

N THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

TAMARA L. KELLEY,	:	
	:	
Appellant-Below,	:	C.A. No: 05A-02-003 (RBY)
Appellant,	:	
	:	
v.	:	
	:	
CHRISTIANA CARE HEALTH	:	
SERVICES,	:	
	:	
Employer-Below,	:	
Appellee.	:	

Submitted: 10/21/05
Decided: 01/12/06

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware,
Attorney for Appellant.

Maria Paris Newill, Esq., Heckler & Frabizzio, Wilmington, Delaware, Attorney for
Appellee.

OPINION

*Upon Consideration of Appellant's Appeal from
Decision of Industrial Accident Board*

DENIED

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OPINION

Appellant, Tamara L. Kelley, appeals the February 7, 2005 decision of the Industrial Accident Board (“Board”), denying her Petition to Determine Additional Compensation Due. Kelley’s Petition sought medical expenses from April 2004 to the present and permanent impairment benefits. Kelley argues that the Board’s decision was not supported by substantial evidence, because the Board accepted the opinion of David C. Stephens, M.D., who testified as an expert medical witness for the employer, Christiana Care Health Services. For the following reasons, Kelley’s Appeal is **DENIED**.

FACTS

On April 25, 2002, Tamara L. Kelley (“Kelley”) was injured while she was working as a home health aide for Visiting Nurses Association (“VNA”), which is operated by Christiana Care Health Services (“CCHS”).¹ Kelley injured her low back trying to prevent a wheelchair-bound patient from falling.² Kelley immediately felt pain in her back, which radiated down her leg.³ Initially, Kelley treated at Health Works, the employee health center for CCHS, where she was diagnosed with left

¹ Tr. Kelley, IAB Hearing, No 1219308, at 5.

² *Id.* at 6.

³ *Id.*

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parasacral paralumbar strain.⁴ Kelley was treated with a course of physical therapy and medication.⁵ Kelley was disabled from work for two weeks, and transitioned back to her home health aide position after working in a sedentary position for a few weeks.⁶

In July 2003, Kelley's pain increased, and she contacted her family doctor who disabled her from work.⁷ Kelley was referred for another course of physical therapy, and underwent diagnostic testing.⁸ An MRI of Kelley's low back revealed mild circumferential bulging disc at L4-L5, but the EMG and bone scan were negative.⁹ In September 2003, Kelley was referred to orthopaedic surgeon, Glen D. Rowe, D.O.¹⁰ Dr. Rowe diagnosed Kelley with lumbosacral strain, and administered cortisone shots, which gave her temporary relief.¹¹ In October 2003, Dr. Rowe referred Kelley to chiropractor, Dr. Michael A. Gondolfo for treatment.¹² Kelley

⁴ *Id.* at 7; Tr. Rodgers, at 35.

⁵ Tr. Kelley, at 8.

⁶ *Id.* at 9.

⁷ *Id.* at 11.

⁸ *Id.* at 12.

⁹ Tr. Rodgers, at 36.

¹⁰ *Id.* at 38.

¹¹ Tr. Kelley, at 14.

¹² *Id.* at 14-15.

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received regular chiropractic treatment until May 2004, when Dr. Gondolfo released her on an “as needed” basis.¹³ From May to December 2004, Kelley treated with Dr. Gondolfo once every two to three weeks, whenever she experienced pain.¹⁴

The parties do not dispute that Kelley sustained an injury to her low back on April 26, 2002, as a result of a work accident. CCHS paid Kelley total and partial disability benefits for the periods immediately following the accident, and for the period from July 2003 to January 2004, when she experienced a worsening of her low back pain. CCHS also paid all Kelley’s related medical expenses, except for the chiropractic treatment she received from Dr. Gondolfo from April to December 2004. CCHS maintains that Kelley’s low back injury had resolved, and any continued chiropractic treatment was not reasonable and/or related to the work accident. In addition, CCHS disputes Kelley’s claim that she sustained a 9% permanent impairment to her low back as a result of the work accident.

DECISION OF THE INDUSTRIAL ACCIDENT BOARD

The Board’s February 7, 2005 decision denied Kelley’s Petition to Determine Compensation Due, which sought permanent impairment benefits and medical expenses for chiropractic treatment from April 7 to December 16, 2004. In addressing Kelley’s permanent impairment benefit request, the Board rejected the

¹³ Tr. Gondolfo, at 74.

