

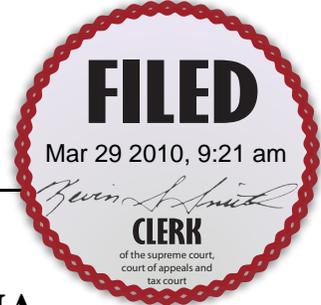
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**IN THE
COURT OF APPEALS OF INDIANA**

TWYLA L. TELLER OSTROWSKI,)
)
Appellant-Claimant,)
)
vs.)
)
ACCUSIL, INC.,)
)
Appellee-Employer.)

No. 93A02-0909-EX-863

APPEAL FROM THE WORKER'S COMPENSATION BOARD OF INDIANA
Cause No. C-178941

March 29, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Twyla Teller Ostrowski appeals the dismissal of her occupational disease claim and the denial of her motion to submit additional evidence by the Indiana Worker's Compensation Board ("the Board"). We affirm.

Issue

- I. Did the Board err by granting Accusil, Inc.'s motion to dismiss Ostrowski's occupational disease claim?
- II. Did the Board err by denying Ostrowski's motion to submit additional evidence?

Facts and Procedural History

From approximately April 2004 until September 2004, Ostrowski worked as a shipping/receiving clerk at Accusil, Inc., in Merrillville. Accusil manufactures silicone medical products. On July 21, 2006, Ostrowski filed her application for adjustment of claim with the Board. She identified her claim as a "worker's compensation claim" and identified "April 2004" as the date of her injury. Appellant's App. at 5. She described her injury as follows: "Plaintiff is suffering from bilateral silicosis due to exposure to silicone while employed at Accusil, Inc." *Id.* On March 20, 2007, Ostrowski filed an amended application of claim, stating that she had an occupational disease, again described as "bilateral silicosis due to exposure to silicone." She identified the date of her last exposure as "September 2004[.]"

On August 21, 2007, Accusil filed a consolidated special answer and motion to dismiss, alleging that Ostrowski's claim was without merit because it was not filed within the

statute of limitations period. Accusil also cited “the number of attorneys that have appeared in this action [on behalf of Ostrowski] and thereafter withdrawn their appearances[.]” Board Hearing Member Gerald Ediger scheduled a hearing on the motion for December 6, 2007. Two days before the hearing, on December 4, 2007, Ostrowski filed another amended application for adjustment of claim, this time stating that she “suffered an occupational disease while working for [Accusil].” *Id.* at 91. At the hearing, Ediger raised sua sponte the issue of Ostrowski’s possible failure to prosecute. He ordered the parties to submit briefs within seven days, which they did. On January 10, 2008, Ediger granted Accusil’s motion to dismiss and issued detailed findings, including the following:

6. That a long series of continuances have been had by [Ostrowski] in this case since its inception for everything from answering discovery, to change of counsel, to pre-trial conferences, to hearing on the Motion to Dismiss. [Accusil] has not requested one continuance in this matter.

....

8. That [Accusil], for support, relies on its discovery and the responses filed by [Ostrowski], including response to Request for Production of Documents seeking all medical records and reports in [Ostrowski’s] possession. Said medical records and reports did not support [Ostrowski’s] claim of occupational disease, nor silicosis, nor accident arising out of [and] in the course of [Ostrowski’s] employment with [Accusil], nor disablement by exposure to an occupational disease arising out of and in the course of the employment of [Ostrowski] with [Accusil].

9. That [Ostrowski] has brought forth no evidence beyond [her] bare allegations of exposure to an occupational disease and disablement by the same and has not shown any proof of an occupational disease being suffered by [Ostrowski] in any of [her] responses to [Accusil’s] Interrogatories, Request for Production of Documents, or Request for Admissions.

10. That [Ostrowski’s] credibility is at issue and it is noted she was previously [...] arrested and convicted on a false informing charge.

11. That the Board finds no evidence of exposure to any material that would

cause silicosis, nor any other occupational disease having been brought to its attention by the parties in this action, particularly [Ostrowski], and by [Ostrowski's] response to [Accusil's] discovery.

12. That it is noted that [Ostrowski] has had seven (7) attorneys in five (5) law firms representing her throughout the pendency of this matter for an incident allegedly taking place in April of 2004, with her original Application for Adjustment of Claim being filed July 21, 2006, as a worker's compensation claim.

13. That [Ostrowski] has not put forth any evidence of any exposure to any material that would cause silicosis or any other occupational disease at her employment.

