, Mr. Hall is very sore by the day's end, and occasionally misses work due to back pain. On the day of the examination, Mr. Hall reported his pain at a level four, but noted that it goes up to approximately seven with physical activity. Mr. Hall also reported sexual dysfunction and a frequent urge to urinate. His primary care physician ruled out his prostate as the source of these problems. Mr. Hall described his physical pain as a burning sensation from his back through his buttocks, left leg, ankle, and foot. He was taking the medications Naproxen, Vicodin and Skelaxin.

8. Dr. Rodgers' physical examination of Mr. Hall revealed extreme tightness in the lumbar musculature. Increased muscle tone in Mr. Hall's lower back extended up into the lower thoracic region. Dr. Rodgers measured the range of motion in Mr. Hall's lower back with dual inclinometers in the manner prescribed by the American Medical Association (AMA) Guidelines. Mr. Hall's active pain-free range of motion was moderate in flexion and extension, mild in lateral bending to the right side, and moderate in lateral bending to the left side. Dr. Rodgers tested Mr. Hall's Achilles reflex, and found his right ankle responded more slowly than his left, which Dr. Rodgers found clinically insignificant to his injury. A sitting root test produced more back pain on Mr. Hall's left side than his right. Mr. Hall's left calf showed mild atrophy at 1.1 centimeters less than his right calf.

9. Under the AMA Guidelines, doctors may use either the Diagnoses Related Estimate (DRE) or Range of Motion (ROM) methods in assessing spinal injuries. Based on Dr. Rodgers' physical examination of Mr. Hall, the AMA Guidelines, as well as the multilevel abnormalities revealed in Mr. Hall's MRI, Dr. Rodgers determined that ROM was the most appropriate method by which to assess the degree of permanent impairment to Mr. Hall's lumbar spine. Dr. Rodgers testified in detail exactly how he used the AMA Guidelines to reach his

conclusion, under the ROM method, that Mr. Hall had suffered an 18% whole person impairment, which converted to a 21% regional impairment rating.

10. Dr. Archer's testimony was presented by deposition on behalf of Johnson. Dr. Archer examined Mr. Hall on April 4, 2007, and reviewed his medical records prior to the deposition. Dr. Archer's physical examination of Mr. Hall's back did not reveal any tenderness or spasms. A sitting root test caused pain while seated, but Dr. Archer determined that Mr. Hall was able to bend fully at the waist. Dr. Archer reviewed Mr. Hall's MRI and believed the results were consistent with a degenerative condition that pre-existed the work accident, as opposed to a multilevel injury diagnosis. Dr. Archer opined that such a diagnosis would have required multiple fractures, disc herniations, pinched nerves, or recurrent injuries, none of which, in his view, were present here.

11. Dr. Archer disagreed with Dr. Rodgers' diagnosis of a 21% permanent impairment to Mr. Hall's lumbar spine. In Dr. Archer's opinion, the DRE method provided a more accurate assessment of Mr. Hall's injuries. Dr. Archer believed Mr. Hall's back problem was a soft tissue injury, most likely a strained muscle, therefore making it ineligible for permanent impairment status. Dr. Archer, performing only a visual assessment, did not find any significant restrictions to Mr. Hall's spinal range of motion. However, he did not measure Mr. Hall's range of

motion with an inclinometer or goniometer. Dr. Archer, although maintaining that Mr. Hall had zero permanent impairment, conceded that if the 2005 injury exacerbated Mr. Hall's pre-existing degenerative condition, Mr. Hall would qualify for a 5% - 8% whole person impairment. This measurement would convert to a 6.6% - 7% regional impairment to the lumbar spine.

12. On November 9, 2007, the Industrial Accident Board issued its opinion, finding that Mr. Hall's work injury had resulted in a 21% permanent impairment to his lumbar spine. Specifically, the Board found

the opinion of Dr. Rodgers to be more persuasive in this case than that of Dr. Archer, who opined that Claimant developed no permanency related to the work accident. [The Board] accept[ed] Dr. Rodgers' opinion that the range of motion model of the AMA Guidelines is the more appropriate method to use in this case since [Mr. Hall] developed problems at two lumbar spine levels, L4-5 and L5-S1, following the lifting work injury.¹

13. In reaching its decision, the Board "reject[ed] Dr. Archer's zero permanency estimate," in large part because

his opinion that [Mr. Hall's] symptoms derive only as a result of...pre-existing degenerative problems is not plausible under these circumstances. Dr. Archer does not account for the fact that [Mr. Hall's] lumbar spine was asymptomatic and did not require treatment before the 2005 work accident despite performing continual medium to heavy duty work.²

¹ *Victor Hall v. Johnson Controls, Inc.*, Hearing No. 1277951 at 10 (Decision on Petition to Determine Additional Compensation Due, November 9, 2007).