¹⁴ *Id.* at 69; Tr. Kelley, at 17.

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opinion of Kelley's medical expert, Dr. Stephen J. Rodgers, an occupational physician, and adopted the opinion of CCHS' medical expert, Dr. David C. Stephens, an orthopaedic surgeon. Using the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition, Dr. Rodgers opined that Kelley should be placed at DRE Lumbar Category II with a 9% impairment of her low back as a result of the work accident. Using the same standards, Dr. Stephens opined that Kelley should be placed at DRE Lumbar Category I with zero permanent impairment. Dr. Stephens opined that Kelley's lumbar strain was healed at the time of Dr. Stephens' December 2003 examination, noting that the September 2004 examination did not reveal any objective signs of back and lower extremity pain. In addition, Kelley had returned to full-time, sedentary work in April 2004.

The Board held that a 9% impairment was disproportionate to Kelley's loss of use based on a diagnosis of lumbosacral sprain. The Board highlighted the fact that, at his June 2004 examination of Kelley, Dr. Rodgers' only objective findings were sacral tenderness and some limited range of motion. The Board noted that Dr. Stephens found Kelley's range of motion to be improved during his September 2004 examination. In addition, the medical records of Kelley's treating medical providers found her to have full range of motion, except for subjective complaints of mild extension and low back pain, which was musculoskeletal in nature. The Board also emphasized that Kelley had no observed muscle guarding or spasm, nor did she have any documented neurological impairment.

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The Board also denied Kelley's request for medical expenses for chiropractic treatments she received from April 7 to December 16, 2004. The Board again accepted the opinion of Dr. Stephens, who testified that Kelley's injuries were short-term, and should have healed within three months. Dr. Stephens' opinion was based on the objective diagnostic tests performed in 2003. Those did not find any anatomic abnormalities which would impact the normal joint function in the sacral region of the lumbar spine, as Dr. Gondolfo had suggested. The Board found that the chiropractic treatments received after April 2004 were not reasonable or necessary, nor were they related to the 2002 accident. The Board found it significant that Kelley started chiropractic treatment 18 months after the accident, and that Dr. Gondolfo released Kelley in May 2004 from regular treatment.

STANDARD OF REVIEW

On appeal, this Court reviews a decision of the Industrial Accident Board to determine whether the Board's decision was supported by substantial evidence and free from legal error.¹⁵ Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁶ In addition, substantial evidence is "more than a scintilla but less than a

¹⁵ *Methodist Country House v. Wright*, 2005 Del. Super. LEXIS 167, at *5.

¹⁶ *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981)(quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

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preponderance..."¹⁷ On appeal, this Court does not have the "authority to weigh evidence, determine the credibility of witnesses or make independent factual findings."¹⁸ If the Board's decision is supported by substantial evidence, this Court "must affirm the ruling unless it identifies an abuse of discretion or a clear error of law."¹⁹

DISCUSSION

Kelley argues that the Board erred by accepting the opinion of Dr. Stephens over the opinions of Kelley's medical expert and Dr. Gondolfo, her treating chiropractor. Kelley also maintains that the Board's decision was not supported by substantial evidence, because Dr. Stephens' opinion that lumbar strain can never become chronic or cause symptoms that last longer than a year has no medical support.

When reviewing the testimony of conflicting expert witnesses, the Board has the discretion to adopt the opinion of one expert, and reject the other.²⁰ The opinion that the Board chooses to follow will be considered "substantial evidence for

¹⁷ *Id.* (quoting *Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

¹⁸ *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005)(citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

¹⁹ *Bolden v. Kraft Foods*, 2005 Del. LEXIS 527, at *5 (Del. Supr.) (citing *DiGiacomo v. Bd. of Public Educ.*, 507 A.2d 542, 546 (Del. 1986)).

²⁰ *Id.*, at *4 (citing *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992)).

