IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARIA KLENK, Claimant-Below/ Appellant, v. THE MEDICAL CENTER OF DELAWARE (a/k/a CHRISTIANA CARE), Employer-Below/ Appellee.	))))))))))))	C. A. No. 07A-03-011 MJB

Submitted: October 26, 2007
Decided: January 30, 2008

On Appeal From the Industrial Accident Board.
AFFIRMED.

OPINION AND ORDER

Robert P. LoBue, Esquire, Wilmington, Delaware, Attorney for Appellant.

Maria P. Newill, Esquire, Heckler & Frabizzio, Wilmington, DE, Attorney for Appellee.

BRADY, J.

Maria Klenk (Appellant/Klenk)[1] appeals a decision of the Industrial Accident Board (Board) denying her Petition to Determine Additional Compensation. Appellant alleged that she suffered a recurrence of total disability and a permanent impairment to her bladder and low back as a result of a 1996 surgery to treat a work-related injury. The Board found that it was not necessary or reasonable to undertake the procedure and that Appellant's employer was not liable for its adverse consequences.

Appellant does not contest the finding that the surgery was not reasonable and necessary, but contends that the additional detriment suffered by her as a consequence is compensable. The Court finds that there is substantial evidence in the record to support the determination of the Board that her decision to have surgery was not reasonable in light of all the relevant circumstances. Given that the surgery was not deemed qualifying for compensation, the Court finds that the additional detriment claimed by the Appellant is not compensable. Accordingly, the Board's decision is AFFIRMED.

[1] The Claimant is referred to as "Klenk" when reference is made to previous proceedings in this case, and as "Appellant" when referring to matters under review at this time.

FACTUAL BACKGROUND

On August 27, 1991 Appellant was injured while working as a blood bank technologist at the Medical Center of Delaware (Appellee/MCD).[2] Appellant was injured when she tripped and fell, striking both of her knees on the floor. After the fall, Appellant began to experience leg and back pain. Her injury was recognized as compensable and she began to receive total disability benefits.

Appellant had surgery to address the cause of pain in her low back on April 29, 1992. The Appellant continued to complain of medical problems, and was referred to a pain management specialist and, eventually, several other health care professionals. Some of her health-care providers, as well as physicians who evaluated Appellant on behalf of Appellee, noted that Appellant's complaints seemed disproportionate to her injuries and lacked objective support. Some health care professionals felt her complaints had a psychological, emotional and/or psychosomatic component.

Appellant was referred to the Mensana Clinic, a pain-management clinic in Baltimore, where one of her treating physicians was Dr. Reginald J. Davis, a neurosurgeon and an assistant professor of neurosurgery at Johns

[2] The Employer is referred to as MCD when reference is made to previous proceedings in this case, and as "Appellee" when referring to matters under review at this time.

Hopkins University and the University of Maryland. After evaluating the Appellant, Dr. Davis recommended additional back surgery.

On June 21, 1996 the Board held a hearing on MCD's Petition for Review of Compensation Agreement and Klenk's Petition for Additional Compensation. In its written decision, the Board granted MCD's Petition for Review of Compensation and terminated Klenk's total disability benefits. The Board found that Klenk was capable of performing sedentary work. The Board found that Klenk's complaints were exaggerated and that some of her treatment and testing was unnecessary and repetitive. Accordingly, the Board granted in part and denied in part Klenk's application for payment of medical expenses. The possibility of a second surgery was raised at the hearing. There was testimony that several doctors believed that a second surgery was not advised, and one doctor opined it would be "inexcusable" to have a second surgery.[3] However, Klenk had not, at that time, petitioned the Board to approve the surgery and did not request MCD to pay for the procedure. Therefore, the Board did not make any explicit findings on the issue of the proposed second surgery.[4]

[3] *Klenk v. Medical Center of Delaware*, Hearing No. 946781 (IAB Feb. 23, 2007).
[4] The Appellee contends that collateral estoppel prevents the Appellant from raising the necessity for a second surgery and claims that the Board made a finding it was not necessary and reasonable at the time of the 1996 hearing. The Board, in this proceeding, determined no such finding was made at the previous hearing. Given the Board's decision from which this appeal is taken, which is consistent with the result Appellee claims was previously decided, and the fact that the Appellant does not claim the surgery was reasonable or necessary in this appeal, it is unnecessary for the Court to address the issue.

On August 12, 1996, Dr. Davis performed an L3-4, L4-5 decompression surgery (1996 surgery) on Appellant. Dr. Davis continued to periodically treat Appellant until sometime in 2000.