² *Victor Hall v. Johnson Controls, Inc.*, Hearing No. 1277951 at 11-12 (Decision on Petition to Determine Additional Compensation Due, November 9, 2007).

The Board's decision placed significant weight on Dr. Archer's mere visual assessment of Mr. Hall's loss in range of motion, "rather than using a measuring device as recommended by the AMA Guides."³ Further, Dr. Archer's opinion that Mr. Hall suffered no permanent impairment constituted a "failure to account for [Mr. Hall's] chronological medical history," gave "no credence to the impact or results of the 2005 work injury," and did not "represent a consistent conclusion."⁴

13. On appeal to this Court, Appellant alleges that the Board erred as a matter of law and fact in finding that Mr. Hall suffered 21% permanent impairment to his lumbar spine as a result of the November 2005 work injury because this conclusion is not supported by substantial evidence. In support of this contention, Appellant alleges that Dr. Rodgers' assessment of Mr. Hall's injuries is incorrect, and that the Board inadequately expressed its rationale for disregarding Dr. Archer's opinion in favor of Dr. Rodgers' diagnosis.

14. This Court has repeatedly emphasized the limited extent of its appellate review of administrative determinations. The Court's review is confined to ensuring that the Board made no errors of law and determining whether

³ *Victor Hall v. Johnson Controls, Inc.*, Hearing No. 1277951 at 12 (Decision on Petition to Determine Additional Compensation Due, November 9, 2007).

⁴ *Victor Hall v. Johnson Controls, Inc.*, Hearing No. 1277951 at 12 (Decision on Petition to Determine Additional Compensation Due, November 9, 2007).

“substantial evidence” supports the hearing officer’s factual findings.⁵ “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁶ It is “more than a scintilla but less than a preponderance of the evidence.”⁷ The “substantial evidence” standard of review contemplates a significant degree of deference to the Board’s factual conclusions and its application of those conclusions to the appropriate legal standard.⁸ “Absent an abuse of discretion, this Court must uphold the Board’s decision.”⁹ In its review, the Court will consider the record in the light most favorable to the prevailing party below.¹⁰

15. The factual record in this case consists solely of the hearing and deposition testimony of each party’s expert witness. Testimonial evidence necessarily implicates an inquiry by the fact finder into the credibility of the witnesses testifying before him. The Board is in the best position to make that inquiry. Credibility determinations made by the Board will not be disturbed on

⁵ *Canyon Cont. v. Williams*, 2003 WL 1387137 at *1 (Del. Super. Ct.); *Hall v. Rollins Leasing*, 1996 WL 659476 at *2-3 (Del. Super.).

⁶ *Breeding v. Contractors-One, Inc.*, 549 A.2d 1102, 1104 (Del. 1998).

⁷ *Id.*

⁸ *Hall*, 1996 WL 659476 at*2 (citing DEL. CODE ANN. TIT. 29 § 10142(d)).

⁹ *Mullin v. W.L. Gore & Associates*, 2004 WL 1965879 at *1 (Del. Super.) (citing *Oceanport Ind. v. Wilmington Services*, 636 A.2d 892, 899 (Del.Super. 1972)).

¹⁰ *General Motors Corp. v. Guy*, 1991 WL 190491 at *3 (Del Super.).

appeal unless the Court determines that the hearing officer abused his discretion.¹¹ On appeal, the Court will not independently “weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions.”¹²

16. Because assessing the credibility of witnesses and deriving inferences therefrom is solely within the province of the Board,¹³ the Court is satisfied that the Board’s decision is supported by substantial evidence. The Board did not abuse its discretion in reaching its conclusions in this case because the testimony presented at the hearing provided the Board with substantial evidence upon which to find that Dr. Rogers’ diagnosis of Mr. Hall’s permanent impairment was credible. The Board’s opinion details the reasons why it accepted Dr. Rogers’s assessment and rejected Dr. Archer’s assessment. Furthermore, “[i]t is entirely proper and appropriate for the Board to accept the medical testimony of one expert witness over that of another.”¹⁴

17. Based on the foregoing, the decision of the Board granting Claimant’s Petition to Determine Additional Compensation Due is **AFFIRMED**.

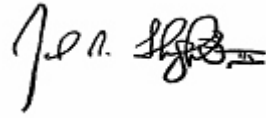
¹¹ *Simmons v. Delaware State Hosp.* 660 A.2d 384, 388 (Del.Super).

¹² *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.Super).

¹³ *Johnson*, 213 A.2d at 66.

¹⁴ *Simmons v. Delaware State Hospital*, 660 A.2d 384, 388 (Del. 1995) (citations omitted).

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "J.R. Slights, III". The signature is written in a cursive style with a horizontal line at the end.

Judge Joseph R. Slights, III

Original to Prothonotary

cc: R. Stokes Nolte, Esquire
Robert P. LoBue, Esquire