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purposes of appellate review.”²¹ When one of the medical experts is also claimant’s treating physician, the Board may give the testimony of the treating physician substantial weight, because the treating physician has greater familiarity with the claimant’s condition.²² The Board is not bound to follow the opinion of the treating physician, however, and may “discount the testimony of any witness on the basis of credibility, provided it states specific, relevant reasons for so doing.”²³

Merely as a hypothetical illustration, the Board, having heard the testimony of the chiropractor, could conclude that such testimony had some financial interest motivation, whereas the contradictory testimony of the examining orthopaedic surgeon was objective, and therefore substantially more credible.

Moreover, Kelley’s reliance upon the allegedly unsupportable position of Dr. Stephens that lumbar strains can “never be chronic” is inappropriate. To begin with, whether or not chronicity could ever occur is of no particular relevance to this case. Theoretically, testimony concerning that could affect credibility. If so, the Board’s decision resolves that issue. The only question here was whether or not the Board, based upon some testimony, found that it occurred in this case. The Board, finding Dr. Stephens’ testimony proper and credible, determined that chronicity did not, as

²¹ *Id.*

²² *Bradley v. State*, 2003 Del. LEXIS 331, at *16 (Del. Super.) (citing *Diamond Fuel Oil v. O’Neal*, 734 A.2d 1060, 1065 (Del. 1999)).

²³ *Jepsen v. University of Delaware-Newark*, 2003 Del. LEXIS 320, at *6 (Del. Super.) (citing *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1216 (Del. 1998)).

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a matter of testimonial fact. Indeed, the testimony of Dr. Stephens²⁴ maintains that very position, when the answers to multiple cross-examination questions are put into context.

In the present case, the Board did not err in rejecting the opinion of Dr. Gondolfo, despite Dr. Gondolfo's position as Kelley's treating chiropractor. The Board had the discretion to weigh the opinions of Dr. Gondolfo and Dr. Stephens, and determine which opinion was consistent with the facts of the case. Although the Board may give greater weight to the testimony of Dr. Gondolfo, as Kelley's treating chiropractor, the Board was not bound to adopt his opinion. The Board was required to provide a relevant basis for discounting Dr. Gondolfo's testimony and adopting Dr. Stephens' opinion.

The Board provided sufficient and relevant reasons for rejecting Dr. Gondolfo's opinion that continued chiropractic treatment after April 2004 was compensable. The Board specifically noted that Dr. Gondolfo released Kelley from regular treatment in May 2004. Dr. Gondolfo began treating Kelley in October 2003. By March 2004, Dr. Gondolfo reduced Kelley's chiropractic treatment to once a week, noting that her range of motion was within the normal range. In addition, Dr. Gondolfo observed that Kelley had made a 75% improvement since her initial evaluation. By his May 2004 examination of Kelley, Dr. Gondolfo reported Kelley's subjective complaints of soreness in the back and tenderness in the tops of her hips,

²⁴ Tr. Stephens at 87

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but also noted a decrease in her reported pain from 5.5 in February 2004 to 2.5 in May 2004. Evidently, based on Kelley's subjective complaints and his objective findings, Dr. Gondolfo released Kelley from regular treatment, and advised her to receive further chiropractic adjustments on an "as needed" basis.

Similarly, the Board was free to weigh the conflicting opinions Dr. Rodgers and Dr. Stephens, and adopt the opinion of Dr. Stephens. Kelley's argument that the Board erred in its decision to follow Dr. Stephens' opinion, because Dr. Stephens' opinion was based solely on an unsupported belief that lumbar strain can never become chronic or cause symptoms that last longer than a year, is not persuasive. The Board's clear acceptance of Stephens' opinion itself constitutes substantial evidence for the purpose of this Court's review.

As referenced earlier, Dr. Stephens' opinion about Kelley's permanent injury and medical treatment was not based solely on general recovery opinions. Dr. Stephens' position that Kelley sustained zero permanent impairment as a result of the April 2002 work accident was based on his two examinations of Kelley in December 2003 and September 2004, and his review of the medical records. At both examinations, Dr. Stephens found no objective indicia of back or lower extremity pain. In addition, at the September 2004 examination, Dr. Stephens noted that the range of motion deficits found by Dr. Rodgers in June 2004 had improved. Dr. Stephens' opinion that Kelley's lumbar strain had healed was based on the absence of objective findings, normal range of motion, and Kelley's having returned to full-time, sedentary employment in April 2004.