On September 20, 2006, Appellant filed a Petition to Determine Additional Compensation, alleging that she had suffered a recurrence of total disability and seeking compensation for a sixty-seven percent permanent impairment to her bladder and a thirty-one percent permanent impairment to her low back (collectively "subsequent injuries"). Appellant attributed her subsequent injuries to her 1991 industrial accident and complications with the two subsequent surgeries which she claims are related to that industrial accident. Appellee contested Appellant's claims.

The Board held a hearing on Appellant's petition on January 24, 2007. Dr. Davis testified that the 1996 surgery was a reasonable and necessary procedure to address Appellant's 1991 work-related injury. He stated that he told Appellant of the potential risks and benefits of the procedure and she decided to undergo the procedure based upon his recommendation.

Dr. Steven J. Rogers, an occupational health physician testified that Appellant's inability to work and her subsequent injuries are the result of her 1991 industrial accident and the two subsequent surgeries.

Appellant testified on her own behalf. She testified that prior to the 1996 surgery her back pain was so severe that she was unable to sit, walk, or care for herself. She decided to have the 1996 surgery on the recommendation of Dr. Davis. She stated that the surgery relieved her symptoms somewhat, and she is now able to care for herself, drive for short distances, and walk better than previously. She testified that she has been unable to work since her 1991 injury and stated that she has a number of health problems other than her injured back. Appellant's son, Robert Klenk, testified that he noticed some improvement in his mother's mobility and comfort after the second surgery, but that she continued to struggle to perform normal household chores, and cried often.

Dr. Larry Edelsohn, a neurologist, testified on behalf of Appellee. Dr. Edelsohn has examined Appellant 12 times between 1992 and 2006 at the request of Appellee. He agreed that Appellant is disabled, but that she is not disabled as a result of the industrial accident. Dr. Edelsohn stated that after Appellant's first surgery, she complained of pain in nearly every part of her body. As time progressed, she began to complain of a host of other symptoms as well. Dr. Edelsohn testified that many of her health care providers felt that Appellant's complaints were exaggerated and the veracity

of her complaints could not be determined by diagnostic tests. He also testified that she was not cooperative with several of her treatment providers.

Due to Appellant's exaggerated complaints and the lack of objective test results, Dr. Edelsohn did not think additional surgery was reasonable or necessary and, in fact, he advised the Appellant, prior to the surgery, that he thought that it was likely to worsen her condition. However, he testified that Dr. Davis is a very capable surgeon who would not have recommended surgery if he did not think it was necessary.

The Board issued a written decision in this matter on February 23, 2007, holding that, based upon the evidence provided by Dr. Edelsohn and the previous testimony of other physicians at the hearing in 1996, nearly contemporaneous with the 1996 surgery, the procedure was not reasonable or necessary treatment. Accordingly, Appellee was held not liable to compensate Appellant for any subsequent adverse effects of the procedure. Appellant's Petition to Determine Additional Compensation was denied, and the instant appeal followed.

STANDARD OF REVIEW

The Court has a limited role when reviewing a decision by the Industrial Accident Board. If the decision is supported by substantial

evidence free from legal error,[5] the decision will be affirmed.[6] Substantial evidence is evidence that a reasonable person might find adequate to support a conclusion.[7] The Board determines credibility, weighs evidence and makes factual findings.[8] This Court does not sit as the trier of fact, nor should the Court substitute its judgment for that rendered by the Board.[9] The Court must affirm the decision of the Board even if the Court might have, in the first instance, reached an opposite conclusion. Only when there is no satisfactory proof in support of a factual finding of the Board may this Court overturn it.[10] The Board's legal interpretations are subject to plenary review.

ANALYSIS

It is not disputed that the Appellant is totally disabled and that she has suffered a permanent impairment to the bladder and low back. The sole issue on appeal is whether the adverse consequences of a surgery that, it is uncontested, was not necessary or reasonable, are compensable.

The Board determined that the 1996 surgery was not a reasonable or necessary medical procedure. In making that determination, the Board examined what the Appellant knew regarding the second surgery: that a

[5] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).
[6] *Sirkin and Levine v. Timmons*, 652 A.2d 1079 (Del. Super. Ct. 1994).
[7] *Oceanport Indus. Inc. v. Wilmington Stevesdores*, Inc., 636 A.2d 892, 899 (Del. 1994).
[8] *Johnson v. Chrysler Corp*., 213 A.2d 64, 66-67 (Del. 1965).
[9] *Id.* at 66.
[10] *Id*. at 67.

number of doctors had recommended against it; that there was concern expressed it would be detrimental in effect; that the results of objective testing did not support it; and that the employer was steadfastly opposed to paying for it. The Appellant elected to have the surgery, and while she testified that she received better mobility and experienced fewer symptoms following the procedure, in fact, she brought this petition based on claims of significant, additional impairment that occurred as a result of the surgery.

