

2015 WL 13697703

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Delaware.

JOHNSON

v.

R.C. FABRICATORS INC.,

C.A. No. S15A-05-001 RFS

|
Date Submitted: September 1, 2015

|
Date Decided: December 22, 2015

On Appeal from the Industrial Accident Board's Decision
on Employee's Petition to Determine Compensation Due:
AFFIRMED

Attorneys and Law Firms

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Opinion

[RICHARD F. STOKES](#), JUDGE

*1 Dear Counsel:
Roger Johnson (“Appellant” or “Employee”) appeals an
April 9, 2015, decision by the Industrial Accident Board
(“IAB” or “Board”) that held Appellant forfeited his worker's
compensation benefits pursuant to [19 Del. C. § 2353\(b\)](#).¹
For the reasons stated below, the Board's decision is
AFFIRMED.

FACTS AND PROCEDURAL BACKGROUND

Appellant, an iron worker, was working for R.C. Fabricators
(“Employer”) on a construction project in Laurel, Delaware.
On October 30, 2013, Appellant fell from a rafter and

suffered injuries to his ribs, right shoulder, and hip. The
Board held a hearing on February 5, 2015, to determine
the limited issue of whether Appellant forfeited his worker's
compensation benefits pursuant to [19 Del. C. § 2353\(b\)](#) due
to his intoxication and/or willful failure or refusal to use a
reasonable safety appliance.

On April 9, 2015, the Board found in Appellant's favor
regarding the failure to use a safety appliance. However, the
Board found Appellant forfeited his right to benefits due to
his intoxication that proximately caused the accident. On May
4, 2015, Appellant filed an appeal with this Court.

DISCUSSION

A. Standard of Review

On appeal, this Court examines only the record upon which
the Board relied in making its decision.² The questions for this
Court are whether substantial evidence supported the Board's
decision and whether the Board's decision is free from legal
error.³ Appropriate evidence is only “such relevant evidence
as a reasonable mind might accept as adequate to support a
conclusion.”⁴ Evaluating the evidence, deciding credibility
issues, and determining factual questions are not considered.⁵
The Court reviews questions of law *de novo*.⁶ “Absent errors
of law, the standard of review of an IAB decision is abuse of
discretion.”⁷

B. The Board Hearing

During the Board hearing, Appellant called five witnesses
to testify: Michael McCanney (“McCanney”), Jason Pisano
(“Pisano”), Marc Hynson (“Hynson”), Marc Klair (“Klair”),
and Appellant Roger Johnson. McCanney, Pisano, and
Appellant stayed at the Holiday Inn in Seaford, Delaware
on October 29, 2013. The accident occurred on October 30,
2013.

McCanney stated Appellant did not take any drugs or
illegal substances the night before the accident. According
to McCanney, at 7:00 a.m., on the day of the accident,
Appellant did not appear impaired on the job site. On that day,
McCanney and Appellant were installing acoustic decking
on a one-story building. McCanney estimated the decking
was approximately twenty feet long and two feet wide. The
workers fashioned a hook out of rebar to help them carry the
large decking pieces across the roof. McCanney claimed he

did not witness Appellant fall from the roof. McCanney did not believe it was raining on October 30, 2013.

*2 According to Pisano, Appellant did not use drugs or alcohol the night before Appellant's accident. Appellant did not appear impaired the day of the accident. Pisano stated he took his morning break at 9:30 a.m., and he believed Appellant's accident occurred thereafter. Pisano did not observe Appellant initially losing his balance. After hearing a noise, Pisano turned and saw Appellant falling through the hole in the roof. There was no precipitation that day.

Hynson, the foreman, noted Appellant did not appear impaired at the construction site. According to Hynson, he asked Appellant to toss him a tool. After receiving the tool, Hynson walked away. Then, Hynson heard a thud behind him. Appellant was laying on the ground. While the paramedics aided Appellant, Hynson observed that Appellant's pants were cut open. A clear plastic bag strapped to Appellant's leg was observed. It appeared to contain an unknown liquid. Hynson believed the weather was sunny.