14. That the fact that [Ostrowski] has now been represented by seven (7) attorneys causes the Board to question the validity and viability of her claims.

15. That [Ostrowski's] responses to [Accusil's] discovery does not show support for her claims as filed to date.

16. That no other evidence has been put forth by [Ostrowski] to support her claims.

....

23. That as a tactic for avoiding hearings and dispositive motions, [Ostrowski] has changed counsels frequently. Alternatively, the change in counsel could also be from recognition of a lack of meritorious case on the part of [Ostrowski's] lawyers. In any event, the continual change of counsel and resulting requests for extension of time have hampered [Accusil] in the preparation and defense of its case, caused an excessive amount of time and expense to be expended in a case which has apparently no merit as none has been shown through 1½ years of litigation in a matter that occurred 3½ to 4 years prior.

24. That [Ostrowski] also has filed a number of amendments to her original Application for Adjustment of Claim, from the one initially filed by [Ostrowski], to several others filed by different lawyers. Three or four amended Applications for Adjustment [of] Claim have been filed. This too is questionable in light of not coming forward with any facts to support allegations in any of the applications for adjustment of claim. This too may appear to be another tactic for delay since no merit has been shown to any of the amended applications.

....

27. That the Board finds for the above and foregoing reasons that [Ostrowski] has not shown any evidence of any claim cognizable after 1½ year[s] of litigation and despite [Accusil's] best efforts to detail exactly what is being claimed against it and to seek proof of the same. As such, the case has no merit and no supporting evidence and is subject to being dismissed.

28. That the case is further subject to being dismissed for lack of proper prosecution.

29. That the Board also further finds that any claim as to injury by accident arising out of and in the course of the employment of [Ostrowski] is beyond the statute of limitations¹ and barred thereby and/or by the non-claim nature of the statute.

30. That there is no evidence to support a claim for Occupational Disease Act or the Application of an Occupational Disease Act statute of limitations.²

31. That one and a half (1½) years of litigation following several years of time from the date of the alleged injury provided more than enough time to [Ostrowski] to assemble at least some evidence of a colorable claim recognizable under the Indiana Occupational Disease Act statute and/or Indiana Worker's Compensation Act. Having failed to do so, [Ostrowski] has totally failed to prosecute her claim, totally failed to show meritorious nature of any claim, even colorably, and has failed to demonstrate that the Occupational Disease Act statute of limitations is applicable to [Ostrowski's] claim inasmuch as [Ostrowski] has not even demonstrated an exposure, nor a disablement due to any element which would cause an occupational disease. Moreover, no proof as to an injury by accident arising out of in the course of the employment of [Ostrowski] with [Accusil] has been had either.

32. The Board now finds in favor of [Accusil] and against [Ostrowski] for the above and foregoing reasons.

¹ "The right to [worker's] compensation shall be forever barred unless within two (2) years after the occurrence of the accident ... a claim of compensation thereunder shall be filed with the worker's compensation board." Ind. Code § 22-3-3-3.

² Pursuant to Indiana Code Section 22-3-7-9(f), "no compensation shall be payable for or on account of any occupational diseases unless disablement ... occurs within two (2) years after the last day of the last exposure to the hazards of the disease.

Id. at 138-42.

On January 24, 2008, Ostrowski filed an application for review by the full Board. The parties submitted briefs to the Board. Ostrowski also filed a verified motion for leave to submit additional evidence, claiming that “such additional evidence is necessary to make a fair presentation on this matter.” *Id.* at 195. This evidence included the affidavits of four of Ostrowski’s prior attorneys, documenting their reasons for withdrawal from the case, as well as two letters from D. Duane Houser, M.D., one to Accusil in December 2007, requesting material safety data sheets of all the materials utilized at the company, and one explaining that Accusil had failed to respond to his request as of May 21, 2008. Following a hearing on October 20, 2008, the Board affirmed Ediger’s decision and remanded “for further proceedings on evidence and disputed issues.” *Id.* at 253.

Upon remand, Ediger held a hearing on February 26, 2009. In his order of March 10, 2009, Ediger found, in pertinent part, as follows:

1. That [Ostrowski’s] counsel had, prior to said hearing, requested a continuance which was objected to by [Accusil]. The Board found the objection well taken and ordered that the hearing go forward as previously noticed.
2. That at the time of the hearing, [Ostrowski’s] counsel again moved for a continuance which was denied by the Single Hearing Member, as no good cause was shown for the continuance which would only add to the long list of continuances and delay occasioned by [Ostrowski] and her various counsel in this action.
-
5. That no good cause was shown why the “evidence” sought to be placed before the Board after the hearing and decision on the Motion to Dismiss was not placed before the Board at an earlier point in time. There was no proof by [Ostrowski] of inability to obtain said evidence at an earlier point in time.

