IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONALD WYRICK, Employee/Appellant,	)	
v.	)	C.A. No.: 11A-08-004 FSS **(E-FILED)**
GREGGO & FERRARA, Employer/Appellee.	)	

Submitted: February 22, 2012
Decided: May 31, 2012

ORDER

Upon Appeal from the Industrial Accident Board -
REVERSED AND REMANDED.

This is a procedurally strange Workers' Compensation appeal involving the "successive carrier rule" and *res judicata*. One worker was hurt twice on the same job, but the employer switched carriers between the accidents. The worker mistakenly filed properly apportioned claims for benefits from both carriers. The worker settled with the successive carrier while the first claim was pending. When the first claim was denied under the "successive carrier rule," the worker turned back to the successive carrier. Relying on *res judicata* principles, the Board let the successive carrier benefit from the worker's obvious mistake and avoid coverage.

I.

Appellant, Donald Wyrick, hurt his lower back in two work-related accidents while employed by the same employer, Greggo & Ferrara. On February 13, 2006, Wyrick slid on ice, landing hard on his right side. Pennsylvania Manufacturer's Insurance was the workers' compensation carrier then on-risk. On January 17, 2007, a bulldozer Wyrick was operating jerked backwards, exacerbating the earlier slip-and-fall. The Hartford was on-risk for Wyrick's second accident. As discussed below, it is agreed that the "successive carrier rule" shifted risk for Wyrick's total impairment from PMA to Hartford.[1]

On October 12, 2010, Wyrick's expert witness, Dr. Jeffrey S. Meyers, issued a permanency report stating Wyrick had a 29% permanent lumbar spinal impairment. Dr. Meyers attributed 21.75% to the 2006 injury and 7.25% to the 2007 injury. On October 14, 2010, Wyrick filed separate Petitions to Determine Additional Compensation Due for partial permanent disability.[2] One was against PMA. The other named Hartford. On August 16, 2011, the Board dismissed Wyrick's 2006 injury claim against PMA, under the "successive carrier rule."[3]

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[1] *Wyrick v. Greggo & Ferrara*, No. 1281957, at *7-8 (Del. I.A.B. Aug. 16, 2011) (Because [Appellant] had a . . . second accident, the entire compensation burden . . . is lifted from . . . PMA.").

[2] 19 *Del. C.* § 2325.

[3] *Wyrick*, No. 1281957, at *7.

Meanwhile, on March 8, 2011, while the PMA claim was pending, Wyrick settled the 2007 claim with Greggo & Ferrara and Hartford. Even though Hartford was on-risk for both accidents, the settlement did not include the 2006 accident. Again, when Wyrick settled he was only pursuing the 2007 claim against Hartford, and the 2006 claim was then-pending against PMA. So, Hartford paid Wyrick approximately $11,000 for his 7.25% permanent partial disability attributed to the 2007 industrial accident. On May 6, 2011, the Board approved the settlement.

On June 16, 2011, Wyrick filed a third petition, including the October 12, 2010 doctor's report addressing both accidents. Eventually, Wyrick's counsel explained to the Board, and it is undisputed, the third petition was prompted by belated concern that the then-pending petition against PMA would founder, as it did, on the "successive carrier rule."[4]

On June 17, 2011, Greggo & Ferrara moved to dismiss the third petition because "the benefits demanded in the latest petition were the subject of a prior petition which was resolved." On July 7, 2011, the Board heard oral argument. Wyrick argued, "[The third petition] should not be dismissed because it's a new petition for additional permanency because, under *Forbes* , [Hartford] owes the whole

[4] *Wyrick v. Greggo & Ferrara,* Del. I.A.B. No. 1297857 Hr'g Tr. 10:15-21, July 7, 2011 ("The other petition is pending because I didn't want to make a decision whether . . . [to] pull the petition against [PMA], . . . whether it's *Forbes* and [PMA] has no obligation to pay anything.")

29%."[5]

The Board dismissed Wyrick's third petition because "it was based on Dr. Meyers's original permanency report, and the subject of a subsequent settlement agreement."[6] On August 8, 2011, Wyrick timely appealed to this court.