Klair, the safety coordinator, was not at the job site when the accident occurred. Later that day Klair took statements from witnesses and prepared a report. According to Klair, all new employees receive a handbook concerning safety and drug policies. Appellant signed a document acknowledging he received a copy of the safety handbook. Further, Appellant signed a "Zero Tolerance Policy" for drugs and alcohol on September 11, 2012. Random drug screenings of employees were scheduled twice a week.

Appellant admitted to smoking marijuana and using cocaine the night before the accident. According to Appellant, McCanney and Pisano smoked marijuana with him while McCanney also joined Appellant in using cocaine. Appellant stated he smoked marijuana between 4:30 p.m. and 6:00 p.m. Appellant admitted he used cocaine between 6:30 p.m. and 7:00 p.m. Appellant claimed he did not feel impaired the following morning. Appellant denied using any drugs during the workday. Appellant testified he was carrying a piece of decking using the metal rebar hook when he slipped. Then, Appellant fell through the hole in the roof. Appellant claimed it was misting at this time, and the workers and Hynson discussed whether work should continue. Further, Appellant acknowledged wearing a bag of urine around his ankle which was discovered. He hid the urine bag to pass Employer's random drug tests.

The Employer's medical expert, Dr. Ali Hameli ("Dr. Hameli"), testified regarding Appellant's intoxication. From his record review, the accident occurred about 10:30 a.m. on October 30, 2013. Appellant's blood sample was collected at 1:40 p.m. on October 31, 2013. Blood tests revealed metabolites of cocaine and marijuana in Appellant's system. Dr. Hameli believed the amount of the metabolite of cocaine present twenty-seven hours after the accident suggested a fairly moderate amount of cocaine entered Appellant's body beforehand. In Dr. Hameli's opinion, Appellant consumed cocaine within two to four hours of the accident.⁸

Dr. Hameli explained the side effects of both marijuana and cocaine consumption. According to Dr. Hameli, the effects of marijuana include deteriorating concentration and judgment, vertigo, and impairment of motor activities like balance and other physical activities.⁹ Further, the effects of cocaine include hallucinations, nausea, vomiting, blurred vision, dizziness, and impairment of observation, judgment and attention.¹⁰ Dr. Hameli stated on direct and cross-examination that other physicians in the field would have reached this conclusion.¹¹ Dr. Hameli concluded that Appellant was impaired by cocaine and marijuana at the time of the fall. Dr. Hameli stated that Appellant's impairment substantially contributed to his work injury. These opinions were expressed within a reasonable degree of medical certainty.

C. The Board Decision

*3 On April 9, 2015, the Board issued an Order denying Appellant's Petition to Determine Compensation Due. The Board found Employer satisfied its burden under [19 Del. C. § 2353\(b\)](#). The Board noted an employee can forfeit the right to compensation for an injury if the injury was the result of the employee's own intoxication; however, the intoxication itself must be the cause of the injury and not merely accentuate the injury.¹²

The Board found Dr. Hameli's expert testimony credible. The Board acknowledged the conflicting accounts from Appellant and Appellant's witnesses. Notably, McCanney testified he was unaware of any drug use the night before the incident. Appellant testified McCanney and Pisano smoked marijuana with him the previous night. The Board concluded Appellant's own witnesses' testimony either contradicted his or was vague. As such, the Board determined Appellant's witnesses lacked credibility.

The Board found Appellant's intoxication was the cause of his injury, based on the whole record, including the testimony of the Appellant. The Board found Dr. Hameli's expert testimony was persuasive. Therefore, the Board concluded Appellant forfeited his right to recover damages and compensation or medical services pursuant to 19 Del. C. § 2353(b). Appellant's Petition to Determine Compensation Due was denied.

D. Parties' Contentions

i. Appellant's Arguments

Appellant argues the Board erred by failing to adequately consider the conflicting lay witness testimony. Specifically, Appellant claims the Board incorrectly stated Dr. Hameli's testimony was unrefuted. According to Appellant, the testimony of his lay witnesses was not considered fully when the Board made its final decision.