6. That discovery filed after the determination made by the Single Hearing Member and additional discovery filed after the determination of the Full Board is not within the rights of [Ostrowski] to make such filings, and [Accusil] has no duty or responsibility to respond thereto.

Id. at 255-57. Based on these findings, Ediger denied Ostrowski's motion to submit additional evidence. Ediger concluded that "no good cause was shown as to why the late filed evidence could not have been filed or obtained in a timely manner." *Id.* at 257. Ediger also concluded that Ostrowski had "no cognisable [sic] claim against [Accusil] under the Indiana Worker's Compensation and/or Indiana Occupational Disease Act statutes, and/or that the applicable statutes of limitation or non-claim have run, and that [Ostrowski] has no evidence to support her claim." *Id.* For these reasons, Ediger dismissed Ostrowski's claim.

Again, Ostrowski filed an application for review by the full Board on March 19, 2009. The parties filed briefs, and on June 22, 2009, the Board held a hearing. On July 29, 2009, the Board issued its order affirming Ediger's decision of March 10, 2009. Ostrowski now appeals the full Board's final determination.

Discussion and Decision

I. Dismissal of Ostrowki's Claim

Ostrowski claims that the Board erred by affirming Ediger's decision to dismiss her occupational disease claim. Our standard of review is well established:

The Worker's Compensation Board, as the trier of fact, has a duty to issue findings of fact that reveal its analysis of the evidence and that are specific enough to permit intelligent review of its decision. In reviewing a worker's compensation decision, an appellate court is bound by the factual determinations of the Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. We examine the record only to determine whether there is substantial evidence and reasonable

inferences that can be drawn therefrom to support the Worker's Compensation Board's findings and conclusion. We will not reweigh the evidence or reassess witness credibility.

Wright Tree Serv. v. Hernandez, 907 N.E.2d 183, 186 (Ind. Ct. App. 2009) (citations and quotation marks omitted), *trans. denied*.

First, Ostrowski alleges that the Board failed to fulfill its obligation to state its findings with sufficient specificity upon contested issues so as to allow intelligent review by an appellate court. *See Schultz Timber v. Morrison*, 751 N.E.2d 834, 838 (Ind. Ct. App. 2001), *trans. denied*. She claims that it made no findings and "merely affirmed the Single Hearing Member's decision." Appellant's Br. at 14. For guidance, we look to our supreme court's decision in *Dial X-Automated Equipment v. Caskey*, 826 N.E.2d 642, 644 (Ind. 2005):

It is of no consequence whether the full board makes separate findings or adopts written findings made by the single hearing member so long as the final decision of the full board may be reviewed in light of the written findings on which the decision is based. Prior cases have recognized that where a hearing officer's statements or findings are supported by the evidence and embody the requisite specificity, the board should not hesitate to adopt and incorporate by reference the hearing officer's work, and that, assuming the appropriate scrutiny occurred, the board is neither prohibited by statute from, nor judicially condemned for, adopting the hearing judge's decision. In this case, the single hearing member made written findings and the full board found that the hearing officer's decision "should be adopted." Such adoption is sufficient to attribute to the full board the explicit written findings of the single hearing member and to permit appellate review accordingly.

Id.

In the instant case, the Board did not specifically state that it "adopted" Ediger's decision, but it did incorporate the entirety of Ediger's order into its own and stated that it "affirm[ed]" Ediger's order. We think that this approval by incorporation is sufficient to

attribute to the Board the Ediger's written findings and to allow us to conduct an intelligent review of the Board's decision.

Next, Ostrowski argues that the Board did not have the authority to dismiss her claim for failure to prosecute without holding a noticed hearing at which she would have the opportunity to present evidence on that issue. In support of this argument, she cites *Pedigo v. Miller*, 369 N.E.2d 1100, 175 Ind. App. 97 (1977). In *Pedigo*, the claimant was injured during the course of his employment and filed a worker's compensation claim. After several continuances and delays, the board ordered Pedigo to make himself available for physical examination within four months. Approximately three months after that order, Pedigo died of independent causes. Upon the employer's motion, the Board dismissed Pedigo's claim because he had failed to comply with the order for physical examination and had failed "to properly prosecute his claim." *See id.*, 369 N.E.2d at 1101, 175 Ind. App. at 98.

