

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

JULIA PANTOJA,)
)
Employee-Appellant,)
)
v.) C.A. No. 03A-01-001-JRS
)
J.C. PENNEY COMPANY, INC.)
)
Employer-Appellee,)

Date Submitted: October 1, 2003
Date Decided: January 29, 2004

MEMORANDUM OPINION

*On Appeal From A Decision of
the Industrial Accident Board.*

REVERSED and REMANDED.

Joseph W. Weik, Esquire, Weik, Nitsche, Dougherty & Componovo, Wilmington, Delaware, Attorney for Appellant, Julia Pantoja.

R. Stokes Nolte, Esquire, Nolte & Brodoway, P.A., Wilmington, Delaware, Attorney for Appellee, Liberty Mutual Insurance Company on behalf of J.C. Penney Company, Inc.

Maria Paris Newill, Esquire, Wilmington, Delaware, Attorney for Appellee, AIG Insurance Company on behalf of J.C. Penney Company, Inc.

SLIGHTS, J.

I.

This appeal arises out of the Industrial Accident Board's ("Board") denial of Appellant, Julia Pantoja's, Petition to Determine Compensation Due. Substantial evidence supports the Board's finding that a new work injury did not occur on December 11, 2001, but it does not support the finding that Ms. Pantoja's symptoms in December, 2001 were unrelated to any work accident. Accordingly, the Board's decision must be **REVERSED**.

II.

In 1996, Ms. Pantoja sustained a work-related injury to her back while employed at a nursing home. The injury resulted in a 7% permanent impairment. She subsequently obtained employment in the shoe department of Appellee, J.C. Penney Company, Inc. ("J.C. Penney"). On September 13, 1999, while Liberty Mutual Insurance Company ("Liberty Mutual") was the worker's compensation insurance carrier for J.C. Penney, Ms. Pantoja fell from a ladder and suffered neck and back injuries. On October 19, 1999, again while Liberty Mutual was the insurance carrier, Ms. Pantoja had yet another fall from a ladder and suffered similar injuries to her back. She consulted her family physician, Dr. Domingo Singson, following each of these incidents. The next time Ms. Pantoja saw Dr. Singson because of back pain was

in July of 2001.¹ Although she reported pain to a specific region of her back, she did not provide any history to which its immediate cause could be attributed. Then, on December 18, 2001, Ms. Pantoja called out of work with a headache. She saw Dr. Singson the following day. At this appointment, Ms. Pantoja allegedly told Dr. Singson that she suffered lower back pain while moving a display table at work on December 11, 2001, although Dr. Singson does not have any documentation of this event. AIG Insurance Company (“AIG”) was the worker’s compensation insurance carrier for J.C. Penney at this time. Ms. Pantoja saw Dr. Singson continuously until June of 2002, when he cleared her to go back to work for ten hours per week.

Ms. Pantoja filed a Petition to Determine Compensation Due on September 23, 2002, alleging that the events of December 11, 2001 caused a recurrence of her previous back injury or, in the alternative, that she sustained a new work injury on that date. She appeared before the Board at a hearing on December 4, 2002, during which she testified that on December 11, 2001, while employed at J.C. Penney, she was asked to move the shoe display table and, when doing so, she “felt something in [her] back.”² She alleged that she told Barbara, her manager, that she hurt her back.³

¹The record indicates that Ms. Pantoja saw Dr. Singson several times between December of 1999 and July of 2001 for problems unrelated to worker’s compensation injuries or accidents.

²Hearing transcript of December 4, 2002 (“Tr.”) at 14.

³*Id.*

Although Ms. Pantoja continued to work during the days following the incident, she claimed that the pain grew worse and she scheduled an appointment with Dr. Singson for December 19, 2001.⁴ She testified that she experienced back pain after December 11, 2001 more frequently than before, and that it was located in her lower back as opposed to her upper back.⁵ She explained that she told Dr. Singson about the work incident and that he must have forgotten to include this information in his notes.⁶ When asked about her back pain after the 1999 accidents, Ms. Pantoja stated that, although not a daily occurrence, it hurt “sometimes.”⁷ Dr. Singson, who testified by deposition on Ms. Pantoja’s behalf, attributed her back problems to the 1999 injuries.⁸ He acknowledged that he did not document the December 11, 2001 incident in his notes.⁹

Dr. Errol Ger testified by deposition on behalf of J.C. Penney. He examined Ms. Pantoja on February 12, 2002, March 8, 2002 and September 23, 2002.¹⁰

⁴*Id.* at 15.

