

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

KEITH JENNINGS,)
)
 Claimant-Below, Appellant,)
)
 v.) C.A. No. N11A-08-005 WCC
)
 AVON PRODUCTS,)
)
 Employer-Below, Appellee.)

Submitted: September 10, 2012
Decided: January 4, 2013

Upon Appeal from the Industrial Accident Board - AFFIRMED

OPINION

Kristi N. Vitola, Esquire. Schmittinger and Rodriguez, P.A., 414 South State Street, P.O. Box 497, Dover, DE 19903. Attorney for Claimant-Below, Appellant.

Francis X. Nardo, Esquire. Tybout, Redfearn & Pell, 750 Shipyard Drive, Suite 400, P.O. Box 2092, Wilmington, DE 19899. Attorney for Employer-Below, Appellee.

CARPENTER, J.

Keith Jennings filed a petition before the Industrial Accident Board (“IAB”) asserting that the injuries he sustained while working for Avon Products (“Avon”) had become permanent. The IAB found that none of Jennings’ injuries were permanent and denied Jennings’ petition for payment. On appeal, Jennings alleges the IAB erred as a matter of fact and law by denying his petition and not considering the appropriateness of other related expenses.

For the reasons discussed below, the decision of the IAB is hereby affirmed.

BACKGROUND

Jennings was employed by Avon as a warehouse worker. On December 6, 2008, another Avon worker dropped a thirteen-pound box on Jennings’ head. Jennings did not lose consciousness and was able to drive himself to the emergency room immediately thereafter. Although diagnostic tests revealed no abnormalities, Jennings began suffering headaches, experiencing ringing in his ears, and feeling off-balance when he returned to work the following week. Jennings was referred to Dr. John Townsend for these complaints. Dr. Townsend removed Jennings from all work until January 2009, at which time he released Jennings to work light duty.

However, Jennings did not return to work until May 2009. In August 2009, Avon’s Delaware plant closed, and Jennings elected to transfer to Avon’s Georgia

plant. Although Jennings' responsibilities at the Georgia plant were highly comparable to his duties at the Delaware plant, his symptoms worsened. Jennings returned to Delaware to see Dr. Townsend in October 2009. At this appointment, Dr. Townsend referred Jennings to physical therapy and removed Jennings from work until March 2010. During this period, the worker's compensation carrier paid Jennings total disability benefits.

Although Dr. Townsend authorized Jennings to resume working in March 2010, Jennings did not return to Avon nor did he seek other employment until November 2010. Between March 2010 and November 2010, Jennings underwent physical therapy, which appeared to improve his symptoms. In November 2010, Jennings took a part-time, one-month seasonal position at Kohl's.¹

In that same month, Jennings filed a petition to determine additional compensation due, seeking compensation for permanent injuries to his brain, head, cervical spine, and vestibular system. He also sought compensation for mileage and outstanding medical expenses. Avon denied Jennings suffered any permanent injuries, and the IAB agreed. The IAB did not make a determination regarding Jennings' request for compensation for mileage or outstanding medical expenses as the parties agreed the insurance carrier had not reached a final decision

¹ Since his position at Kohl's ended, Jennings has not worked and has only applied for one job (as a toll collector).

regarding whether they would compensate for those expenses. Jennings timely appealed the IAB's decision.

STANDARD OF REVIEW

The Court's review of the IAB's decision is limited to determining whether the IAB's findings and conclusions are supported by substantial evidence and free of legal error. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² Questions of law are reviewed *de novo*.³ If substantial evidence exists and there is no error of law, then the Court must affirm the IAB's decision.⁴

DISCUSSION

Jennings advances two main arguments. First, he contends that the IAB erred when it determined Jennings did not suffer any permanent injuries due to the work accident. Second, Jennings alleges the IAB erred when it failed to make a determination regarding Jennings' mileage and outstanding medical expenses. The Court will address each of these arguments in turn.

² *Baker v. Allen Family Foods*, No. 97A-06-004, 1997 WL 818015, at *2 (Del. Super. Dec. 2, 1997).

³ *Id.*

⁴ *Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002).

1. Permanency of Injuries

When determining whether an employee has been permanently impaired, the IAB must decide whether the employee suffered a permanent loss of use of a member or part of his body and whether such loss of use was caused by a work accident.⁵ The IAB must determine loss of use based upon the employee's ability to use the body part; loss of use represents that degree of normal use which is beyond the employee's ability or capability.⁶ The employee bears the burden of demonstrating permanent impairment and may do so by presenting medical expert testimony. If the employer also presents medical expert testimony, then the IAB is free to rely on either expert's testimony.⁷

a. Cervical Spine

There appears to be no dispute that, as a result of the accident, Jennings suffered some neck pain. However, ten days after the accident, a computed tomography ("CT") scan of Jennings' cervical spine appeared normal, as did a magnetic resonance imaging ("MRI"), which was taken approximately a month and a half after the accident and again one year later. Between March 2010 and November 2010, Jennings underwent physical therapy and this appeared to lessen

⁵ 19 Del. C. § 2326(g).