In *Pedigo*, another panel of this Court held that the Board must provide a dismissal hearing at which time any claimant may present evidence of his eligibility. The *Pedigo* court advanced two important policy reasons for a hearing in this circumstance:

First, without a hearing, it is doubtful whether the claimant has been afforded due process of law. Second, proceedings before the [Board] are not grounded in formality; and the [Board] is not bound by the rules of civil procedure. Therefore, a dismissal based upon procedural deficiencies is antithetical to the [Board]'s inherent fact-finding, thus substantive, purpose. The dismissal of Pedigo's claim did not even attempt to address the evidentiary basis of his claim.

Id. at 1103.

As noted by Accusil, *Pedigo's* facts differ significantly from those in Ostrowski's

case. Ostrowski's case was dismissed for several reasons, only one of which was failure to prosecute. The original purpose of the hearing on December 6, 2007, was to address Accusil's motion to dismiss, which was based upon claims of insufficient evidence and a failure to meet the statute of limitations. Ostrowski was given prior notice of the hearing and had the opportunity to present evidence. During the hearing, Hearing Member Ediger raised the issue of possible dismissal for Ostrowski's failure to prosecute and asked the parties to submit briefs on that issue, which they did. Ediger later ordered dismissal of Ostrowski's claim for all three reasons—statute of limitations violation, insufficient evidence, *and* failure to prosecute. Therefore, even if the full Board erred in adopting Ediger's determination that Ostrowski's case should be dismissed for failure to prosecute, it was harmless error because there were two additional reasons for dismissal.

First, Ediger found that there was no evidence to support a claim under the Occupational Diseases Act. He concluded that the record did not indicate that Ostrowski suffered from a disease arising out of the course of her employment at Accusil, nor was there evidence of a direct causal connection between the conditions under which she worked and her alleged medical condition. Second, Ediger found that the occupational diseases statute of limitations did not apply and that therefore Ostrowski's claim, originally filed as an accident claim in July 2006, was barred by the statute of limitations. The full Board incorporated these conclusions in its order dismissing Ostrowski's claim, and we cannot say that the evidence leads inescapably to a contrary conclusion. Therefore, we affirm the full Board's December 9, 2008 dismissal of Ostrowski's claim.

II. Motion to Submit Additional Evidence

Finally, Ostrowski alleges that when the Board remanded to Ediger for “determination of all pending matters[,]” it intended for Ediger to hear “the merits of [her] case.” Appellant’s Br. at 23. We disagree. It appears to us that the Board intended for Ediger to do exactly what he did, which was to determine whether Ostrowski was entitled to submit additional evidence offered on October 20, 2008, to the Board, and to determine whether she was entitled to require Accusil to respond to her request for production of May 23, 2008. Ediger found that Ostrowski had failed to offer a reason for not having earlier produced her former attorneys’ affidavits and Dr. Houser’s request for material information from Accusil. Accusil had raised the issue of insufficient evidence and lack of merit to Ostrowski’s claim in its motion to dismiss, which was the basis of the December 4, 2007, hearing at which Ostrowski was permitted to present evidence, and she failed to present such evidence at that time. Moreover, her request for production was submitted nearly two years after she filed her claim. The evidence supported the denial of both these requests, and having done so, Ediger determined that “all pending matters and issues on remand have now been dealt with and effectively resolved.” Appellant’s App. at 258.

Again, Ostrowski claims that the Board’s incorporation of Ediger’s findings and conclusions was not sufficient to afford appellate review, but for the reasons cited earlier in this opinion, we disagree. In sum, Ostrowski was given an opportunity to present evidence in response to Accusil’s motion to dismiss. Based on the evidence in the record as well as evidence presented at that hearing, Ediger found in Accusil’s favor. The Board incorporated

Ediger's findings and conclusions and affirmed his decision, remanding for a determination on two remaining evidentiary issues raised by Ostrowski. Ediger ruled in Accusil's favor on these issues, and the Board again incorporated his findings and conclusions and affirmed his decision. Based on our review of the record in this case, we think there is substantial evidence and reasonable inferences therefrom which support Ediger's findings and conclusions, which were then incorporated by the Board into its decisions. We certainly cannot say that the evidence is undisputed and leads inescapably to a contrary conclusion, and therefore, we must affirm the Board's dismissal of Ostrowski's claim and denial of her motion to submit additional evidence.

Affirmed.

RILEY, J., and VAIDIK, J., concur.