BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ESTATE OF HERBERT MITCHELL,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1322082
	)	
ALLEN,[1]	)	
	)	
Respondent.	)	

Does claimant's estate have the right to resume to autopsy and notify their opponent?

ORDER

Background: Herbert Mitchell ("Claimant") died on June 4, 2008, when he was trapped inside a grain bin when soy bean meal poured into the bin, ultimately burying him and causing his death. The official Certificate of Death listed the cause of death as asphyxia due to (or as a consequence of) "occlusion of the nose and mouth and immobilization of the chest and abdomen by external pressure."

On May 16, 2011, Claimant's Estate filed a Petition to Determine Additional Compensation Due seeking compensation for permanent impairment, namely 100% permanent impairment to the right lung and 100% permanent impairment to the left lung. Allen sought to dismiss this petition, but that motion was denied. The Board held that, in light of the Supreme Court's decision in *Estate of Watts v. Blue Hen Insulation*, 902 A.2d 1079 (Del. 2006), where a claimant dies from the work accident, nothing in the Workers' Compensation Act expressly abrogates a claim for permanency benefits. "Since there is no express restriction on a post-death claim for permanent injuries by the estate of a worker who dies from his injuries, we hold that

[1] There is an issue before Superior Court as to whether Claimant's employer at the time of the work accident was Allen Family Foods or Allen's Hatchery. There is no need to summarize the facts in that dispute. As the Board understands it, Superior Court has not yet made a determination on that issue. Accordingly, the Board continues to take no position on who the proper employer is. Thus, the respondent in this motion is simply listed as Allen.

the worker's statutory right of action survives." *Estate of Watts*, 902 A.2d at 1083. Allen argued that, under the circumstances of this case, where Claimant died virtually immediately at the time of the accident, Claimant could not factually have sustained a permanent impairment prior to death. The Board determined that this was a factual question. It was possible that Claimant sustained a physical injury to his lungs that would have qualified as a permanent impairment to the lungs had Claimant survived.

> If the effect of the accident was only to block oxygen from reaching Claimant, such that he suffocated, then the lungs themselves were not physically damaged in the accident and no award of permanent impairment to the lungs would be possible. The lungs, in that case, ceased to function because Claimant died of a lack of oxygen, not from any physical damage (or "impairment") to the structure of the lungs themselves. On the other hand, if Claimant's Estate can provide persuasive evidence that the weight of the grain on Claimant's chest and abdomen or the presence of the grain in Claimant's airways actually resulted in physical damage to the lungs that would have been permanent in nature had Claimant somehow survived, then a valid claim for benefits could be presented and the degree of impairment to the physical structure of the lungs could be assessed.

Estate of Herbert Mitchell v. Allen, Del. IAB, Hearing No. 1322082, at 9 (August 8, 2011)(ORDER). Accordingly, Allen's motion was denied. Claimant, however, would have the burden of establishing that his lungs sustained an anatomical permanent impairment prior to death, not because of death.

Following this decision, Claimant's Estate had Claimant's body exhumed and an autopsy performed by Dr. Richard Callery on October 10, 2011, over two years after the death of Claimant. No notice of this was given to Allen's counsel and no opportunity was presented to allow Allen to arrange to have its own medical expert present at the time.[2] Experts have

[2] In fact, on October 10, counsel for Claimant's Estate contacted Allen's counsel requesting a continuance of the hearing in this case. No mention of the autopsy was made despite the fact that it was happening that same day.

informed Allen that the fact of the autopsy itself destroyed any ability for Allen to conduct a meaningful second autopsy on its own behalf.

Following this autopsy, Claimant's Estate filed an additional petition seeking "100% permanent impairment" to the heart, liver, left kidney, right kidney, brain and "entire digestive system." Allen first learned of the autopsy when provided a copy of Dr. Callery's permanency opinion on December 12, 2011, two months after the autopsy was performed. Photos from the autopsy were not provided to Allen until just a day prior to this motion hearing.

Allen argues that conducting the autopsy without notice to opposing counsel both results in an unfair advantage to Claimant's Estate and obstructed Allen's own access to the evidence because a second autopsy cannot be performed. Allen requests that all evidence from the autopsy be excluded from the hearing or, in the alternative, that the Board order that an adverse inference by applied so that all reasonable doubts concerning the evidence shall be resolved in Allen's favor by the factfinder. Claimant's Estate argues that it was not compelled under any rule or law to notify Allen of the planned autopsy by its medical expert.[3]

Analysis: At the motion hearing, there was some discussion about whether the Board had the authority to order an autopsy. This question is moot because Allen is not seeking to re-exhume Claimant and perform a second autopsy. Because of the length of time that Claimant has been deceased and the fact that the one autopsy was done, a second autopsy could not generate any useful information. The question presented to the Board concerns the admissibility of evidence concerning the autopsy that was performed at the request of Claimant's Estate without notice to Allen.