⁶ *Wilmington Fibre Specialty Co. v. Rynders*, 316 A.2d 229, 230-31 (Del. Super. 1974).

⁷ *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

the pain associated with his neck injury. However, when Jennings appeared before the IAB in April 2011, he testified that his neck pain had returned, and he rated his pain at a 3-4 on a scale of 1 to 10.

Using the fifth edition American Medical Association's *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"), Dr. Townsend classified Jennings as Diagnosis Related Estimate ("DRE") Category II and assigned Jennings an 8% impairment rating with respect to the cervical spine. Dr. Townsend based this rating on Jennings' complaints of neck pain, muscle guarding, and notations of spasm, spasms which Dr. Townsend never observed but other clinicians did. Dr. Townsend also based his rating on imaging studies that showed mild degenerative changes to the cervical region, even though he stated the degenerative changes were not correlative with Jennings' injury. Specifically, when asked if there were any changes between the two imaging studies of Jennings' spine that were taken a year apart, Dr. Townsend replied, "Yes, just mild degenerative disc disease, but no herniations."⁸

Dr. Robert J. Varipapa, who examined Jennings on behalf of Avon in December 2009, assigned Jennings a 0% permanent rating with respect to the cervical spine and classified him as DRE Category I. Like Dr. Townsend, Dr.

⁸ Dr. Townsend Dep. 40.

Varipapa observed degenerative changes to the cervical spine; however, Dr. Varipapa concluded that these changes were not related to the injury and were normal for Jennings' age. Additionally, Dr. Varipapa found no muscle guarding or spasm. Dr. Varipapa compared Jennings to the example patient in the *AMA Guides* who has intermittent neck pain but full range of motion; the *AMA Guides* classifies this example patient as DRE Category I with 0% impairment.

Both doctors observed that Jennings had full range of motion, but only Dr. Townsend observed muscle guarding, which was not determined to be severe enough to limit Jennings' range of motion to any significant degree. Based on the foregoing, the IAB's decision that Jennings is not permanently impaired with respect to his cervical spine is based on substantial evidence and the Court will not disturb it.

b. Vestibular System

Jennings experienced symptoms of vestibular disequilibrium a few days after the accident and when he first saw Dr. Townsend a few weeks later. When he began physical therapy, Jennings continued to experience vertigo but not the associated nausea. Further, by August 2010, Jennings was reporting only rare vertiginous sensations to Dr. Townsend. On the date of his hearing, however, Jennings testified that the vertiginous sensations persisted and the nausea had returned.

Using the fifth edition *AMA Guides*, Dr. Townsend assigned Jennings to DRE Category II with a 7% permanent impairment rating to the vestibular system because Jennings reported symptoms of vestibular disequilibrium—dizziness and vomiting—with supportive objective findings, which consisted of a positive Hallpike’s maneuver⁹. Dr. Townsend did not administer any inner ear diagnostic tests because he felt they would be redundant, having already objectively found vestibular problems via the positive Hallpike’s maneuver.

Using the same fifth edition *AMA Guides*, Dr. Varipapa assigned Jennings to DRE Category I with a 0% permanent impairment rating to the vestibular system. Jennings reported vertiginous sensations to Dr. Varipapa; however, Dr. Varipapa noted that patients may have symptoms of vestibular disequilibrium and may even have difficulty performing systematic activities like riding a bike and walking on scaffolds and still be placed in DRE Category I. Further, Dr. Varipapa and Dr. Townsend both observed that Jennings could tandem walk consistently and continuously.

⁹ Also known as the Dix-Hallpike maneuver, the Hallpike’s maneuver is a “test for eliciting paroxysmal vertigo and nystagmus in which the patient is brought from the sitting to the supine position with the head hanging over the examining table and turned to the right or left; vertigo and nystagmus are elicited when the head is rotated toward the affected ear.” *Physician’s Desk Reference Medical Dictionary* 1060 (2nd ed. 2000). Therefore, a positive Hallpike’s maneuver occurs when “[t]he patient experiences vertigo and nystagmus a few seconds after a positive change.” *Attorneys Medical Deskbook* § 18:4 (4th ed. 2011).