⁵*Id.* at 20-21.

⁶*Id.* at 29.

⁷*Id.* at 20; *see also id.* at 12-13.

⁸November 1, 2002 deposition of Dr. Singson (“Singson depo. 2”) at 60-61.

⁹*Id.* at 44.

¹⁰November 26, 2002 deposition of Dr. Ger (“Ger depo.”) at 3-4.

According to Dr. Ger, Ms. Pantoja offered conflicting renditions of the alleged December 11, 2001 incident during these examinations, first telling him that she hurt her back lifting a table, and then telling him that she hurt her back falling off a ladder.¹¹ Ultimately, Dr. Ger concluded that Ms. Pantoja's back problems were "a continuation of the previous injuries" and opined that she was fit for full-time sedentary work.¹²

The Board also heard the testimony of Barbara Hunter, Ms. Pantoja's immediate supervisor at J.C. Penney. Ms. Hunter stated that Ms. Pantoja did not complain of back pain in December of 2001, nor did she exhibit any physical difficulties.¹³ Ms. Hunter further stated that sales employees were not asked to move display tables because that duty fell on the "display person."¹⁴

Carol Graham also testified on behalf of J.C. Penny. She is the "payroll clerk" who handles worker's compensation claims. She receives these claims from the security department, calls them in to the insurance company, and follows up on the paperwork.¹⁵ According to Ms. Graham, on December 18, 2001, Ms. Pantoja called

¹¹*Id.* at 25, 38-39.

¹²*Id.* at 27-28.

¹³Tr. at 90.

¹⁴*Id.* at 96-97.

¹⁵*Id.* at 99.

out of work with a headache, then submitted a doctor's note a few days later stating that she would be out for a period of time because of a back problem.¹⁶ On January 16, 2002, Ms. Pantoja called Ms. Graham to submit a worker's compensation claim and stated that her back problem resulted from moving a table at work.¹⁷

III.

The Board denied Ms. Pantoja's petition in a decision dated December 18, 2002. Pursuant to the standard for successive carrier liability in recurrence/aggravation cases set forth in *Standard Distrib. Co. v. Nally*¹⁸, the Board was to consider whether Liberty Mutual, as the carrier at risk for the original injury, sustained its burden of showing that Ms. Pantoja suffered an "untoward event" on December 11, 2001, thereby shifting the risk to AIG. The Board never reached this stage of the inquiry, however, because it found that Ms. Pantoja's current spine complaints were not casually related to any work injury. It acknowledged that Ms. Pantoja was injured in September and October of 1999 and that her condition

¹⁶*Id.* at 100-101.

¹⁷*Id.* at 101-102.

¹⁸630 A.2d 640, 646 (Del. 1993)("The rule we endorse for determining successive carrier liability in recurrence/aggravation disputes places responsibility on the carrier on the risk at the time of the initial injury when the claimant, with continuing symptoms and disability, sustains a further injury unaccompanied by any intervening or untoward event which could be deemed the proximate cause of the new condition.").

deteriorated after January of 2002, but did not attribute the deterioration to a work injury. The Board stated that Ms. Pantoja and her physicians testified that her back pain from the 1999 accidents had cleared up by July of 2001. The Board also concluded that Ms. Pantoja was not a credible witness, and therefore discredited Dr. Singson's conclusion that her back pain came from the alleged December 11, 2001 incident because Ms. Pantoja was the source of that information. The Board interpreted Dr. Ger's conclusion to be that Ms. Pantoja's back pain was not caused by any work accidents. Consequently, the Board concluded that it was not necessary to address the issue of carrier liability.

IV.