[3] Claimant's Estate's counsel notes that Dr. Callery is the State Medical Examiner and refers to him as a "State official." However, for purposes of this litigation, Dr. Callery is not functioning in his capacity as a State official, but as Claimant's Estate's medical expert.

Case law on this specific subject is scarce. Allen cites *Holm-Waddle v. William D. Hawley, M.D., Inc.*, 967 P.2d 1180 (Okla. 1998). That was a medical malpractice action. The action had been pending for two years and four months before the decedent died. An autopsy was performed by a medical expert hired by plaintiff's counsel. The autopsy was limited to the organs concerned in the malpractice action. The decedent's body was then cremated. No notice was given to the defendant of decedent's death, the autopsy or the cremation. The defendant learned of the autopsy two months later. *Holm-Waddle*, 967 P.2d at 1182. The defendant moved to dismiss the entire malpractice action, citing a party's duty to supplement discovery and a lawyer's ethical duty not to obstruct another party's access to evidence. Instead, the trial court simply prohibited the use of most of the evidence from the autopsy. *Holm-Waddle*, 967 P.2d at 1182. On appeal, the plaintiff argued that the trial court abused its discretion.

The Oklahoma Supreme Court upheld the trial court's decision as not being an abuse of discretion. It cited, with favor, a Federal Rules Decision commenting on an undisclosed autopsy performed while a wrongful death action was pending.[4] The federal court stated:

> When an expert employed by a party or his attorney conducts an examination reasonably foreseeably destructive without notice to opposing counsel and such examination results in either negligent or intentional destruction of evidence, thereby rendering it impossible for an opposing party to obtain a fair trial, it appears that the Court would not only be empowered, but required to take appropriate action, either to dismiss the suit altogether, or to ameliorate the ill-gotten advantage.

[4] The Oklahoma Supreme Court distinguished the situation when an autopsy was performed prior to any claim of compensation being made. In *Western States Construction Co. v. Stailey*, 461 P.2d 940 (Okla. 1969), an autopsy was done prior to the making of a workers' compensation claim. The court held that there was no duty to give notice of an autopsy to a person with only an "indirect interest" in the outcome. *Western States Construction*, 461 P.2d at 944. The *Holm-Waddle* court observed that a defendant in pending litigation cannot be said to have an "indirect interest" in the outcome of the autopsy. *Holm-Waddle*, 967 P.2d at 1182.

Barker v. Bledsoe, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979). In light of this, the *Holm-Waddle* court agreed that suppressing most of the evidence of the autopsy was appropriate. *Holm-Waddle*, 967 P.2d at 1183.

Outside of the context of autopsies, there is plentiful Delaware law on the subject of spoliation of evidence. Usually, the issue comes up in the context of seeking an "adverse inference instruction" to a jury to the effect that, if a party has wilfully destroyed evidence, the jury should "adopt a view of the facts as unfavorable to the wrongdoer as the known circumstances will reasonably admit." *Equitable Trust Co. v. Gallagher*, 102 A.2d 538, 541 (Del. 1954). However, such an instruction is not appropriate for accidental or negligent destruction of evidence. "An adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item." *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006). In other words, the standard "requires a showing that a party acted with a mental state indicative of spoliation." *Midcap*, 893 A.2d at 548. There must be wrongful conduct indicative of a desire to suppress the truth. *Nationwide Mutual Fire Ins. Co. v. Delmarva Power & Light Co.*, Del. Super., C.A. No. 06C-10-225, Cooch, J., 2009 WL 684565 at *10 (March 16, 2009). It is enough if the conduct is "reckless," indicating a conscious indifference to the rights of others such that there was a foreseeability of harm to the other resulting from the act that the actor perceived or should have perceived. *Nationwide Mutual*, 2009 WL 684565 at *11.

In the current case, the autopsy of Claimant was not done with the intent to destroy the evidence. On the contrary, Claimant's Estate was doing it in an effort to gain evidence. However, it was foreseeable that the act of the autopsy would prevent the other party from doing

the same thing and gaining evidence for itself. This gets to the nub of the problem. The autopsy itself was not wrongful, but was Claimant's Estate wrongful in not notifying Allen that it was to be conducted and thus depriving Allen of the chance to be present and gain its own evidence rather than to be completely dependent on whatever photographs or notes Claimant's medical expert chose to take?

Claimant is, of course, correct, that there is no specific statute or Board rule that states that the opposing side must be notified of autopsies conducted during the pendency of litigation. It seems unlikely that the need for such a specific provision would have occurred to the General Assembly or the Board. However, there are provisions in the Workers' Compensation Act that reinforce the basic concept that parties should deal fairly and openly with each other.