The Board, based upon the principle that, under Delaware law, an employer is not required to compensate an employee for unreasonable or unnecessary medical care, concluded as follows:

> [I]t must logically follow that the employer cannot be held responsible for negative consequences of that unreasonable procedure. It would be contrary to all reason to say that the employer does not have to pay for unreasonable surgery but does have to pay for the additional harm to the claimant caused by the surgery. In short, if a claimant undergoes unreasonable medical treatment and that treatment results in a worsening of the claimant's condition, that surgery can constitute an intervening event that breaks the chain of causation from the original work injury at least with regard to any worsening of the condition.[11]

Appellant argues that the Board erred by concluding that the 1996 surgery broke the chain of causation between her original injury and her subsequent injuries. Appellant submits that unreasonable or unnecessary

[11] *Klenk v. Medical Center of Delaware*, Hearing No. 946781 (IAB Feb. 23, 2007).

treatment precludes a finding that Appellee must pay for the surgery but does not relieve Appellee of liability for the adverse consequences of the surgery. Appellant contends that Appellee may still be liable for the surgery's consequences if Appellant's "decision to undergo surgery was reasonable under all circumstances."[12]

After considering the submissions of the parties and the applicable legal standards, the Court finds that there is substantial evidence to support the finding of fact that the surgery was not necessary and reasonable. Further, it is clear from the record that the Board's conclusion reflects an examination of the reasonableness of the Appellant's decision to have the surgery.[13]

Legal Standard for Causation in Worker's Compensation Claims

Delaware has a well-settled standard for causation in worker's compensation cases that involve further injury to a compensable, work-related injury. In *Hudson v. E.I. Dupont,*[14] this Court stated as follows:

> A subsequent injury is compensable only if it follows as a direct and natural result of the primary compensable

[12] *Pacific Employers Ins. Co. v. Industrial Com'n of Arizona,* 652 P.2d 147, 149 (Ariz. App. 1982).
[13] The Court notes that the Board also, in part, based the decision to deny the Appellant's petition on a finding that Appellant engaged in volitional conduct (the 1996 surgery) contrary to an express prohibition by Appellant which she knew had indicted it would not pay for the additional surgery. The Court finds the application of that concept to these facts questionable and does not decide this matter, relying in any way, on that basis. See Larson §10.05 at 10-12 (2003).
[14] *Hudson v. E.I. DuPont De Nemours & Co.,* 245 A.2d 805, 810 (Del. Super. 1968).

> injury… If the subsequent injury is attributable to the claimant's own negligence or fault, the chain of causation is broken and the subsequent injury is not compensable.[15]

There are no reported Delaware cases that address the issue of further injury from unnecessary or unreasonable surgery, and so the Court looks to a recognized treatise for guidance. According to *Larson's Workers' Compensation Law*,[16] it is "uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable."[17] Further, when a claimant undergoes unauthorized treatment for an otherwise compensable injury, two possible issues arise. "One is whether the employer is liable for the costs so incurred…. The other question is whether the employer is liable for any added disability."[18]

In the case at bar, Appellant did not request Appellee to pay for the surgical procedure, and, indeed, does not dispute, in this appeal, the Board's finding that the surgery was both unreasonable and unnecessary. Therefore, the sole issue raised is whether Appellee is responsible for the surgery's adverse consequences.

---

[15] *Id.*
[16] Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 10.09[1], at 10-24 (2003).
[17] *Id.*
[18] *Id*. at §10.12 at 10-40 (2001).

The standard of reasonableness of a worker's compensation claimant whose actions contribute to aggravating a work-related injury is well articulated in *Amoco Chemical Corp. v. Hill*.[19]

> [I]f the chain of causation could have been said to have been brown [sic] by a subsequent injury attributable to the Claimant's own negligence or fault, an intervening cause would exist and the employer would be relieved of liability…..Negligence is the doing of some act which a person of ordinary prudence would not have done under similar circumstances.[20]

The intervening cause clearly must be the result of the conduct of the claimant. Claims for compensation for results from actions outside the control of the claimant are compensable. Therefore, the review in this case must determine if there was sufficient evidence to support a finding that the decision of the Appellant was negligent or she can be attributed "fault", or responsibility, for the intervening cause, in this case, the surgery. The evidence supports such a finding by the Board. Before she underwent the surgical procedure, Appellant knew that there were a number of doctors who had recommended it. She had heard, at the compensation hearing held just a month or so prior to the 1996 surgery, that there was concern the surgery would be detrimental, and indeed, one doctor described as "inexcusable" any

[19] *Amoco Chemical Corp. v. Hill*, 318 A.2d 614 (Del. Super 1974).
[20] *Id*.

decision to have the surgery.[21] She heard several medical professionals testify that the results of objective testing did not support it, and that the employer was steadfastly opposed to paying for it. The Appellant elected to have the surgery, and while she testified that she received better mobility and fewer symptoms, she is claiming significant, additional impairment that occurred as a result of the surgery.