Ms. Pantoja argues that the record lacks substantial evidence to support the Board's finding. She points out that the Board's interpretation of Dr. Ger's conclusion was incorrect because he testified that her back problems, including the July 2001 pain, stemmed from the 1996 and 1999 work accidents. Dr. Singson attributed the pain to the 1999 accidents, and Ms. Pantoja herself testified that the pain never went away after the 1999 accidents. According to Ms. Pantoja, the Board improperly failed to address the issue of whether the alleged December 11, 2001 injury was related to a new accident or to her prior accidents, even though this issue was a primary focus of the evidentiary presentation and oral argument. She charges

the Board with the obligation to make a factual determination on this issue as part of its obligation to follow an orderly and deductive decision-making process.

AIG, on behalf of J.C. Penney and as the insurance carrier for the alleged December 11, 2001 incident, argues that the Board's findings are supported by substantial evidence. In light of the Board's broad discretion when making credibility determinations, AIG argues that the Board correctly rejected the conflicting testimony of Ms. Pantoja, and properly accepted the testimony of Ms. Hunter and Ms. Graham with respect to the occurrence of the alleged accident. Likewise, AIG contends that Dr. Singson's opinions properly were discredited because of Ms. Pantoja's lack of credibility. According to AIG, Ms. Pantoja's history of back pain provided support for the Board's decision.¹⁹ Finally, AIG argues that the Board's failure to address the cause of Ms. Pantoja's back problems is free from legal error because there could have been any number of causes and she never met her burden of showing that any were work-related.

Liberty Mutual, the insurance carrier for the 1996 and 1999 incidents, argues

¹⁹In its Answering Brief, AIG points out that Ms. Pantoja's Opening Brief makes reference to her "ongoing neck [and] back problems." AIG asks that the Court not examine this issue on appeal because the claims at the hearing on the Petition only involved back problems, and issues not raised below should not be raised for the first time on appeal. (AIG Answering Brief at 12 (citing *Wilmington Memorial Co. v. Silverbrook Cemetery Co.*, 297 A.2d 378 (Del. Super. 1972))). The Court agrees with AIG's position given the record below. Accordingly, the Court has not considered any alleged ongoing complaints of "neck problems" in reaching its decision here.

that substantial evidence supports the Board’s finding that Ms. Pantoja’s disability is unrelated to a work injury. Liberty Mutual contends that in Ms. Pantoja’s brief, she misstated Dr. Ger’s conclusions about the source of injury. According to Liberty Mutual, Dr. Ger actually stated that her disability resulted from a “natural” continuation of prior back problems. It is argued that the Board’s finding that Ms. Pantoja’s symptoms had resolved before July of 2001 was harmless error and irrelevant to the Board’s decision. Finally, Liberty Mutual asserts that the Board was not required to address whether the cause of the disability was related to the alleged 2001 incident or to the 1996 and 1999 incidents.

V.

The Court must determine whether the Board’s decision is supported by “substantial evidence” and free from legal error.²⁰ “Substantial evidence” means such relevant evidence as a reasonable mind “might accept as adequate to support a conclusion.”²¹ The Court may overturn the Board’s decision only when there is no substantial, competent evidence of record to support it.²² Furthermore, “the credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be

²⁰*Cole v. State*, 1988 Del. Super. LEXIS 37, at *6 (citations omitted).

²¹*Histed v. E.I. du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

²²*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)(citations omitted).

drawn therefrom are for the Board to determine.”²³

VI.

Ms. Pantoja bore the initial burden of establishing a work-related injury and the extent of that injury.²⁴ Upon examination of the record, it is clear that Ms. Pantoja did not meet her burden with respect to the alleged December 11, 2001 injury, and that the Board’s decision to this effect was supported by substantial evidence. According to Dr. Singson’s notes from December 19, 2001, Ms. Pantoja did not inform him that her back pain was related to any incident at work, although she testified otherwise.²⁵ The absence of such a description in Dr. Singson’s records is persuasive in light of Dr. Singson’s notes from the 1996 and 1999 incidents, both of which provide detailed histories of the injuries.²⁶ Furthermore, Dr. Ger testified that Ms. Pantoja provided him with two different renditions of the alleged December 11, 2001 incident: first, she claimed that she lifted a table, but a few months later she claimed that she fell off a ladder.²⁷ Ms. Graham and Ms. Hunter provided information that contradicted Ms.

