



WORKERS' COMPENSATION COMMENTARY



March - April 2003

Volume 10 Issue 2

PREPONDERANCE OF EVIDENCE AND SUBSTANTIAL EVIDENCE: WHAT EXACTLY IS THAT COURT LOOKING FOR?

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[Every once in a while, we are pleased to have a guest writer prepare an article on a subject of interest to our readers. This newsletter, as you can see, was authored by judge Zamudio of the Van Nuys office of the WCAB. Actually, this article was extracted from a recorded talk that he gave to an IEA class taught by Mr. Ivey and, as they say on the videos, it was edited to fit. Ed.]

Labor Code §5953 provides that findings and conclusions of the Appeals Board on questions of fact are conclusive and final and are not subject to review. Labor Code §5952 provides the extent of review and the statutory bases for reconsideration that you see recited in the Petitions for Reconsideration filed by your counsel. Among those is the allegation that the judge's decision is not supported by "substantial evidence". "Substantial evidence" is an extremely important concept.

The Court of Appeal in addressing a Petition for Writ of Review, will not hold a trial *de novo* (all over again), take evidence or exercise its independent judgment on the factual evidence, but it can review questions of law and determine whether or not the factual findings made by the Board are supported by substantial evidence. The Board has fact-finding powers to resolve conflicts in the evidence as between lay witnesses and medical reports, and has the power to draw inferences from the evidence and to determine the credibility of witnesses. In doing so, there still

has to be substantial evidence for the Board's ultimate decision. In adjudicating the matter, Labor Code Section 3202.5 is also important because that sets forth the preponderance of evidence standard, although Labor Code Section 3202 mandates that the Workers' Compensation Act be liberally construed for the purpose of extending benefits for the injured person, Labor Code Section 3202.5 mandates that nothing in 3202 relieves a party from meeting their evidentiary burden of proof by a preponderance of evidence.

The statute defines preponderance of evidence to mean such evidence as when weighed with that opposed to it, has more convincing force and a greater probability of truth. When weighing the evidence, the test is not the relevant number of witnesses but, rather, the relevant convincing force of the evidence. That's important to remember. If I have ten witness and you only have one, I don't necessarily win. The one witness may be more credible because there may be contemporaneous evidence that corroborates that witnesses' testimony. So, that's what you do, you apply the "preponderance of evidence" rule in weighing the evidence and making findings concerning evidentiary disputes.

Hanna defines "substantial evidence" as evidence that, if true, has probative force on the issues in the case. The evidence must be reasonable in nature, credible, and of solid value. When the Board's findings and award is not within the realm of what a reasonable trier

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of fact could find, it is not supported by substantial evidence and must be annulled. Hanna cites the *Bolton Case, (Braewood Convalescent Hospital vs. WCAB, (Bolton) [1983] 48 CCC 566)* in which the Court defined the meaning of substantial evidence. In that case, the applicant was requesting reimbursement for a self-procured weight reduction program. Mr. Bolton had a preexisting weight problem. He weighed approximately 422 pounds at the time of the injury on January 6, 1978 when he slipped and fell injuring his back and right elbow. He had been chronically overweight since childhood. The employer admitted the injury and provided temporary disability benefits and treatment. Dr. Wells, the applicant's personal treating doctor as well as two doctors engaged by the employer, recommended that he lose weight to facilitate his recovery from the injuries.

The applicant had participated in weight reduction programs and at the time of the accident, he was participating in such a program but had not been very successful. None of the doctors that were then seeing the applicant for the industrial injury recommended a specific weight reduction program and the employer hadn't offered to pay for any such program. A friend of the applicant, who also had a weight problem had gone to the Duke Medical Center in North Carolina for his obesity. He recommended that the applicant go there. In February of 1979, the applicant self procured that program, enrolling at the clinic. He was told, and later testified, that it was a supervised live-in treatment program and one of the number one obesity clinics in the world.

He participated in the clinic until November of 1979 and during that period, lost about 175 pounds. The applicant discontinued the clinic at that time because he could no longer afford it because he was paying for it out of his own pocket. Later, in a letter, Dr. Wells

wrote that it was imperative that he lose weight to obtain relief from his industrial injury and the doctor was in total agreement with the program, believing it to be an integral part of his treatment. Mr. Bolton returned to California and worked part-time as a security guard and then he went to a different clinic to try to lose weight. During that two-month period, he actually gained 16 pounds.