The terminology in the Board's opinion refers frequently to the reasonableness of the procedure, and does not include an explicit finding that the Appellant's choice to have the surgery was unreasonable in light of all the relevant circumstances. It is clear, however, that the analysis was of the information which was known to the Appellant when she made the decision, and that the finding was that her decision to have the surgery was not reasonable under all the circumstances.[22]

No principle of law should prevent a person from pursuing whatever course of medical treatment they choose to undergo. Each individual should have the authority and ability to decide that for themselves. The question presented here, however, is whether, when an individual decides to undergo surgery, deemed unnecessary, in the face of significant information that

[21] *Klenk v. Medical Center of Delaware*, Hearing No. 946781at 19 (IAB Feb. 23, 2007).
[22] At one point, the Board even refers to Appellant as "reckless" for deciding to undergo the surgery without prior approval. While the Court does not adopt the sentiment, the statement clearly reflects that the focus of the Board's analysis was on the Appellant's state of mind and decision-making.

advises against it, the employer should be held responsible if the desired benefits are not obtained. This Court is of the opinion that no principle of law should require that result.

It is not dispositive that Dr. Davis recommended the surgery. Delaware law on the related issue of compensation for the procedure itself is clear.

> [I]f a physician directs a patient to undergo treatment which turns out not to be reasonable or necessary to treat a compensable injury….there is nothing in the statute which requires the employer to pay the cost. If the converse were true, the door to all sorts of abuses would be opened.[23]

It belies common sense to hold that the detrimental results of a procedure deemed not necessary or reasonable to undertake are compensable.

Appellant relies upon *Pacific Employers*, a decision of the Arizona Court of Appeals, to support her appeal.[24] In that case, an injured employee, faced with differing medical opinions, elected surgery, and suffered adverse consequences as a result. He had not, however, properly notified his employer or the insurance carrier as required under the applicable sections of Arizona's Worker's Compensation Statute.[25]

---

[23] *Bullock v K-Mart Corp*., 1995 WL 339025 at *3 (Del. Super. May 5, 1995).
[24] *Pacific Employers Ins. Co. v. Industrial Com'n of Arizona*, 652 P.2d 147 (Ariz. App. 1982).
[25] *Id.*

An administrative judge, on appeal from a hearing, permitted the employee's request for compensation benefits for the adverse results on the ground that the "applicant is entitled to benefits which result from a combination of the accident and of the treatment he received from a legally qualified physician designed to improve his condition."[26]

The Court of Appeals affirmed the award, and applied a "reasonableness test" to determine when an employee's conduct breaks the chain of causation between the primary work-related injury and any aggravation of the primary injury.[27] Based upon this precedent, the Court held that the unauthorized treatment did not break the chain of causation so long as the employee's "decision to undergo surgery was reasonable under all the circumstances."[28] This Court finds the Board's decision in this matter to be consistent with the principles in *Pacific Employers.*

Analysis in this case is aided by a review of *Hernandez v. Boston Market*, in which a compensation claimant's employer was paying for chiropractic treatments for a work-related injury.[29] After the employee reached a plateau in her treatment, she elected to continue to go to the chiropractor because the treatments continued to offer her some relief from

[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Hernandez v. Boston Market Inc*., 2005 WL 1653716 (Del. 2005).

her symptoms.[30] However, the evidence reflected that she was able to obtain the same level of relief by using a heating pad and taking over-the-counter pain medication.[31] Accordingly, the Board found that the treatment was not reasonable and necessary, and the employer was not required to pay for the superfluous treatments.[32] The Board's decision was affirmed by this Court and the Delaware Supreme Court. While it is clear that the employee preferred the chiropractic treatment to the home remedies, under the statute it was not reasonable to expect the employer to pay for the treatment when less expensive remedies provided the same level of relief. Indeed, in this case, the result of the exercise of the Appellant's "preference" is not just neutral, but detrimental. It is, similarly, not reasonable for the employer to be required to pay in this case.

CONCLUSION

For the forgoing reasons, the decision below is hereby AFFIRMED.

IT IS SO ORDERED.

/s/

M. Jane Brady

Superior Court

[30] *Id.*
[31] *Id.*
[32] *Id.*