²³*Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003)(quoting *Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. Super. 1972)).

²⁴*Streett v. State*, 669 A.2d 9, 11 (Del. 1995)(citing *McCormick Transp. Co. v. Barone*, 89 A.2d 160 (Del. 1952)).

²⁵Singson depo. 2 at 44; Tr. at 29.

²⁶*See id.* at 18, 26-27, 32.

²⁷Ger depo. at 25, 38-39.

Pantoja's version of the alleged incident: Ms. Graham recalled Ms. Pantoja calling out of work on December 18, 2001 due to a headache,²⁸ and Ms. Hunter did not remember Ms. Pantoja reporting any work-related injury or reporting any physical difficulties in December of 2001.²⁹

The Board determined that Ms. Pantoja was not a credible witness based on her demeanor and dim recollection of events. This determination lies within the discretion of the Board; the Court cannot substitute its judgment for that of the Board.³⁰ Thus, the Court will not disturb the Board's well-supported finding that Ms. Pantoja did not suffer a work injury on December 11, 2001.

The inquiry does not end here, however. Next, the Court must examine whether substantial evidence supports the Board's finding that Ms. Pantoja's back pain in December, 2001, was not related to any work injury. It does not. After acknowledging that Ms. Pantoja "undeniably" injured her neck and spine in the 1999 accidents, the Board stated that "[c]laimant and her physicians testified, however, that this problem completely resolved before July of 2001."³¹ This statement, which

²⁸Tr. at 100.

²⁹*Id.* at 90.

³⁰*Director of Revenue v. Stroup*, 611 A.2d 24, 26 (Del. Super. 1992)(citing *Stuart v. Del. Liquor Commission*, 74 A.2d 472 (Del. Gen. Sess. 1950)).

³¹Board's Decision of December 18, 2002 at 7.

presumably led the Board to its ultimate conclusion, is inaccurate. At no point did any of the testifying witnesses indicate that Ms. Pantoja's problems resolved before July 2001. In fact, to the contrary, the testimony clearly indicates that her problems persisted during this time and related back to her 1996 and 1999 work accidents. Dr. Ger, upon whom the Board primarily relied, testified that Ms. Pantoja's present back problems are a "natural continuation of the prior injury problems."³² Dr. Ger agreed that the present symptoms reflected aggravations of her preexisting injuries, specifically referencing the 1996 and 1999 accidents.³³ Although the Board did not find Ms. Pantoja to be credible, it is worth noting that she never stated that her back pain had completely resolved as of July of 2001.³⁴ Similarly, Dr. Singson opined that her problems in July 2001 were related to her 1999 injuries.³⁵

³²Ger depo. at 40.

³³*Id.* at 29.

The colloquy between counsel and Dr. Ger was as follows:

Counsel: "Is it your opinion that the symptomatology that [Ms. Pantoja] has been experiencing, beginning December 2001, is a continuation of the problems she has been experiencing since 1996 and 1999?"

Dr. Ger: "Yes."

Counsel: "Would you describe her present problems as a flare up of her preexisting problems?"

Dr. Ger: "Yes."

³⁴Tr. at 12-13. Ms. Pantoja's testimony indicates that the back pain was sporadic rather than constant, but nevertheless it still existed.

³⁵August 16, 2002 Deposition of Dr. Singson at 6.

The record contains no competent evidence to support the conclusion that Ms. Pantoja's ongoing back pain did not result from her 1996 and 1999 work injuries. In fact, the undisputed testimony of record clearly demonstrates the causal connection and is inconsistent with the Board's decision. In the absence of substantial supporting evidence, the Board's decision must be reversed.³⁶ It is undisputed that Liberty Mutual is the carrier on the risk for the relevant time periods.³⁷

Based on the foregoing, the decision of the Board is **REVERSED** and **REMANDED** for further proceedings consistent with this decision.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to the Prothonotary.

cc: Joseph W. Weik, Esq.
R. Stokes Nolte, Esq.
Maria Paris Newill, Esq.

³⁶*Johnson*, 213 A.2d at 67 (citation omitted).

³⁷*See* Tr. at 39-40.