The *AMA Guides* provide two examples pertinent to the doctors' findings. In the first example, a patient with a positive Hallpike's maneuver but a normal electronystagmogram ("ENG") is assigned a 0% permanent impairment rating. In the second, a patient with a positive Hallpike's maneuver and an ENG test that shows no vestibular function in one ear is placed in DRE Category II for permanent impairment. Dr. Townsend never performed an ENG test on Jennings; nonetheless, Dr. Townsend insisted Jennings is permanently impaired because of the positive Hallpike's maneuver. Although Dr. Townsend's diagnosis may be medically sufficient, a reasonable mind could also accept Dr. Varipapa's testimony and the *AMA Guides* examples as evidence that Jennings' vestibular system is not permanently impaired.

The IAB held that there were no objective findings to support a permanent vestibular system injury and rejected Jennings' claim for total disability. Jennings argues this holding contradicted the record because the positive Hallpike's maneuver was an objective finding of vestibular disability. While Dr. Townsend testified that the positive Hallpike's maneuver was an objective finding, Dr. Varipapa—who knew Jennings had a positive Hallpike's maneuver—testified that the standard practice to objectively establish an alleged vestibular disability would

have been to perform the ENG testing.¹⁰ When faced with conflicting medical expert testimony, the IAB is free to rely on either expert.¹¹ When Dr. Varipapa's testimony is considered with testimony that Jennings is capable of tandem walking, rarely experiences vertiginous sensations, and is able to operate a motor vehicle,¹² the Court finds that the IAB's decision regarding the permanency of Jennings' vestibular disability is supported by substantial evidence on the record.

c. Head

Jennings developed a severe headache after the box fell on his head at work, and his headaches persisted for the next several days. A CT scan of Jennings' head taken shortly after the accident was normal, with no evidence of fluid build-up, swelling, or hemorrhaging. Jennings reported to Dr. Townsend that he suffered persistent, pulsatile, unilateral headaches lasting more than four hours and often involving nausea. The frequency of Jennings' headaches decreased from July to October 2010, such that in September 2010 he told his physical therapist that he rarely had headaches. Jennings' self-diagnosis changed once he appeared

¹⁰ Dr. Townsend Dep. 59, 63; Dr. Varipapa Dep. 27-28.

¹¹ *Wortman*, 453 A.2d at 106.

¹² The only conflicting evidence the IAB heard on driving restrictions came from Jennings himself, who testified that he was not allowed to drive more than four hours per day. Hr'g Tr. 31. Dr. Varipapa, on the other hand, testified that Jennings had no driving restrictions. Dr. Varipapa Dep. 27. Additionally, Dr. Townsend explained his recommendations for Jennings' future treatment—which included medications, icing, heating, and exercising—without mentioning driving restrictions. Dr. Townsend Dep. 25-26. Further, the IAB heard evidence that Jennings drove himself to the emergency room immediately after the accident and drove to and from Georgia when he relocated to the Avon plant there.

before the IAB, where he testified that he was still suffering from headaches at least twice a week.

Using both the fifth edition *AMA Guides* and the newsletter to the sixth edition *AMA Guides*, Dr. Townsend assigned Jennings a 10% permanent impairment rating with respect to the head. Dr. Townsend based this rating on Jennings' description of his headaches' persistence and quality, despite acknowledging that Jennings' symptoms have waxed and waned since the accident. Dr. Townsend did not have Jennings keep a headache log or fill out questionnaires to track the frequency or quality of his headaches, but he did suggest occipital blocks to help with the headaches. For reasons unknown to Dr. Townsend, Jennings never followed through with that suggestion. Further, Dr. Townsend noted that financial worries associated with Jennings' unemployment could have aggravated Jennings' headaches.

Dr. Varipapa concluded that Jennings is not permanently impaired with respect to the head because Jennings' headaches were not severe or significant and, at best, were mild in nature and intermittent. The Court finds that the IAB's decision regarding the permanency of Jennings' disability with respect to his head is supported by substantial evidence on the record and will not be disturbed.

d. Brain

Jennings testified that he became irritable immediately after his work accident, even though an MRI of his brain taken one month later was normal. Further, Jennings did not tell Dr. Townsend about his psychological problems until Avon's Delaware plant closed in the summer of 2009. At that time, Jennings was dealing with the closing of his place of employment for the past twenty years, an impending relocation to Georgia, and, shortly thereafter, the news that his son had contracted Lyme disease. Dr. Townsend prescribed Jennings antidepressants. Notably, as of the date of his hearing—over a year after his return to Delaware—Jennings was still taking medications for irritability.

Despite Jennings' complaints, Dr. Townsend did not order any psychological or neuro-psychiatric examinations and did not ask Jennings to document stressors in his life. Further, Dr. Townsend acknowledged that Jennings' move to Georgia, financial woes, and his son's health issues probably effected Jennings' irritability.¹³ Nevertheless, Dr. Townsend assigned Jennings a 10% permanent impairment rating with respect to his brain under the fifth edition *AMA Guide*, which was based upon the mood swings Dr. Townsend witnessed and Jennings described.