For example, while a claimant has the statutory right to employ "a physician, surgeon, dentist, optometrist or chiropractor of the employee's own choosing," it is specifically provided that "[n]otice of the employee's *intention* to employ medical aid as aforesaid shall be given to the employee's employer or its insurance carrier or to the Board." DEL. CODE ANN. tit. 19, § 2323 (emphasis added). In addition, "[n]otice that medical aid *was employed* as aforesaid shall be given within 30 days thereafter to the employer or its insurance carrier in writing." DEL. CODE ANN. tit. 19, § 2323 (emphasis added). Thus, a claimant is to give an employer (or its insurance carrier) both notice of the claimant's intent to use a doctor of the claimant's choice as well as notice (within 30 days) of the fact that such medical aid was in fact used. Such notification allows an employer the opportunity to make its own arrangements to examine the claimant at or near the same time that the claimant is being examined by the claimant's own doctor. Similarly, an employer has the right to have an injured employee examined by a doctor of the employer's choosing, but by statute "the employee shall be entitled to have a physician . . . of the employee's

own selection . . . present to participate in such examination." DEL. CODE ANN. tit. 19, § 2343(a).

Of course, an autopsy cannot reasonably be described as "medical aid" as that term is used in Section 2323 but, using that section as an analogy, the Board recognizes that, in the current case, Allen had no notice of the autopsy prior to it being done and was not notified that it had been done until two months later. It has no way to examine Claimant for itself. The fact that the autopsy was not mentioned to Allen's counsel despite counsel for Claimant's Estate being in communication with Allen's counsel on the very day of the autopsy leads to the obvious inference that not telling Allen was a deliberate and intentional litigation tactic by Claimant's Estate.

However, if we are considering analogous situations, it should also be recognized that there are analogies that point in the other direction. Frequently, if an injured employee has surgery, the operative report from the surgeon becomes important evidence. The surgeon is the one who was present and got to see the actual situation while all other medical witnesses are limited to relying on the operative report. That situation does not seem all that much different from the situation presented here: Claimant's medical expert doing the autopsy did a report that Allen's medical witnesses will have to rely on. There is a slight--but meaningful--difference though. In a surgical situation, the employer can review objective diagnostic testing done prior to the surgery and can have additional testing done after the surgery. The employee might have been examined by the employer's medical expert prior to the surgery and could certainly be examined again after the surgery. Thus, there would be ways for the employer to gain independent evidence to verify the findings on the operative report. In the case of the current autopsy, Allen does not have any means to verify the findings by means of any other testing.

Under the circumstances of this case, Allen is limited to what Claimant's expert noted in his report and the photographs Claimant's expert chose to take.

It is also true that, normally, an administrative board should hear all evidence that could conceivably throw light on the controversy. *Ridings v. Unemployment Insurance Appeal Board*, 407 A.2d 238, 240 (Del. Super. 1979). The Board should normally consider evidence that contains probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. *See Rules of the Industrial Accident Board* ("*Board Rules*"), Rule 14(C). In furtherance of this goal, it has been established that "[t]he Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of discretion." *Board Rules*, Rule 14(C). It is undeniable that the autopsy findings would likely constitute evidence of probative value. However, the Board is also charged with ensuring that it makes a just determination in every proceeding, *see* DEL. CODE ANN. tit. 19, § 2301A(i), and fundamental principles of justice need to be observed. *See General Chemical Div., Allied Chemical & Dye Corp. v. Fasano*, 94 A.2d 600, 601 (Del. Super. 1953).

Taking all these competing factors into consideration, the Board finds that the actions of Claimant's Estate in performing an autopsy of Claimant without notice to Allen had the effect of putting Allen at an unfair disadvantage in this litigation. As mentioned earlier, the Board is satisfied that the lack of communication was a deliberate choice by Claimant's Estate. However, the Board also finds that the disadvantage does not outweigh the importance of the probative value of the autopsy findings. Phrased another way, the prejudice to Allen is not so great as to merit the complete exclusion of all evidence from the autopsy.

Having said this, the Board recognizes that, because of the lack of notification from Claimant's Estate concerning the autopsy, Allen has been deprived of all opportunity to

investigate the facts for themselves. Some remedial measure is appropriate "to ameliorate the ill-gotten advantage." *See Barker*, 85 F.R.D. at 547-48. Under the circumstances, the Board finds that it is appropriate to order that an adverse inference be applied so that all reasonable doubts concerning the autopsy evidence are to be resolved in Allen's favor by the factfinder. Because Allen was deprived of all opportunity to find facts for itself from the autopsy, it is only fair to assume that any doubts concerning the evidence would have favored Allen's position.

IT IS SO ORDERED THIS 20th DAY OF FEBRUARY, 2012.

INDUSTRIAL ACCIDENT BOARD

Lowell L. Groundland
LOWELL L. GROUNDLAND

Terrence M. Shannon
TERRENCE M. SHANNON

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Christopher F. Baum

Mailed Date: 2-20-12

bc
OWC Staff

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