IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RONNIE MILLER	)	
	)	CIVIL ACTION NUMBER
Appellant	)	
	)	09A-02-011-JOH
v.	)	
	)	
LUTHERAN SENIOR SERVICES	)	
	)	
Appellee	)	
	)	

Submitted: September 24, 2009
Decided: January 5, 2010

MEMORANDUM OPINION

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

Appearances:

Michael D. Bednash, Esquire, of Kimmel Carter Roman & Peltz, Newark, Delaware, attorney for appellant

Cheryl A. Ward, Esquire, of Heckler & Frabizzio, Wilmington, Delaware, attorney for appellee

HERLIHY, Judge

This case comes to the Superior Court from the Industrial Accident Board's ("Board") denial of compensation for an alleged work-related injury suffered by claimant, Ronnie Miller. Miller claims that he was injured while unloading a truck on December 15, 2006, while in the scope of his employment with Lutheran Senior Service ("LSS"). LSS claims that Miller was not working that day and the injury could not have occurred at work. The Board found that Miller did not meet his burden to show that he was injured on the job. Miller appeals that decision and this Court affirms.

Factual Background

Miller is around forty years old. He became a line cook for LSS at its Lutheran Towers I facility in April, 2006. Of the two facilities operated by LSS, this was the only one where Miller worked. On December 13 and 14, 2006, Miller worked many hours at LSS. He was not scheduled to work on December 15, 2006.

Miller testified that his then supervisor, Jean Gerard DeLinois, asked him to come to Towers 1 early the morning of December 15th. The purpose was to help unload a food truck and Miller said he arrived to do that around 6:00 a.m. While in the process of unloading, Miller said he slipped on something, perhaps ice, and fell. While falling, he related, he bumped his shoulder on a dumpster and used his right hand to brace his fall.

After the truck was unloaded, Miller says he told DeLinois he had hurt his shoulder, and then he left. Miller had not and did not punch in a time card that day. Neither DeLinois nor Miller filled out any kind of paperwork regarding the incident even though

DeLinois was supposed to do so. DeLinois was at some later date fired for an incident involving an LSS employee.

Rolf Eriksen testified for LSS. He said LSS's records showed a food truck delivery to Lutheran Towers II but not Towers I. DeLinois signed for the delivery. Eriksen also said it was unlikely there was ice in the area of Towers I because of construction work and LSS's sensitivity to ice because of its elderly residents.

He first learned of Miller's claim of injury in May, 2007, though Miller went to the hospital in March of that year because of the pain and trouble lifting his right arm. After a MRI, the diagnosis was a right rotator cuff tear. Miller did not tell anyone at LSS in March of the hospital visit. Miller became a full-time employee in March 2007 but did not report the December incident until May. When he did, Eriksen had him fill out an incident report which, if DeLinois were still employed, he would have signed.

DeLinois did not testify before the Board.

Miller presented no medical evidence, relying, instead, apparently, upon the testimony of LSS's physician witness, Dr. Erol Ger. He testified that he saw Miller on two occasions and that, in his opinion, if the accident happened, then the injury suffered likely resulted from it.[1] However, if the incident did not occur, then the tear could be explained as the natural result of a pre-existing condition.[2] He reviewed Miller's previous

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[1] *Id.* at 5.

[2] *Id.*

medical records and opined that the previous injury could be related to the results shown on a 2001 MRI, which indicated severe tendonitis in his right shoulder. Also, in February 2003, Miller saw Dr. William Newcomb for right shoulder pain. Dr. Ger also opined that this was also not a pre-existing condition exacerbated by a work incident.

The Board set forth its findings of facts and conclusions of law. It did not credit Miller's testimony and found Eriksen's testimony credible.[3] It reviewed Miller's time records and noted that he never started work before 6:57 a.m., so a 6:00 a.m. start would be unusual.[4] It also noted that some time records indicated brief stays at work and concluded that Miller would clock if he was there that day.[5] The Board noted the discrepancy between Miller's recollection of falling on ice and being unsure what caused the fall and mentioned the weather history of that day.[6] It also noted Miller's inaction in completing a prompt accident report, his description of not having time off to see the doctor before March, 2007, even through his time records indicated otherwise, and the doctor's testimony that this injury could be consistent with a previous injury or condition.[7]

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[3] *Id.* 8-12.