¹³ Dr. Townsend Dep. 82.

Dr. Varipapa concluded Jennings is not permanently impaired with respect to his brain. Dr. Varipapa noted that it is difficult to objectively classify psychiatric issues because they are subjective by nature; however, Dr. Varipapa recognized that Jennings' relocation away from his family to work in Georgia may have affected his mood swings, and Dr. Varipapa could not specify a psychiatric disease that Jennings may be suffering without verifiable neurological testing.

On appeal, Jennings alleges the IAB erred by not finding that the work accident caused his irritability because, according to Jennings, the record reflects that all parties agreed Jennings' irritability stemmed from the work accident. However, the issue before the IAB was the permanence—not the origin—of Jennings' psychiatric issue. The IAB cited the *AMA Guides*, which tie permanent emotional disturbance to verifiable neurological problems. Jennings, however, provided no evidence of verifiable neurological problems. Further, Dr. Varipapa went through the examples of verifiable neurological problems listed in the *AMA Guides* and testified that none of them applied to Jennings. On the basis of this and other testimony related to Jennings' irritability, the IAB concluded that Jennings is not permanently disabled on account of his reported psychological issues and the record would not support the Court overturning that decision.

e. Conclusion

When the testimony before the IAB is considered as a whole, this case is simply a dispute between two doctors regarding whether Jennings' injuries are now permanent. The issue has been complicated by the fact that the worker's compensation carrier continued to pay for medical expenses and treatment for more than two years after the accident. Because of this and the generally accepted belief by legal practitioners in this field that injuries lasting more than a year become permanent, Jennings has attempted to argue that permanency should be presumed simply due to the length of time benefits have been paid. However, while the "1 year rule" may have some merit when supported by medical testimony, the Court is not aware of it being one that is mandated by statute or even one legally accepted by the Court and the parties have cited no authority for such a proposition. Since it is the IAB's responsibility to determine issues of credibility and to determine which doctor's testimony they find more convincing, this Court will not disturb the IAB's finding when there is medical testimony supporting the decision. In this case, there is supporting medical testimony and, therefore, substantial evidence exists to support the IAB's decision, which the Court will not disturb.

2. Outstanding Mileage and Medical Expenses

Jennings alleges the IAB erred as a matter of law when it failed to render a decision regarding Jennings' outstanding mileage and medical expenses. The parties' and the IAB's discussion of outstanding mileage and medical expenses on the record is somewhat unclear and the Court is not convinced it is even ripe for decision.

It appears that the IAB did not consider the issue of the outstanding expenses since they were still being processed by the insurance carrier at the time of the hearing. After a confusing exchange among the attorneys and IAB members at the hearing, all parties agreed to wait for a response from the insurance carrier before bringing the matter of outstanding payments before the IAB.¹⁴ If the insurance carrier denied reimbursement, Jennings was to bring his contentions before the IAB on motions day.

Since Jennings now argues the IAB erred in failing to make a decision regarding the outstanding expenses, the Court can only assume the insurance carrier either never responded to Jennings' requests for reimbursements or denied them. If the insurance carrier never responded, then Jennings' argument is premature. However, if the insurance carrier denied Jennings' claim, then the

¹⁴ See Hr'g Tr. 28 ("If there's no response from the carrier in regard to the payment of these bills bring this matter before the board on motions day and we'll deal with it at that time.").

claim is contested; this would enable Jennings to bring the matter before the IAB, as the IAB and the attorneys previously discussed.

Jennings cites *Jepsen v. University of Delaware* to support his argument that the IAB was compelled to consider the outstanding medical expenses because they were contested.¹⁵ Here, however, the outstanding expenses were not contested; instead a decision had not yet been made whether to pay them. This was not the case in *Jepsen*, where the claimant demanded payment for outstanding medical bills while the employer claimed the bills had already been paid. For this reason, *Jepsen* is inapposite to the case at bar, and the Court concludes that the IAB acted appropriately when it deferred a decision on Jennings' outstanding expenses. It is possible that the matter has now been determined by the IAB, and if so, Jennings was free to timely appeal any adverse ruling unrelated to the present appeal.

CONCLUSION

For the foregoing reasons, the appeal of the Industrial Accident Board is, therefore, **AFFIRMED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.

¹⁵ See *Jepsen v. Univ. of Delaware-Newark*, No. 02A-11-003HDR, 2003 WL 22139774, at *3 (Del. Super. Aug. 28, 2003) (explaining that IAB shall determine matters according to Worker's Compensation Act whenever employer and claimant cannot agree on benefits).