

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947  
TELEPHONE (302) 856-5264

John W. Morgan, Esquire  
Anthony N. Delcollo, Esquire  
Heckler & Frabizzio  
800 Delaware Avenue, Suite 200  
P.O. Box 128  
Wilmington, DE 19899

Joseph J. Rhoades, Esquire  
Stephen T. Morrow, Esquire  
1225 King St., Suite 1200  
P.O. Box 874  
Wilmington, DE 19899

**RE: *Shaw Group, Inc. v. Robinson***  
**C.A. No. S11A-12-005 RFS**

*Appeal of a Decision of the Industrial Accident Board.  
Decision Affirmed. Appeal Denied.*

Submitted: September 5, 2012  
Decided: November 14, 2012

Dear Counsel:

This is my Letter Order affirming a decision of the Industrial Accident Board (“Board”). The Board granted Claimant Lawrence Robinson’s petition for additional benefits due to a compensable work injury, and Employer Shaw Group, Inc. appeals the decision to this Court.

While engaged in his work as an electrician for Employer, Claimant fell several feet into a concrete ditch. Claimant landed on his hands and knees to avoid hitting his head on the concrete. Considerable medical treatment and two surgeries followed. Employer acknowledged the work injuries to the left upper extremity and right lower extremity. Claimant’s right knee was operated on February 14, 2006. His left wrist was operated on March 12, 2007. Claimant received permanent partial disability benefits of 25 percent impairment to his left shoulder and 24 percent permanent impairment to his right wrist. On May 23, 2011, Dr. Sowa performed a left wrist and left elbow

surgery. On Dr. Sowa's reference, Claimant presented to Dr. Ann Kim, who treated him for his neck and shoulder pain. The parties agreed to an open-ended period of temporary total disability benefits.

Because Employer disputed causation on the left elbow surgery performed by Dr. Sowa and the cervical treatment provided by Dr. Kim, Claimant filed a petition with the Department of Labor for additional benefits. The Board held a hearing where Claimant testified, as well as Dr. David Thomas Sowa, MD, and Ann Kim, MD, on Claimant's behalf and Michael Mattern, MD, on Employer's behalf. The Board found in Claimant's favor and Employer appealed to this Court.

**Standard of review.** On appeal of a decision of the Board, this Court's review is limited to whether the Board's factual are supported by substantial evidence and whether the decision is free from legal error.<sup>1</sup> The Court will not disturb the findings of the Board if there is evidence in the record from which the Board's conclusions could be fairly and reasonably drawn.<sup>2</sup>

**Cervical spine and radicular pain.** The Board found Claimant to be credible in describing the accident and his various conditions, including his cervical symptoms. The Board found that the cervical condition was the product of the 2005 fall. The Board based this finding on the testimony of Dr. Sowa and Dr. Kim, in conjunction with Claimant's testimony.<sup>3</sup> Dr. Sowa and Dr. Kim agreed that the force of falling onto concrete, taking the impact on his wrists generated force on both of Claimant's shoulders. Dr. Sowa described the injury as a whiplash resulting from Claimant jerking his neck backwards to avoid hitting his head on the concrete.

On appeal, Employer argues that the Board was "manifestly unreasonable" in finding Claimant to be credible about his cervical pain because he did not mention it for 1 ½ years after the accident and was not consistent about when it started. For this reason, Employer argues that the Board's decision is not based on substantial evidence and must be reversed.

In making this argument, Employer relies on *A.H. Angerstein, Inc. V. Jankowski*,<sup>4</sup> where the claimant was unable to give an intelligible version of the accident on cross examination. The court found that the employer had been denied its right to cross examine a witness who had testified on direct examination. The doctor's direct testimony, who based his opinion in part on what the claimant had told him, was inadmissible hearsay. The court's holding was based on the fact that no

---

<sup>1</sup>*Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340 (Del.1993).

<sup>2</sup>*Asplundh Tree Expert Co. v. Clark*, 369 A.2d 1084 (Del.Super.1975).

<sup>3</sup>The Board noted that the three physicians agreed that the 2005 fall was the type of accident that was consistent with Claimant's cervical problems. The Board also accepted the testimony that patients who present with multiple problems focus first on their most serious symptoms, as was the case here.

<sup>4</sup>187 A.2d 81 (Del.Super.1962).

credible account that the claimant was injured in the course of his work duties existed.

