IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
	:	C.A. No. 02A-12-006 SCD
Employer-Below/Appellant,	:	
	:	
	:	
v.	:	
	:	
CYNTHIA NEFF,	:	
	:	
Employee-Below/Appellee.	:	

ORDER

For the reasons set forth in the memorandum opinion attached hereto, petitioner's appeal from the decision of the Industrial Accident Board is hereby REVERSED and REMANDED.

IT IS SO ORDERED this 3rd day of September 2003.

_____

Judge Susan C. Del Pesco

Original to Prothonotary
xc: John J. Klusman, Esquire
Thomas J. Roman, Esquire
Industrial Accident Board

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STATE OF DELAWARE,	:	
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Employer-Below/Appellant,	:	
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v.	:	C.A. No. 02A-12-006 SCD
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CYNTHIA NEFF,	:	
	:	
Employee-Below/Appellee.	:	

Submitted: July 15, 2003
Decided: September 3, 2003

Upon petitioners appeal from the decision of the Industrial Accident Board – **REVERSED AND REMANDED**

MEMORANDUM OPINION

John J. Klusman, Jr., Esquire, of Tybout, Redfearn & Pell, Wilmington Delaware, for Employer-Below/Appellant State of Delaware; and

Thomas J. Roman, Esquire, of Kimmel, Carter, Roman & Peltz, P.A., Wilmington Delaware, for Employee-Below/Appellee Cynthia Neff.

Del Pesco J.

Employer appeals a decision of the Industrial Accident Board ("Board") awarding benefits for permanent partial impairment. The claimant had three non-compensable surgical procedures to her low back prior to a compensable accident in 1997 which resulted in three additional surgeries. The issue on appeal is whether the Board erred in granting claimant compensation for her full disability, without discounting for her pre-existing condition, because pre-1997 she was asymptomatic and fully employed. I conclude that *Sewell v. Delaware River and Bay Authority*[1] is distinguishable, that the decision is governed by the Workers' Compensation apportionment statute,[2] and that the Board erred in awarding claimant benefits for permanent impairment not proximately caused by the 1997 accident. The Board's decision is REVERSED and REMANDED.

Facts

Cynthia Neff ("Neff or claimant") was employed by the University of Delaware from 1984 until 1997. There is no factual dispute about her medical history or the circumstances surrounding the onset of her disability in 1997.

In 1984, Neff first suffered a ruptured disc in her lower lumbar spine. She does not know how it occurred; she did not seek or receive disability benefits from her employer. Her injury was surgically corrected that same year and she returned

[1] *Sewell v. Delaware River & Bay Authority*, 796 A.2d 655 (Del. Super. Ct. 2000), *aff'd* 793 A.2d 1243 (Del. 2002).

to work without restrictions. In 1986, Neff required additional surgery and, following rehabilitation, she again returned to her work without restriction. In 1993 she fell down stairs at home, further injuring her back.[3] After surgery, she once again was permitted to return to full duty without restrictions. Neff continued her duties with the University, uninterrupted, for the next four years.

On March 13, 1997, Neff, a security service officer for the University since 1984, injured her lower back while attempting to break-up a fight at the Bob Carpenter Center on the University's Newark campus. She immediately recognized that something was wrong with her back, but she continued to work. Weeks later, while sitting on an elevated stool during a stakeout, her back "locked up" and she had to be driven home. Since then, she has undergone three low back surgeries.[4] She presently suffers from pain in her low back and right leg with

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[2] DEL. CODE ANN. tit. 19, §2327 (2002).

[3] Dr. Townsend testified by deposition introduced at trial ("Townsend at ____") that "[t]he patient had back problems in 1984 that resulted in a partial discectomy at L4-5, and then two later at L5 S1. In 1993 she fell down stairs and had surgery again at L4-L5. She was then involved in the fight in March of 1997." Townsend at 5.

