09/25/96 WILLIAM KEELER v. CONCO TELLUS

1996 | Cited 0 times | Superior Court of Delaware | September 25, 1996

MEMORANDUM OPINION

ALFORD, J.

This is the Court's decision on the appeal filed by William Keeler ("Appellant") from two Industrial Accident Board ("Board") decisions. First, Appellant appeals from an Interlocutory Decision dated June 15, 1994 where the Board found that Conoco Tellus, Inc. ("Appellee") was not "obligated to produce surveillance unless it was to be offered into evidence." Keeler v. Conco Tellus, Inc., IAB No. 734602 (June 15, 1994). [1] Second, Appellant appeals the Board's final decision dated December 19, 1995, denying Appellee's Petition to Review the Compensation Agreement and granting in part and denying in part Appellant's Petition to Determine Additional Compensation Due. Keeler v. Conco Tellus, Inc., IAB No. 734602, (December 19, 1995). [2] For the reasons set forth below, the Board's decisions are Affirmed in Part and Reversed in Part.

Facts

On September 9, 1981, Appellant was injured in an industrial accident when a large wrench fell on his head. Pursuant to a Board approved compensation agreement between the parties, Appellant received both temporary total disability and permanent partial disability payments for his injuries. On April 12, 1993, Appellant filed a Petition to Determine Additional Compensation Due. Appellant claimed that the permanency percentages of his permanent injuries increased and thus he was entitled to an increase in his permanent partial disability payments. Appellant claimed the following changes in permanency: cervical spine from 50% to 70%; upper right extremity from 2.5% to 20%; and upper left extremity from 5% to 20%. Appellee filed a Petition for Review on February 25, 1994, seeking to terminate the disability benefits. Appellee claimed that Appellant's disability had terminated or diminished and he was therefore physically able to return to work.

Correspondence in the record indicates that on March 1, 1994, as part of discovery, Appellant requested all surveillance documents and all surveillance or other photographs, films or videotapes. Appellee responded on March 3, 1994, and informed Appellant that in the event it decided to use surveillance reports at trial, the same would be provided prior to the expiration of the 21 day deadline. The Board held a hearing to resolve the discovery dispute and ruled that "the carrier has no obligation to produce surveillance unless it is offered as evidence." (Bd. dec. at 2). On September 8, 1995, Appellee provided to Appellant a copy of a surveillance report prepared by Mr. Steve Greylock, the Appellee's investigator. Although there was no evidence that videos or pictures were taken by

Mr. Greylock, Appellant requested by letter dated September 14, 1995, that any photos of Appellant taken by Mr. Greylock be forwarded to Appellant. By letter dated October 11, 1995, Appellee advised Appellant that Mr. Greylock did not videotape Appellant.

It is unclear whether the Board's June 15, 1994 decision addressed discovery of any and all types of records of surveillance or only written surveillance reports. The record is clear that no pictures or videotapes exist and that the written surveillance reports were in fact delivered to Appellant prior to the hearing.

Correspondence between the Board and the parties indicates that another pretrial issue involved the addition of Dr. Hogan as Appellant's medical expert. On August 10, 1995, Appellant notified the Board to add Dr. Bose, the operating surgeon, as his third medical expert. On September 7, 1995, due to the difficulty in scheduling Dr. Bose for a deposition, the Appellant asked the Board for a continuance. The Appellee opposed the continuance motion since the Appellant was granted prior continuances, had two other medical experts and could place Dr. Bose's medical records into evidence without the necessity of his testimony. The record is unclear regarding the Board's decision on the continuance but correspondence indicates that the Board agreed to the continuance in order to allow for the deposition of Dr. Bose. In October 1995, the Appellant added Dr. Hogan as his fourth medical expert. Appellee objected to the addition of Dr. Hogan on the grounds that four medical experts were excessive and a potentially burdensome expense to the carrier. On December 11, 1995, due to difficulties in deposing Dr. Bose, the parties agreed that Dr. Bose would not testify but they would stipulate that his medical records would be admitted into evidence. The Appellee also noted his continued objection to any further continuance and to the testimony of Dr. Hogan.