The applicant then filed for reimbursement for his weight loss clinic expenses and transportation costs. A judge awarded him reimbursement for that weight-loss program and also temporary disability. The employer filed a Petition for Reconsideration and the Board affirmed the judge regarding that issue. The employer challenged the Board's decision before the Court of Appeal on the issue of reimbursement for the weight reduction program. In its decision, the Court of Appeal defined the term "substantial evidence" as above quoted in Hanna. Such evidence has to be more than a mere scintilla and mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be reasonable in nature, credible, and of solid value. And the Appeal Court also noted that it may not simply isolate evidence which supports or disapproves the Board's conclusions and ignore other relevant facts which rebut or explain the supporting evidence, but must examine the entire record.

In reviewing the facts of the case the Court of Appeal noted that the applicant had been injured on the job, and the employer was aware of the injury. They further pointed out that he had been directed by three physicians, including two hired by the employer, to lose weight to obtain relief from his industrial injury. They noted that he had been overweight all his life and unsuccessfully participated in other weight loss programs, and that his own doctor (Dr. Wells) had recommended

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a specific reduction program later. So, although the employer has the right to request that the applicant obtain treatment within a reasonable geographic area, I think the Court in reviewing the facts here, noted that there was no evidence obtained by the defendant that a weight loss clinic in North Carolina would be unreasonable or inappropriate. Given the history that the applicant had of unsuccessful attempts at weight loss in local programs coupled with his weight loss in the program and, because of his un rebutted testimony that he understood this was the number one obesity clinic in the world and that his personal doctor had declared that this was reasonable and necessary, the Court found that there was substantial evidence to support the Board's order directing the defendant to reimburse him for that weight loss clinic program.

Another case that deals with the concept of substantial evidence is that of *Universal City Studios, Inc. v. WCAB* (Lewis) [1979] 44 CCC 1133. This case involved an appeal from the Board's decision on permanent disability finding that the applicant had a semi-sedentary disability for an injury to the left ankle, even though her subjective complaints were found by an AME to be constant minimal to slight pain in the ankle and foot, becoming more than moderate with prolonged walking or standing. The doctor opined that she was able to perform work activity that would permit her to sit and stand equally, alternately and intermittently throughout the day. After submission, the judge indicated that he was going to refer the case to the Disability Evaluation Unit for formal rating and when he did so, the only instruction he gave to the rater was "rate the AME report". He did not set forth the factors of the disability in his instructions as is required.

Formal rating instructions are a tentative finding of fact and the judge is required to fully and accurately set forth the factors of disability

that he finds so that the rating specialist can review those and make a recommended rating. The rating specialist then proposes a rating on the specified factors and the parties have the right to contest that recommended rating by moving to cross-examine the rater or have the right to ask the judge to strike his instructions and propose new instructions because the judge didn't include a certain factor or ignored another medical opinion saying that the level of disability is less. In the *Universal Studios* case, the judge simply deferred everything to the rater and so the rater reviewed the AME report and came up with a 60% standard based on the language about the work activity limitation that he equated with a semi-sedentary work restriction even though the the subjectives were certainly not that high.

There was also evidence presented in the trial that the applicant obtained subsequent employment and was working. And then the Court of Appeal noted in its decision that, although you can have permanent disability and still work, the Board's findings in regard to permanent disability have to be consistent with the evidence and there has to be some fairness and justice. The important thing about this case was that the semi-sedentary restriction was based upon a mechanical reading, or interpretation of the report, and the Court of Appeals said that the Board cannot engage in that kind of mechanical process in evaluating evidence and determining disability, it has to look at, and consider, the entire record. Here the evidence showed that the applicant was working, that there were no objectives to explain why on a prophylactic basis she might need such a restriction, and the restrictions were totally incongruent with the level of subjective complaints. The Court of Appeals reversed the Board's decision and they remanded it because there was no substantial evidence to support that high of a rating, 66% after adjusting for age and occupation, for basically a sprained ankle.