Appellant relies on *Whaley v. Shellady, Inc.*, that states, "uncontradicted evidence need not necessarily be accepted as true, where there is evidence or circumstances from which a contrary inference may be drawn."¹³ Appellant argues there are several reasons to be skeptical of Dr. Hameli's testimony: (1) only metabolites were found in his system; (2) the drug test was performed twenty-seven hours after Appellant was injured; and (3) Dr. Hameli testified the industry standard for determining whether someone was intoxicated is to perform [blood and urine tests](#) at the time of the accident. Consequently, Dr. Hameli's testimony should be disregarded.

Also, Appellant argues the Board should have given more weight to the eyewitness testimonies. Appellant notes two lay witnesses, McCanney and Pisano, testified that Appellant fell because the rebar hook slipped. Appellant states this is an external force that caused and/or contributed to his injuries. Moreover, McCanney, Pisano, and Hynson testified about their interactions with Appellant. They believed Appellant was not impaired. Thus, the Board erred when it decided Dr. Hameli's testimony was the most credible evidence.

Appellant relies on *Thompson*, another IAB decision, to argue the Board should give more weight to eyewitness testimony over circumstantial evidence of medical experts in the context of an intoxication defense.¹⁴ In *Thompson*, direct observation was preferable to subsequent medical expert testimony about functional impairment and proximate cause of injury.¹⁵ Appellant asserts the Board was unaware that

Dr. Hameli's testimony could be disregarded and should have credited the lay testimony.

ii. Appellee's Arguments

*4 Employer contends there is substantial evidence to support the Board's decision. Specifically, the Board was free to determine that Appellant's claimed timing of his drug use was not credible. Dr. Hameli testified Appellant took the drugs between two to four hours before the work accident.¹⁶ Consequently, there was a four hour window when Appellant could have used drugs from the time Appellant woke up at 6:15 a.m., to the time of the accident at 10:30 a.m.. Employer claims there were three opportunities for Appellant to consume the drugs that morning: (1) when he woke up; (2) on his way to the job site; and (3) during the morning break. Employer argues the close nexus of time between when Appellant could have consumed the drugs and the accident supports Dr. Hameli's opinion. In particular, Dr. Hameli opined that Appellant was intoxicated when he fell, and the intoxication substantially contributed to the injury.

According to Employer, there was no external force or contributing factor that caused Appellant to fall. For example, in *General Motors Corp. v. Edwards*, an intoxicated claimant fell to his death while trying to avoid a sledgehammer.¹⁷ Although, claimant was intoxicated, the Board found claimant's intoxication was not the proximate cause of his death.¹⁸ The Board concluded claimant acted as any person would have in that situation whether they were sober or not.¹⁹ Employer distinguishes *Edwards* from the current case by pointing out there was no secondary force that caused Appellant's injury. Appellant was not trying to avoid a coworker nor did Appellant trip over a piece of building material. The weather was not an external force that contributed to his injuries. Appellant merely lost his balance and fell because he was intoxicated.

Finally, Employer argues circumstantial medical expert testimony of intoxication is substantial evidence to support an intoxication defense pursuant to 19 Del. C. § 2353(b).²⁰ In *Finocchiaro*, claimant was injured in a motor vehicle accident while making a delivery for his employer.²¹ Tests revealed alcohol and opiates were in his system following the motor vehicle accident.²² The Board accepted the medical expert's opinion that claimant was under the influence of alcohol based on the tests. Furthermore, the Board found claimant's faculties were severely impaired at the time of the

accident.²³ The Superior Court affirmed the Board's decision to deny claimant's petition to determine compensation due. There was substantial evidence to support the Board finding claimant was intoxicated, notwithstanding claimant's contrary testimony and that intoxication proximately caused the accident.²⁴

Based on the ruling in *Finocchiaro*, Employer argues Dr. Hameli's credible circumstantial medical expert testimony provides substantial evidence to support an intoxication defense pursuant to 19 Del. C. § 2353(b). Employer notes there is substantial evidence on the record to support the Board's decision. Specifically, Employer notes the evidence proves Appellant ingested the drugs within hours of the accident. Also, the effects of those drugs had on Appellant's body caused the accident. Moreover, the Board was free to determine Appellant and his witnesses lacked credibility. Therefore, there is substantial evidence on the record to conclude Appellant's injuries were the result of his own intoxication.

E. Analysis

The question for this Court is whether there is substantial evidence on the record to support the Board's finding that Employer satisfied its burden of proof imposed by 19 Del. C. § 2353(b). For the following reasons, the Court finds the Board did not err in finding that Employer satisfied its burden.