The Board held a hearing on the merits on December 19, 1995. [3] During opening arguments, Appellee alerted the Board that it would object to the testimony of Dr. Hogan and argued that Dr. Hogan's testimony was cumulative in light of the other two medical experts. (Tr. at 30). The Appellant first offered the deposition testimony of the two other medical experts. (Tr. at 31-60). When Appellant called Dr. Hogan to the stand, Appellee objected and moved to strike the witness citing its prior objections. (Tr. at 112-13). Appellant argued that Dr. Hogan's testimony was not cumulative and he offered the most positive testimony for the Appellant regarding permanency ratings. (Tr. at 113-16). The Board denied the Appellee's Motion to Strike and allowed Dr. Hogan to testify.

Mr. Greylock testified regarding his surveillance of the Appellant. (Tr. at 2-61-267). Mr. Greylock testified from a narrative report he prepared based on his personal observations of Appellant. (Tr. at 262). Appellant cross-examined Mr. Greylock regarding his personal observations and at no time did Appellant question Mr. Greylock regarding the existence of surveillance photographs or videotapes. (Tr. at 267-271).

Regarding the Petition to Terminate, the Board found that the Appellee failed to show that the Appellant was not incapacitated from work and was medically employable. (Final Bd. dec. at 13).

Considering the Petition to Determine Additional Compensation Due, the Board found that there were no increases in permanencies to the cervical spine or right upper extremity but there was a 10% increase in permanent partial impairment to the left upper extremity from 5% to 15%. (Final Bd. dec. at 13-15). The Board ordered an award reflecting the appropriate compensation rate. (Final Bd. dec. at 17).

Having determined that there was an increase in compensation rate, the Board found that the Appellant was entitled to have his medical witnesses' fees, except those of Dr. Hogan, taxed to the Appellee. (Final Bd. dec. at 17-18). The Board opined that Dr. Hogan's testimony was not necessary since two medical experts had already been deposed regarding the permanency issue. (Final Bd. dec. at 16). Additionally, the Board found Dr. Hogan's testimony to be unreliable since his permanency ratings were not in the range of the other medical experts and he failed to identify the methodology used in reaching his permanency ratings. (Final Bd. dec. at 14, 15, 17). Since the Board did not rely on Dr. Hogan's testimony and Appellant was on notice that Appellee would oppose Dr. Hogan's testimony, the Board held that the Appellant would have to bear the expenses of Dr. Hogan's testimony. (Final Bd. dec. at 17).

Standard and Scope of Review

When reviewing a decision of the Board, this Court's shall determine whether the Board erred as a matter of law in formulating or applying legal precepts. State v. Cephas, Del. Supr., 637 A.2d 20, 23 (1994). Questions of law are reviewed de nova. Oceanport Ind. v. Wilmington Stevedores Inc., Del. Supr., 636 A.2d 892, 899 (1994). With respect to Conclusions of the Board, the reviewing Court is limited to determining whether there is substantial evidence in the record to support the Board's factual findings. Histed v. E.I. DuPont de Nemours & Co., Del. Supr., 621 A.2d 340, 342 (1993); Eldridge v. Bandurski, Inc., Del. Super., Civ.A. No. 94A-08-007, Cooch, J. (Feb. 13, 1995) (Order). The issues before this Court are mixed questions of law and fact. The question of whether material is privileged and protected from discovery is a legal question. Tackett v. State Farm Fire & Cas. Ins., Del Supr., 653 A.2d 254, 258 (1995). Likewise, the question of whether or not a medical expert's fees should be taxed to the employer is a question of law where it involves the interpretation and application of our worker's compensation statute, 19 Del.C. § 2301 et seq. ("the Act"), and a question of fact where the Board makes factual findings and Conclusions. Cephas, 637 A.2d at 21-22.

Discussion

Discovery of Surveillance Materials

The question on appeal is whether a worker's compensation carrier must produce surveillance videotapes, photographs, etc. of the claimant in response to a discovery request. The Board held that surveillance does not have to be produced unless the party intends to offer it as evidence; while, it must be produced 21 days prior to a hearing, if the carrier intends to use the surveillance as evidence.

(Bd. dec. at 2).

The Board based its decision on Parker v. Chrysler Corp., IAB No. 987798 (March 30, 1994). In Parker, the claimant requested production of a surveillance report prepared by the employer's investigator. The employer advised the claimant that any surveillance information would be provided 21 days before the scheduled hearing. The Board held that compliance with Board Rule 9(D)(7) requires only disclosure of the intention to use surveillance evidence and not actual production of the report. Additionally, the Board found that the surveillance reports were part of counsel's trial preparation and were protected by the work product doctrine.