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Many times, as a trial judge, I'll hear defendants argue that it's important that the court consider the applicant's post-injury activities and employment even though there isn't a claim for a CT, a subsequent CT, or a subsequent injury. The defendant wants to offer into evidence the applicant's post-injury abilities and they do it via subrosa films or with testimony of the applicant on cross-examination or by deposition, The *Universal Studios* case tells us why that kind of evidence is relevant. You might get a judge who is impatient with the defense, and may ask " why are you wasting my time? There is no subsequent industrial injury, or a non-compensable subsequent injury under 4750.5". The judge needs to be reminded that *Universal Studios* is good authority and good guidance on how the Board will reach findings of fact about the extent of permanent disability. Subsequent activities of the injured worker are relevant and need to be considered to make a proper and just decision based on substantial evidence.

The last case that needs to be considered in terms of preponderance of the evidence and substantial evidence questions is the *Garza Case*. *Garza v. WCAB (McDonnell Douglas Aircraft Corp.)* [1970] 35 CCC 500. *Garza* was employed as a spray painter and was injured on January 5th while attempting to push a paint stand into position. While doing so, he felt something pull in his back and a sharp pain in the tailbone. He became dizzy and noticed numbness in his left hand, leg and shoulder as well as the left side of his chest. A day or two later, he told his foreman and lead man that he had to go to the hospital. Although he mentioned having pain in his cheek and possible sinus trouble, he did not report the back injury to the Workers' Compensation coordinator until January 24th.

He was admitted to the Hospital on January 8th complaining of various symptoms to his left side of his face and lower ribs and motor difficulties in the lower extremities. He had first seen a dentist, who found nothing wrong with his teeth, and who referred him to other doctors. Apparently, he did not tell those doctors about his back injury until January 13th. He was seen by a doctor on January 30th, and an exploratory laminotomy was performed, which displayed a herniated disk, with impingement of the nerve root and scarring. After the surgery, his condition improved. The medical records disclosed that he had undergone prior back surgery in 1954 and had complained of subsequent back injuries or pain from time to time thereafter. When asked about the delayed reporting of the January 5th injury to his employer or his doctors, he testified that he had hoped that his condition would soon improve and feared he might lose his job for failing to advise his employer about his prior back injuries. The judge found that he suffered an industrial injury on January 5th and awarded benefits, taking the issues of permanent disability and apportionment off calendar. The defendants challenged the decision. The Board reversed the trial judge on the basis that he had failed to report the alleged injury to either his co-employees or to doctors from whom he sought treatment. The Board said that his failure to disclose his back complaints prior to the alleged incident was also a factor in finding him not credible. The board found that there was circumstantial evidence in conflict with his direct testimony and weighing his testimony in light of that circumstantial evidence, found him not credible.

The applicant appealed this decision to the Court of Appeals. The Court of Appeals provided a good analysis appearing on

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pages 503 to 505 of the opinion. The Court looked at the evidence and noted that there was a reason for the applicant not to report his back injury. When he had disclosed the prior back problems when applying for other work, the records show that he had been rejected. The record also disclosed that he had a prior injury with the same employer where he suffered the January 5th incident and, apparently, there was some reprimand given to him about that injury. When the Court looked at the record as a whole, it found that there was a reason and a basis for the trial judge to make the findings that he did and the Board had selectively ignored that evidence and looked at other evidence to make these inferences, but without explaining or discounting why the trial judge was wrong in making his decision.

The Court of Appeal noted that the trial judge had an opportunity to observe the manner and demeanor of the witness, unlike the board that is working off a paper record, and the Court said that that was an important factor. The board has to keep in mind in reversing a trial judge, that if they are going to reverse the trial judge on credibility, then it has to point out in the record why the trial judge's findings are wrong and it can't just simply say that we draw different inference although it's correct that the board has power to retry the case and independently look at the evidence, but again, it has to be able to explain why it is reversing the trial judge and making a new decision. The board can't just simply say "we're just deciding differently".

This is an important case for claims professionals to consider and keep in mind when dealing with factual disputes while weighing the input from the employer

against the results of their own investigation during the first 90-days when they have to decide whether to accept or deny the claim. It's important to talk to all the witnesses and have somebody meet with them and maybe take statements. Deposing the claimant to find out how credibly he will come across as a witness testifying before a judge is critical in a significant claim. Your attorney can give you his impressions about that testimony so that you can anticipate what a trial judge might do if it goes to trial. Knowing that your witnesses will say one thing and the applicant under oath has testified another way, only with as much information as possible can the claims professional make an informed decision about whether to settle the case or litigate it.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.