II.

On appeal from the Industrial Accident Board, the court's role is limited to determining whether there was substantial evidence supporting the Board's findings, and whether the decision was legally correct.[7] Substantial evidence is enough evidence to support a conclusion.[8] It is more than a scintilla but less than a preponderance.[9] Questions of law are reviewed *de novo.*[10] When considering the facts, the court defers to the Board's expertise and competence.[11] It is the Board's role to determine credibility.[12]

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[5] *Id.* at 12:5-8. *See also Forbes Steel & Wire Co. v. Graham*, 518 A.2d 86, 89 (Del. 1986).

[6] *Wyrick*, No. 1297857 (Del. I.A.B. July 7, 2011) (ORDER).

[7] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965).

[8] *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del. 1994).

[9] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[10] *Munyan v. Daimler Chrysler Corp.,* 909 A.2d 133, 136 (Del. 2006).

[11] *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1993).

[12] *Simmons v. Delaware State Hosp.,* 660 A.2d 384, 388 (Del. 1995).

If an injured employee suffers an old injury's recurrence and the employer changes insurers, the employer's original insurer remains liable.[13] A recurrence is "the return of an impairment without the intervention of a new or independent accident."[14] If, however, the second injury is a new work-connected accident, or an exacerbation, the coverage falls entirely on the insurer on-risk for the new injury.[15] The last carrier bears the entire burden when an employee suffers separate, compensable accidents while working for the same employer.[16] Hence, the "successive carrier rule."

Res judicata bars a party from bringing a second lawsuit after judgment has been entered in a prior suit involving the same parties[17] and embracing claims that should have been brought under the original claim.[18] As a matter of law, Board-approved settlements are final and binding,[19] unless modified by 19 *Del. C.* § 2347.[20]

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[13] *Forbes Steel & Wire Co.*, 518 A.2d at 89 (citing *DiSabatino & Sons, Inc. v. Facciolo,* 306 A.2d 716, 719 (Del. 1973)).

[14] *DiSabatino & Sons, Inc.,* 306 A.2d at 719.

[15] *Forbes Steel & Wire Co.*, 518 A.2d at 89.

[16] *Id.* (citing *DiSabatino & Sons, Inc.,* 306 A.2d at 719).

[17] *Betts v. Townsends, Inc.,* 765 A.2d 531, 534 (Del. 2000).

[18] *Sutton v. Coons,* 940 A.2d 946, 2007 WL 4293073, at *2 (Del. 2007) (TABLE).

[19] 19 *Del. C.* § 2344(a).

[20] *Id.* § 2347.

III.

As mentioned, the Board concluded that Wyrick's third petition and his now-settled October 14, 2010 petition were substantively similar and could not be relitigated. As he did below, Wyrick argues his third petition is different and not barred by the rule because:

> [Wyrick] brought an action based on a physicians' opinion that he had 7.25% permanent impairment. [Hartford] paid that sum. [Wyrick]'s total impairment was 29%. [Wyrick] brought a subsequent action . . . for the difference of 21.75%. [T]he parties were the same, [but] the issues were different and had not been decided or adjudicated."[21]

The Board is rightly concerned about not having to consider fragmented claims. That is inefficient and potentially confusing. While this claim superficially presents that sort of problem, the record only supports the finding that Wyrick meant to pursue his 29% total impairment from the outset. In the process, Wyrick overlooked the "successive carrier rule."

Hartford does not dispute that the 21.75% impairment attributed by the expert to the 2006 injury was not addressed in the March 8, 2011 settlement.[22]

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[21] Appellant's Br. at 5-6.

[22] *See Wyrick,* No. 1297857 Hr'g Tr. 8:10-13 ("[Hartford] settled [with Wyrick]. He may or may not have a claim against [PMA]. That's not [Hartford's] concern").

Although the third petition clumsily referred to the January 17, 2007 injury, that injury was settled for 7.25% and the third petition only sought the additional 21.75% impairment associated with the 2006 injury. The only inference that makes sense, therefore, is that the third petition was addressed to the as-yet uncompensated 2006 injury. As Wyrick makes clear, he is not trying to take advantage: "This subsequent action . . . is for the difference of 21.75%."