Appellant accurately points to White v. Satterfield and Ryan, IAB No. 925339 (July 23, 1993), as a case where the Board issued a decision that contradicts its position in Parker. In White, the claimant requested that the carrier produce a surveillance videotape and report detailing the claimant's activities. Pursuant to Board Rule 11(A), the Board ordered discovery of the surveillance videotape and the surveillance report since the materials were documents which contained evidence relating to the subject matter of a pending hearing. These two decisions are difficult to reconcile and indicate an inconsistent interpretation of the Board Rules regarding the disclosure of surveillance material.

There are two applicable Board Rules that the parties raise involving the discovery of surveillance materials. Rule 9(D)(7) states, "a party wishing to use a movie, video or still pictures must advise the opposing party twenty-one (21) days prior to the hearing." IAB Rule No. 9(D)(7) (emphasis added). Rule 11(A) provides that a party may discover, "any designated documents which constitute or contain evidence relating to any matter which is relevant to the subject matter involved in the pending hearing and not otherwise privileged and which are in the possession, custody or control of the party upon whom the request is served." IAB Rule No. 11 (A) (emphasis added). Initially, it is important to note that different types of surveillance materials are addressed in these two Rules. Rule (D)(7) speaks only to movies, videos or photographs. Rule 11 (A) refers to "any designated document." Delaware courts have also differentiated videotapes, movies and photographs from written surveillance reports. For these reasons, the two types of surveillance materials will be separately discussed.

Surveillance reports of a claimants activities will be discoverable unless "otherwise privileged." Appellee asserts that surveillance reports constitute privileged material under the work product doctrine. Delaware's work product doctrine provides that materials prepared in anticipation of litigation or for trial are discoverable "only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Super. Ct. Civ. R. 26(b)(3). This Court has found that the question of whether a document was prepared in anticipation of litigation is a highly factual question. Puccio v. Hinkle, Del. Super., No. 84C-NO-103, slip op. at 6, Gebelein, J. (March 4, l986)(Opinion). The test is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of

the prospect of litigation." Id. (citing 8 Wright & Miller, § 2024 at 198) . Generally, where a carrier employs an investigator to develop evidence to rebut claims of injury or degree of injury, and central issues in the case rest on the degree of injury, it is likely that the surveillance report was prepared in anticipation of litigation. See id. Accordingly, substantial need and undue hardship must be established before the Board compels the production of an investigator's report. [4] Id.

Videotapes, movies and photographs taken in anticipation of litigation are likewise protected against discovery by the qualified immunity of the work product doctrine. See Hoey v. Hawkins, Del. Supr., 332 A.2d 403, 406 (1975); Olszewski v. Howell, Del. Super., 253 A.2d 77, 77 (1969). Accordingly, it remains the burden of the party requesting production to show that, when balancing the interests of each party and the facts of the particular case, a showing of substantial need and undue hardship is met. However, unlike written reports, the unique nature of photographs, movies and videotapes may weigh heavily towards a sufficient showing of substantial need and undue hardship to overcome the qualified immunity of the work product doctrine. See Olszewski, 253 A.2d at 77. As this Court explained:

First, even assuming the plaintiffs can recall the events of the [days] in question, the precise evidence which the defendant has, the film, is now unique and cannot be reproduced. Second, moving picture evidence is subject to misuse by splicing, angle of shooting, misleading condensation, selective lighting, either natural or artificial, and many other variables. . .. Third, there is now, at least in civil cases, a well established policy of pretrial disclosure which is based on a rationale that a trial decision should result from a disinterested search for the truth from all the available evidence rather than tactical maneuvers based on the calculated manipulation of evidence and its production. Fourth, disclosure should expedite the Disposition of the case by encouraging settlement, by bringing to head any objections to the evidence, and by giving the plaintiffs opportunity to develop counter-evidence.

Olszewski, 253 A.2d at 78.

Appellee contends that Rule 11(A) is inapplicable since the Board adopted a pretrial procedure which pertains to the discovery of videotapes. According to Appellee, Rule 9(D)(7) controls the discovery of videotapes and provides that the a party wishing to use a videotape as evidence in a Board hearing need only advise the opposing party twenty-one days prior to the hearing. This Court disagrees with Appellee's interpretation of Rule 9(D)(7).