No such situation exists in this case. Claimant testified on both direct and cross examination, and Employer exercised its right to confrontation. The Board reviewed Claimant's testimony before accepting it as credible. The record shows that Claimant acknowledged that he did not bring up the neck pain until Dr. Sowa performed surgery on his left wrist, which he believed would alleviate his other problems. The doctors agreed that many with numerous problems want treatment for the worst one first. Credibility findings are the Board's responsibility and are not disturbed on appeal.<sup>5</sup> Finding proximate cause in the related testimony of Dr. Sowa, Dr. Kim and Claimant, the Board noted that no dispute existed among the three physicians as to the necessity and reasonableness of the cervical treatment, and awarded Claimant payment of his medical expenses related to the cervical spine.<sup>6</sup>

**Left elbow.** Although the physicians agreed that the left elbow surgery performed by Dr. Sowa was reasonable and necessary, Dr. Mattern disputed causation because in his opinion the median nerve was compromised by Claimant's carpal tunnel syndrome. The Board accepted the testimony of Dr. Sowa, who testified that Claimant experienced "double crush syndrome," a common condition which arises when trauma affects two closely situated nerves. Dr. Sowa expressed his opinion that the left elbow condition, involving the median and ulnar nerves, was derivative of the untreated cervical condition. With no dispute that the left elbow treatment was reasonable, and having determined causation based on Dr. Sowa's testimony, the Board found that Claimant was entitled to payment of the medical expenses related to the left elbow.<sup>7</sup>

On appeal, Employer argues that because Dr. Sowa did not provide substantial evidence about Claimant's cervical spine problems, he also failed to present substantial evidence that the left elbow problem was related to the untreated spine condition. The Court has rejected Employer's argument that Dr. Sowa did not provide substantial evidence about the cervical spine. Thus, Employer's argument as to Claimant's left elbow, premised on Dr. Sowa's lack of substantial evidence for the spine, cannot be accepted.

Employer compares this case with *Delaware Terminal Company v. Harmon*.<sup>8</sup> In *Harmon*, the Board accepted a doctor's opinion that the claimant had suffered an injury that would resolve itself within three months, and the Board did make a permanency award. However, the Board awarded costs of ongoing physical therapy, medical appointments and medication. This Court

---

<sup>5</sup>*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.Super.); *Thomas v. Christiana Excavating Co.*, 1994 WL 750325 (Del.Super.).

<sup>6</sup>Title 19 *Del.C.* § 2322.

<sup>7</sup>*Id.*

<sup>8</sup>2007 WL 64757 (Del.Super.).

reversed the award of future medical expenses because it was inconsistent with a short-term injury and the Board had no other evidence to rely on, having rejected the testimony of the other physician.

The *Harmon* decision has no bearing here. In this case, the Board accepted Dr. Sowa's testimony as to the cause of Claimant's cervical and left elbow problems and made awards consistent with Dr. Sowa's opinion and testimony.

**Other issues.** Employer argues that the case should be remanded to the Board for consideration of two unresolved issues. Employer argues that the Board ignored Claimant's inconsistent testimony about his spinal condition. The record shows that the Board reviewed Claimant's testimony and found him credible regarding his condition both before and after the accident. The Board observed that Claimant acknowledged that he thought his neck pain and shoulder pain were related to his hand and wrist conditions. He mentioned these symptoms to Dr. Sowa when surgery on the left wrist did not relieve his neck pain. Citing to Dr. Mattern's observation, the Board stated that one has to drag information out of Claimant regarding his medical conditions. The Board fulfilled its obligation in considering the Claimant's testimony and making a finding that he was credible. That finding stands.<sup>9</sup>

Employer also argues for remand because Dr. Kim testified that the June 2007 MRI of Claimant's cervical spine showed only degenerative changes, which were acknowledged by all three physicians. When Claimant first presented to Dr. Kim in June 2007, he complained of neck pain radiating into his left shoulder, and numbness in his left forearm and left hand. In light of Claimant's undisputed asymptomatic neck changes, Dr. Kim opined that the fall into a concrete hole created the setting that produced or aggravated the neck condition. The Board accepted Dr. Kim's testimony in a proper exercise of its discretion.

Employer has not established a ground to remand the case to the Board for reconsideration of the testimony.

**Conclusion.** For all these reasons, the Board's decision is **AFFIRMED** and Employer's appeal is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ Richard F. Stokes*

Richard F. Stokes

Original to Prothonotary

---

<sup>9</sup>*Johnson*, at 66.