Hartford did not present evidence that the 29% claim was settled for 7.25%. The evidence shows that only the 7.25% portion of the 29% claim was initially settled, then the Board dismissed Wyrick's claim against PMA. Thus, neither the 7.25% settlement nor the Board squarely addressed Hartford's liability for the whole 29%. Accordingly, as further discussed next, *res judicata* does not bar Wyrick's third petition.[23]

IV.

This is an odd fact pattern. But, it is clear that Wyrick has been pursuing

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[23] *See, e.g., Glanden v. Land Prep, Inc.,* 918 A.2d 1098, 1101 (Del. 2007) ("The previous IAB hearings addressed [Glanden's] ability to return to work, but the IAB made no finding or determination of a brain injury. Because [it] did not previously decide whether any brain injury or permanent impairment occurred as a result of the accident, *res judicata* [does not] bar[] the current proceeding."). *See also LaPoint v. AmerisourceBergen Corp.,* 970 A.2d 185, 193-94 (Del. 2009) (*citing Kossol v. Ashton Condominium Assoc., Inc.,* 637 A.2d 837, 1994 WL 10861, at *2 (Del. 1994) (TABLE) ("[T]o assert *res judicata* as a bar to a plaintiff's claim . . . the defendant must show that the plaintiff 'neglected or failed to assert claims which in fairness should have been asserted in the first action.'")).

a 29% combined impairment for the 2006 and 2007 injuries from the beginning. He filed a petition against PMA and expected PMA to cover 21.75% of the 29%, as it was on-risk in 2006. Almost simultaneously, Wyrick filed a petition against Hartford to cover the remaining 7.25%, including an expert report addressing both mishaps. It is undisputed that when the parties settled, Hartford knew Wyrick was relying on an expert report attributing 21.75% to 2006 and 7.25% to 2007. There is nothing in the record supporting a finding that Wyrick and Hartford viewed the 7.25% as encompassing the 21.75% claim, even if that view might be expected in the typical settlement. Here, the process was skewed by the "successive carrier rule" situation's mishandling.

In summary, the Board was right that the "successive carrier rule" applied. The Board was also correct that Board-approved settlements, such as the7.25% settlement, are final and binding between the parties. It also appears, as mentioned, that the third petition misleadingly references the 7.25%, rather than the 21.75% portion of the 29% combined claim. Nevertheless, as explained, the record only allows the conclusion that the 7.25% settlement left the 21.75% claim unresolved. Therefore, the settlement only keeps Wyrick from asking Hartford to pay more on the 2007 claim. But, the 7.25% settlement left the claim's 21.75% balance subject to further resolution.

In light of the above, it cannot be said that the 21.75% claim was "the subject of a subsequent settlement agreement." And while it is true that the 21.75% claim is based on the same expert report as was the 7.25% claim, the report addressed the separate claims separately. It also is not alleged, nor could it be said, that with the PMA claim pending, Hartford and Wyrick intended that the 7.25% settlement would keep Wyrick from filing a petition against the carrier on-risk for the 2006 accident.

In closing, the court emphasizes how important the undisputed facts are in this case. Here, it is established that Wyrick was diligently pursuing a claim from the beginning, consistent with the undisputed medical expert opinion received immediately before Wyrick filed for benefits. Further, he was not trying to obtain serial decisions to his benefit, nor was there other overreaching by him. Here, due to the "successive carrier rule," Wyrick filed part of his claim against the wrong carrier and while that was pending, he unwittingly settled with the successive carrier. Again, there is no reason to believe that Hartford viewed the 7.25% settlement as embracing its clear obligation to cover the 21.75% balance of the 29% claim. Allowing Hartford to avoid coverage under these special circumstances would amount to a windfall for Hartford, coming at an injured worker or a third carrier's expense.

V.

For the foregoing reasons, the Industrial Accident Board's July 7, 2011

decision is **REVERSED AND REMANDED** for proceedings consistent with this decision.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary
pc: Kenneth F. Carmine, Esquire
John J. Klusman, Jr., Esquire
Nicholas M. Krayer, Esquire