*5 When analyzing a 19 Del. C. § 2353(b) case, the Board must apply the proximate cause standard to determine the cause of the employee's accident.²⁵ The proximate cause standard is commonly referred to as the "but for" test.²⁶ Stated more fully, in order to satisfy the "but for" test, a proximate cause must be one "which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."²⁷ Employer, in the present case, must meet two criteria to satisfy forfeiture: (1) Employee was intoxicated; and (2) Employee's intoxication was a but for cause of the injury.²⁸

There is substantial evidence on the record to support the contention that Appellant was intoxicated based on Dr. Hameli's testimony. Dr. Hameli testified as an expert witness. Generally, courts analyze the following six factors before an expert testifies: (1) whether the witness is qualified as an expert by assessing the expert's knowledge, skill, experience,

training, or education; (2) whether the evidence offered is otherwise admissible, relevant, and reliable; (3) whether the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) whether the specialized knowledge being offered will assist the trier of fact to understand the evidence or to determine a fact in issue; (5) whether the expert testimony will not create unfair prejudice, confuse the issues, or mislead the jury; and (6) whether the probative value of the evidence upon which the expert relies substantially outweighs the risk of prejudice.²⁹

Recognizing the criteria, Dr. Hameli is a qualified medical expert because of his education, training and experience gained from examining 60,000 cases and 12,000 autopsies.³⁰ Dr. Hameli's testimony is relevant to whether Appellant was intoxicated during the accident. Dr. Hameli's opinion is based on information upon which other experts in this field rely.³¹ Standard texts were relied upon.³² Dr. Hameli states other physicians, relying on the same blood samples and medical evidence, would reach the same conclusion.³³ Additionally, Dr. Hameli's methods for determining whether Appellant was intoxicated is shared by other physicians and can be duplicated by other physicians in this field.³⁴ Dr. Hameli's testimony assisted the Board, acting as the trier of fact, because his evidence helped it determine whether Appellant was intoxicated at the time of the accident. Nothing suggests Dr. Hameli's testimony would confuse the Board or create an unfair prejudice. The probative value of Dr. Hameli's testimony substantially outweighed the risk of prejudice because his testimony is highly probative to Appellant's intoxication and did not create any risk of prejudice. The foundation is sufficient for Dr. Hameli's testimony regarding Appellant's intoxication and its effects.³⁵

*6 When making factual findings the Board, as the fact finder, is free to make determinations regarding credibility.³⁶ On the record, Appellant presented testimony that contradicted Dr. Hameli's findings. Although Appellant's witnesses testified Appellant did not appear intoxicated on the morning of the accident, the Board concluded their testimony lacked credibility given the inconsistencies. The Board was free to reject this testimony and to accept Dr. Hameli's testimony and find it credible.³⁷ Dr. Hameli's expert testimony constitutes substantial evidence regarding Appellant's intoxication.

Moreover, there is substantial evidence on the record to support the conclusion that Appellant's intoxication was the proximate cause of the accident. Dr. Hameli testified that the effects of cocaine and marijuana would negatively impact Appellant's ability to perform physical activities.³⁸ Dr. Hameli concluded Appellant's impairment from the cocaine and marijuana substantially contributed to the work injury.³⁹ Although Appellant proffered alternative explanations for the fall—the weather and the rebar hook slipping—the Board was free to find those explanations were not credible given the inconsistencies found in the testimonies of Appellant's co-workers.⁴⁰ Dr. Hameli's testimony constitutes substantial evidence to support the Board finding the accident would not have occurred but for Employee's intoxication.