When interpreting a statute, the fundamental principle is to give full effect to legislative intent. Hudson Farms, Inc. v. McGrellis, Del. Supr., 620 A.2d 215, 217 (1993). If the statute is unambiguous and there is no reasonable doubt as to the meaning of the words used, this Court's duty is to apply the literal meaning of the words. Id. Rule 9(D)(7) provides that a "[a] party wishing to use a movie, video or still pictures must advise the opposing party twenty-one (21) days prior to the hearing." IAB Rule 9(D)(7) . The Rule clearly and unambiguously imposes a notice requirement to advise the

opposing party of the intent to introduce a videotape (movie or photograph) at the hearing. Rule (9)(D)(7) does not address discovery issues and the notice requirement is independent of the requirements stated in Rule 11(A). Therefore, regardless of whether the videotape is discoverable under Rule 11(A), the opposing party must be notified at least 21 days prior to the hearing that the videotape will be used at the hearing.

Applying these rules to the case sub judice, the Board committed legal error by stating that the carrier has no obligation to produce surveillance unless it is to be offered as evidence, and then production must be made twenty-one days in advance of the hearing. (Bd. dec. at 2). The twenty-one day period applies only to notice of intent to use the videotape, movie or photographs at the hearing; it does not apply to production. The production of the videotape must be analyzed under Rule 11(A), not Rule 9 (D)(7).

Although the Board applied the incorrect legal standard, it had no effect on this case since the record indicates that (1) no surveillance videotape was taken of the Appellant, and (2) the written surveillance report was produced upon request.

Medical Witness Fees

Although the Board found that Appellant was entitled to an award, it refused to tax the costs of Dr. Hogan's testimony to the Appellee. The Appellant argues that once an award is received, § 2322(e) is mandatory and requires the cost of medical witness fees to be taxed to the employer. Appellee argues that the Board has discretion in taxing the costs to the employer. Since the Dr. Hogan's testimony was arguably cumulative and redundant, Appellee asserts the Board's decision was proper.

Section 2322(e) states, "the fees of medical witnesses testifying at hearings before the [Board] in behalf of an injured employee shall be taxed as a cost to the employer or the employer's insurance carrier in the event the injured employee receives an award." 19 Del.C. § 2322(e) (emphasis added). Although the language of the statute appears to be mandatory, the Delaware Supreme Court has held that there are circumstances where the Board has authority to deny witness fees. See Brandywine School Dist. v. Hoskins, Del. Supr., 492 A.2d 1247, 1251 (1985).

In Hoskins, the Board disallowed the payment of expert witnesses fees to the successful claimant. Id. at 1252. The Board found that the Doctor's testimony at the hearing added nothing to the case which was not in the record by virtue of the Doctor's deposition. Id. On appeal, the Superior Court noted that under § 2322(e), the Board does not have the discretion to deny expert witness fees to a successful claimant and reversed the Board's decision. Id. The Delaware Supreme Court affirmed the Superior Court's ruling based on the facts of the case but declined to adopt the rule that the Board could never refuse to allow medical witness fees to a successful claimant. Id. The Court noted that under most circumstances, the claimant is entitled to medical witness fees if the claimant obtains an award. Id. at 1252. The Court clarified that in some instances however, the Board may disallow

medical witness fees if (1) an unreasonable number of medical witnesses are called, and (2) the testimony of the medical witness is unreasonably cumulative or redundant because of the testimony of other medical witnesses. Id.

Based on the Board's limited discretion in denying medical expert expenses, there is not substantial evidence in the record to support the Board's denial of fees under the Hoskins test. The Board's reasons for denying the fees were that:

The claimant had already deposed a neurosurgeon and an orthopedic surgeon (the claimant's IME doctor) with regard to permanency. There was no necessity to introduce the testimony of another orthopedic surgeon (Dr. Hogan) for a second IME opinion. Furthermore, the Board did not find his testimony to be reliable . His testimony added little to the claimant's case. In addition, the carrier made it clear from the time the claimant proposed to utilize Dr. Hogan that it would seek to strike Dr. Hogan's testimony.