[4] Dr. John E. Hocutt, Jr., M.D. testified by deposition introduced at trial ("Hocutt at _____"). He described the claimant's post-1997 surgeries as follows:

> She had an MRI in June of '97 which showed significant degenerative disc disease at L4/5 with a complete collapse of the disc and end plate edema and a question of an L5/S1 disc herniation, which he felt was responsible for her symptoms.
>
> He also referred to a provocative discography which demonstrated severe degenerative disc at L4/5 and L5/S1. At that point he recommended surgery.
>
> She did have that surgery with L5 nerve root decompression and iliac crest bone graft, an anterior retro peritoneal exploration, mobilization of the great vessels, anterior lumbar discectomy and anterior decompression at L4/5, L5/S1, along with an interbody fusion at L4/5 and L5/S1, and with a BAK interbody fusion device times two at that level.

associated burning and cramping. She testified that sometimes her left foot and toes curl up. She currently receives total disability and is incapable of performing her previous employment duties. There is no dispute that the post-1997 surgical procedures and associated disability are causally related to Neff's employment.

Expert Testimony

The parties presented the Board with expert opinions. Neither of the testifying experts was a treating physician.

Claimant's expert, Dr. John E. Hocutt. Jr., initially reported that Neff suffered a 19% permanent impairment of her lumbar spine caused by the 1997 work accident. When deposed for purposes of the hearing, he modified his opinion; he increased the impairment by 15%, to 34% total impairment, allocating 19% to the 1997 incident, and 16% to the pre-existing condition.[5]

> Then in September, '98, she had a CT myelogram which demonstrated narrowing of the foramen from the posterior corner of the cage that had been previously put in. And this was likely causing an L5 radiculopathy. So he recommended an L5/S1 nerve root decompression.
>
> And she had that decompression with laminotomy on October of '98. And then August 16th, '99, she had a dorsal laminotomy with insertion of R-E-S-U-M-E electrode for intractable pain secondary to arachnoiditis. And then two days later she had an internalization of the electrodes with implantation of an Itrel generator.

Hocutt at 5-7.

[5] The Board observed that "Dr. Hocutt believes the percentage attributable to [Neff's] prior injuries is more of a legal than a medical question; however he does note that prior to her 1997 accident she had no clinical indication of disability." *See* Board Op., Hearing No. 1139310 at 4, (Sept. 19, 2002). Further, Dr. Hocutt testified that his findings were pretty close to Dr. Townsend's findings and any discrepancy was likely related to differences in range of motion measurements. *Id*.

Dr. John B.Townsend, III, the employer's expert, opined that Neff has a 30% permanent impairment to her lumbar spine. He based his opinion on both the pre-existing impairment and the injuries stemming from the 1997 accident. When asked to apportion the impairments, Dr. Townsend allocated 15% to Neff's prior injuries and surgery and 15% to the 1997 work related accident. He testified that "it seemed most reasonable to split things down the middle and give her half of the permanency for her current complaints and half for preexisting surgeries."[6]

The Board found Dr. Townsend's overall permanency ratings to be more credible;[7] but it rejected his allocation, awarding the full 30% permanent impairment to the lumbar spine. The Board explained:

> The Board is convinced by the testimony of both physicians that Claimant is entitled to a degree of permanency attributable to her prior condition, even if the records suggest that prior to 1997 her back was asymptomatic.
>
> * * *
>
> Thus, the Board adopts the opinion of Dr. Townsend over that of Dr. Hocutt to determine that Claimant has a thirty-percent impairment.
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> * * *
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> In making this determination, the Board finds it unnecessary to address the argument that this case is somehow distinguished from *Sewell v. Delaware River & Bay Authority*….[8]

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[6] *See* Board Op. at 5 quoting Townsend at 10.
[7] *See* Board Op. at 6.
[8] Board Op. at 5-6. "It does not matter that [Neff] was asymptomatic prior to her 1997 accident, because the Guides rate impairment not disability. Impairment reflects changes in structural abnormalities and the changes in ability to perform activities with those changes; it does not reflect the patient's ability to work or overall pain complaints." *Id*. at 5, *see also* Townsend at 11-12.