Considering the foregoing, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

Very truly yours,

/s/ **Richard F. Stokes**

Richard F. Stokes

All Citations

Not Reported in Atl. Rptr., 2015 WL 13697703

Footnotes

- 1 [19 Del. C. § 2353\(b\)](#) provides in pertinent part: "If any employee be injured as a result of the employee's own intoxication...the employee shall not be entitled to recover damages in an action at law or to compensation or medical, dental, optometric, chiropractic or hospital service under the compensatory provisions of this chapter. The burden of proof under this subsection shall be on the employer."
- 2 [Burgos v. Perdue Farms, Inc.](#), 2011 WL 1487076, at *2 (Del. Super. Apr. 19, 2011).
- 3 *Id.*
- 4 *Id.*
- 5 *Id.*
- 6 [Anchor Motor Freight v. Ciabattoni](#), 716 A.2d 154, 156 (Del. 1998)(citation omitted).
- 7 [Opportunity Ctr., Inc. v. Jamison](#), 2007 WL 3262211, at *2 (Del. May 24, 2007) (citation omitted).
- 8 Dr. Hameli Dep. 71:21–71:24 (stating the level of Benzoylcgonine found in Appellant's system 27 hours after the accident indicates Appellant consumed the cocaine between two to four hours before the accident).
- 9 Dr. Hameli Dep. 21:12–27:11.
- 10 *Id.*
- 11 Dr. Hameli Dep. 81:20–81:24 (concluding he was not the only physician who would reach the same conclusions based upon the blood samples and the medical evidence he reviewed).
- 12 [Penn Del Salvage, Inc. v. Wills](#), 282 A.2d 613, 614 (Del. 1971).
- 13 [Whaley v. Shellady, Inc.](#), 161 A.2d 422, 424 (Del. 1960).
- 14 [Thompson v. City of Wilmington](#), IAB Hearing Number 1206668 (July 22, 2002).
- 15 *Id.*
- 16 Dr. Hameli Dep. 71:21–71:24.
- 17 [Gen. Motors Corp. v. Edwards](#), 1998 WL 283392 (Del. Super. Jan. 7, 1998).
- 18 *Id.*
- 19 *Id.*
- 20 [Finocchiaro v. D.P., Inc.](#), 2006 WL 3873257 (Del. Super. Dec. 29, 2006) ("*Finocchiaro*").
- 21 *Id.*
- 22 *Id.*
- 23 *Id.*
- 24 *Id.*
- 25 [Finocchiaro](#), 2006 WL 3873257, at *6.
- 26 [Culver v. Bennett](#), 588 A.2d 1094, 1097 (Del. 1991) (citing [Chudnofsky v. Edwards](#), 208 A.2d 516, 518 (Del. 1965)).
- 27 *Id.* (quoting [James v. Krause](#), 75 A.2d 237, 241 (Del. Super. 1950)).

- 28 [Finocchiaro](#), 2006 WL 3873257, at *6.
- 29 [State v. Vandemark](#), 2004 WL 2746157, at *3 (Del. Super. Nov. 19, 2004)(Further, the Court notes under IAB Rule 14(b), the Board is free to disregard any of the customary rules of evidence and legal procedures).
- 30 Dr. Hameli Dep. 76:9–76:20.
- 31 Dr. Hameli Dep. 81:16–81:24 (when asked whether other physicians would reach the same conclusions based upon the blood samples and the medical evidence, Dr. Hameli responded: “the references indicate that the experience of other experts which I gave you some examples, they came to the same conclusion”).
- 32 Dr. Hameli Dep. 77:7–78:19 (Dr. Hameli relied upon several texts including the *Legal Medicine Pathology and Toxicology* and the *Parikh Textbook of Medical Jurisprudence and Toxicology*).
- 33 *Id.*
- 34 *Id.*
- 35 Dr. Hameli Dep. 62:3–62:15 (concluding that Appellant was impaired by cocaine and marijuana at the time of the accident, and the impairment substantially contributed to the accident).
- 36 [Allied Container v. Legg](#), 2006 WL 2578908, at *5 (Del. Super. Aug. 28, 2006) (holding “[a]ssessing the credibility of witnesses and deriving inferences therefrom is solely within the province of the Board”).
- 37 *Id.*
- 38 Dr. Hameli Dep. 21:12–27:11 (concluding the effects of cocaine include “blurred vision, dizziness, and impairment of observation, judgment and attention.” The effects of marijuana include “deteriorating concentration and judgment, producing vertigo and impairment of motor activities like balance”).
- 39 Dr. Hameli Dep. 73:18–73:22.
- 40 [Allied Container v. Legg](#), 2006 WL 2578908, at *5 (Del. Super. Aug. 28, 2006).