(Final Bd. dec. at 16-17). Section 2322(e) mandates the payment of medical expert fees to a successful claimant and it is only very limited circumstances that the Board can refuse to order payment. When denying the fees the Board must consider whether the number of witnesses is unreasonable and the testimony is cumulative and redundant. Hoskins, 492 A.2d at 1252. Although it is the Board's role to determine issues of credibility and decide what weight should be given to the testimony, Air Mod Corp. v. Newton, Del. Supr., 59 Del. 148, 215 A.2d 434 (1965), the Board's determination of the reliability of the testimony should not be a factor in denying fees. Nor does analysis under Hoskins involve a determination of whether the claimant had knowledge of the fact that the employer planned to strike the expert's testimony.

Turning to the Hoskins factors, Appellant had three medical witnesses. [5] Dr. Hogan attributed the highest permanency ratings to the permanent partial injuries. He testified the Appellant had 70% permanent partial impairment to the cervical spine and 20% permanent partial impairment to each upper limb. (Tr. at 136). The highest permanency rating for the cervical spine by the other two medical witnesses was 50%. (Tr. at 57). The highest permanency rating for the upper extremities was 15%. (Tr. at 39). Like the testimony of the other two medical witnesses, Dr. Hogan's testimony involved the degree of disability. However, his testimony was not redundant or cumulative in that his permanency ratings were higher than the other medical experts, and if accepted by the Board, would result in a greater permanent partial disability award.

Additionally, the record indicates that the Board had numerous pretrial opportunities to disallow Dr. Hogan's testimony. By letter to the Board, the Appellee objected to Dr. Hogan's participation in the case on three separate occasions, October 6, 1995, October 17, 1995 and December 11, 1995. Pretrial procedure allows the Board, in its discretion, to limit the number of expert witnesses and the length of examination. 19 Del.C. § 2121; IAB Rule 9(A)(4). Although the Board had the authority to act, it declined to rule on Appellee's request to disallow Dr. Hogan's testimony.

At the hearing on December 19, 1995, Appellee noted his continued objection during his opening statement to the Board, (Tr. at 30), and again when Dr. Hogan was called to testify, (Tr. at 112-116). The Board went off the record to discuss the issue and ultimately decided to allow Dr. Hogan's testimony. (Tr. at 116). It is logical to assume that the Board heard a proffer of the testimony and concluded that the testimony may have some value to the proceeding. Again, at this point the Board could have disallowed Dr. Hogan's testimony but instead allowed it. It appears that the Board decided at this point that the testimony was not cumulative or redundant and that three (or four) medical witnesses was not an unreasonable number.

The Board erred as a matter of law in formulating and applying the correct legal precept involving the discovery of videotapes made of a claimant. However, the error of law had no bearing on the outcome of the hearing since the record clearly indicates that there were no surveillance videotapes of Appellant. The Board's decision not to order the Appellee to pay Dr. Hogan's medical expert witness fees was not supported by substantial evidence. Dr. Hogan's medical witness fees shall be taxed as a cost to the Appellee.

For the foregoing reasons, the decision of the Industrial Accident Board is AFFIRMED IN PART AND REVERSED IN PART.

IT IS SO ORDERED.

Haile Alford

J.

1. The June 15, 1994 Board decision will be denoted as "Bd. dec. at ".

2. The Board's December 19, 1995 decision will be referred to as "Final Bd. dec. at ".

3. References to the transcript of the Board hearing held December 19, 1995, will be denoted as "Tr. at ".

4. This court has recognized that the burden of proving substantial need and undue hardship will be difficult to meet in order to discover written reports prepared in anticipation of litigation. Under the discovery rules, the investigator can be deposed as a witness who has knowledge of a factual issue in the case. The substantial equivalent of information contained in the report is therefore available through deposing the witness. Absent the unavailability of the investigator or a lapse of memory concerning the investigation, it will be difficult to show that it is not possible to obtain the substantial equivalent without undue hardship. See, e.q., Puccio, slip op. at 7.

5. The parties dispute the number of medical witnesses. The Appellee contends that there were actually four medical witnesses. However, while the parties stipulated to admitting Dr. Bose's medical records, Dr. Bose did not testify, was not deposed, nor did Appellant request medical witness fees for Dr. Bose. The record does not reflect that the Board

considered Dr. Bose's medical records except as they were summarized in Dr. Hogan's testimony.