Upon the Employer's motion for reargument the Board again stated:

> The decision issued by the Board on September 19, 2002 stands. Superior Court has held that "when an industrial injury triggers disability or impairment from a latent prior condition, the entire condition is compensable and no attempt should be made to weigh the relative contribution of the accident and the preexisting condition to the final result."[9]

Standard of Review

The scope of review of a decision from the Industrial Accident Board is limited. The Court determines whether the agency's decision is supported by substantial evidence and is free from legal error.[10] Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion.[11] This Court does not act as the trier of fact nor does it have authority to weigh the evidence, weigh issues of credibility, or make factual conclusions.[12] This Court's review of conclusions of law is *de novo*.[13]

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[9] Board Order, Hearing No. 1139310 at 1 (Dec. 10, 2001), quoting *Sewell,* 796 A.2d 655 at 662-63.

[10] *Devine v. Advanced Power Control, Inc.*, 663 A.2d 1205, 1209 (Del. Super. 1995) (citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985)).

[11] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

[12] *Johnson*, 213 A.2d at 66.

[13] *Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002) (citing *State of Delaware v. Worsham*, 802 A.2d 939, 1106 (Del. 1994)).

Analysis

The Board based its decision on a misapplication of the legal principle stated in *Sewell*.[14] *Sewell* is factually distinguishable. The claimant in *Sewell* was a worker who had a no symptoms of his severe degenerative knee condition until an accident on the job caused an acute, persistent soft-tissue sprain. The swelling caused his pain and decreased his functional capabilities.[15] The Court held that because the pre-existing condition was a naturally occurring degenerative change resulting from the aging process, the apportionment provision of the Delaware Workers' Compensation statute did not apply.[16]

Sewell carefully distinguishes the two types of situations involving pre-existing conditions which arise under the Workers' Compensation statute. The first is when a claimant is injured by the aggravation of a pre-existing condition without an identifiable industrial accident. Such a circumstance calls into play the "unusual exertion" rule. That rule "provides that the injury is compensable, notwithstanding the previous condition if the ordinary stress and strain of employment is a 'substantial factor' in causing the injury."[17] The second occurs when there is an

[14] 796 A.2d 655 at 662.
[15] *Sewell*, 796 A.2d 655 at 657.
[16] DEL. CODE ANN. tit. 19, § 2327.
[17] *Sewell*, 796 A.2d 655 at 660, citing *Duvall v. Charles Connell Roofing,* 564 A.2d 1132 (Del. 1989).

identifiable work-related accident, in which case the question of compensability is based on a "but for" standard of proximate cause.[18]

> If the worker had a pre-existing disposition to a certain physical or emotional injury which had not manifested itself prior to the time of the accident, an injury attributable to the accident is compensable if the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger,' causation is satisfied for the purposes of compensability.[19]

Neff's claim results from an identifiable work-related accident. Thus, the "but for" test is applicable. The evidence from both experts supports the conclusion that Neff's current disability was proximately caused by her employment. The next question is apportionment.

The statutory provision which controls in these circumstances provides:

> Whenever a subsequent permanent injury occurs to an employee who has ***previously sustained a permanent injury***, from any cause, whether in line of employment or otherwise, the employer for whom such injured employee was working at the time of such subsequent injury shall be required to pay only that amount of compensation as would be due for such subsequent injury without regard to the effect of the prior injury. [20] (emphasis supplied)

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[18] *Reese v. Home Budget Ctr.,* 619 A.2d 907 (Del. 1992).
[19] *Id*. at 910.
[20] DEL. CODE ANN. tit. 19, § 2327 (a).

Application of this provision has been limited to ***previously sustained permanent injury*** which was not a naturally occurring degenerative change to the body resulting from the aging process.[21]

Neff's pre-existing condition was the result of previous injury and trauma, not naturally occurring degenerative changes. While she was asymptomatic prior to the accident, the fact remains that prior to 1997 she had undergone surgical procedures which changed her anatomy. Those surgical procedures resulted in a measurable disability, as confirmed by both testifying experts.

The Board erred as a matter of law in its application of *Sewell.* Based on the Board's conclusion that the testimony of Dr. Townsend was the more credible, the Board is directed to enter an award of 15% permanent partial impairment in favor of Neff and against the employer.

Conclusion

For the foregoing reasons, the decision of the Industrial Accident Board is REVERSED and REMANDED.

[21] *Natasi-White, Inc. v. Futty*, 509 A.2d 1102, 1104 (Del. 1986).