[4] *Id.* at 9.

[5] *Id.*

[6] *Id.* at 10. This Court must note that Eriksen relied upon an unofficial Internet weather history to buttress his testimony that it was unlikely there was ice on December 15th. This Court cautions the Board about the extent it chooses to rely upon "evidence" from theInternet. See *Jianniney v. State*, 962 A.2d 229 (Del. 2008).

[7] *Id.* at 9-11.

Taking all of this into account, the Board determined that Miller failed to discharge his burden of proving the injury occurred on the job and denied benefits.[8]

Parties' Contentions

Miller argues that the Board erred because he in fact did meet his burden of proving that he was injured on the job. He highlights various statements in the Board's decision that he argues show that there was substantial evidence that he was injured at work. He alleges that because there was substantial evidence that he was injured at work, the Board could not have based its denial on substantial evidence. In response, LSS points to favorable evidence the Board used to show that its decision was based on substantial evidence.

Standard of Review

The duty of this Court on appeal from the Board is to determine whether the Board's decision is supported by substantial evidence and free from legal error.[9] This requires the Court to review the entire record to determine whether, on the basis of all of the testimony and exhibits before the Board, it could fairly and reasonably reach the conclusion that it did.[10] Only where there is no substantial, competent evidence to support

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[8] *Id*. at 12.

[9] *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. 1985).

[10] *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. 1980).

the Board's factual findings may this Court overturn the Board's decision.[11] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[12] This Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility and make its own factual finds and conclusions.[13] The Board determines the credibility of witnesses, the weight of their testimony and the factual inferences.[14] The Board is entitled to reject a portion of a witness' testimony and accept another portion or to accept one document over another.[15] This Court does not substitute its judgment for that of the Board.[16]

Discussion

Mindful of this Court's circumscribed function on appeal, the Court finds that the Board's decision was based on substantial evidence. The Board accurately described the controversy as a purely factual one.[17] The Board found Miller's testimony non-credible and credited Eriksen's testimony and read the documentary evidence to further LSS's

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[11] *Street v. State*, 669 A.2d 9, 11 (Del. 1995).

[12] *Munyan v. DaimlerChrysler Corp.*, 909 A.2d 122, 136 (Del. 2007).

[13] *Glanden v. Land Prep, Inc.,* 918 A.2d 1098, 1100 (Del. 2007).

[14] *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 157 (Del. 2006).

[15] *Munyan*, 909 A.2d at 136.

[16] *Standard Distributing*, 897 A.2d at 157.

[17] Decision at 8.

argument.[18] Those factual and credibility determinations are Board's exclusive authority. This Court will not make its own credibility determination; its function is to examine the record and determine if the Board's decision was based on substantial evidence. In this case it was. There are contradictions in Miller's testimony with documents supplied to Board. There is testimonial evidence that Miller was not working that day, that the delivery truck did not go to Miller's Lutheran Towers I location, and LSS and Miller's work history made his story unlikely. The Board was within its authority in reaching the decision that Miller's injury was not caused at work. The Court cannot upset that determination based upon the record and arguments presented.

Miller's argument that he presented substantial evidence that he was injured at work turns this Court's appellate review standards on their heads. He would substitute this Court's judgment for that of the Board by having the Court make an independent determination of (1) credibility and(2) that had he made the requisite showing to meet his burden of proving a work related injury. This cannot happen.

Conclusion

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

IT IS SO ORDERED.

J.

[18] The Board fulfilled its responsibility to explain why it made its credibility determinations. *Turbitt v. Blue Hen Lines*, 711 A.2d 1214, 1215 (Del. 1998).