IN THE SUPERIOR COURT OF THE STATE OF

DELAWARE IN AND FOR NEW CASTLE COUNTY

CHRISTOPHER PARSON	)	
	)	CIVIL ACTION NUMBER
Appellant	)	
	)	12A-03-019-JOH
v.	)	
	)	
CITY OF WILMINGTON	)	
	)	
Appellee	)	

Submitted: January 14, 2013
Decided: January 24, 2013

MEMORANDUM OPINION

Upon Appellee's Motion for Reargument -
GRANTED in part and DENIED in part

Appearances:

Christopher A. Amalfitano, Esquire, of Ramunno & Ramunno, P.A., Wilmington, Delaware, Attorney for Appellant.

John Gilbert, Esquire, and John J. Ellis, Esquire, of Heckler & Frabizzio, Wilmington, Delaware, Attorneys for Appellee.

HERLIHY, Judge

Appellee, City of Wilmington, has moved to reargue this Court's December 24, 2012 ruling reversing a decision of the Industrial Accident Board. The Board denied Christopher Parson's petition for compensation for an injury allegedly suffered on January 14, 2011. The Board held he suffered a recurrence of his compensable May 14, 2009 injury, but held it could not award him anything for that prior injury, as he had not sought additional compensation.

In reversing the Board, the Court held the Board erred in applying the wrong standard in determining Parson's work related injury was a recurrence and not an aggravation. The City argues that this Court erred in so holding, and contends it erred in other portions of its holding.

Upon re-examination, the Court concurs that it erred, and refines its earlier opinion accordingly. Accordingly, the motion to reargue is **GRANTED in part, and DENIED in part**.

Discussion

A brief factual background is necessary to place this matter into context. Parson had been sanitation worker for eighteen years with the City. His job was a "chucker." That entailed either picking up trash cans, trash bags and the like, and dumping them into a trash truck, or attaching a dumpster hook to the truck. There is no personal lifting in this second duty.

Parson suffered an acknowledged compensable back injury in 2009 when the trash

truck in which he was riding was hit. In 2011, he was picking up a trash bag as part of regular duties when he felt a sharp pain down his leg. There was no new injury to his back. Based on the medical testimony, as recited in this Court's earlier decision, the Board held a recurrence, not an aggravation had transpired.

In reaching this conclusion, the Board employed the standard enunciated in *Standard Distributing Co. v. Nally*.[1] The standard in *Nally* involved what is known as successive carrier liability and how to determine whether a subsequent injury is an aggravation or a recurrence of an earlier compensable injury. While the City did not change carriers between the two incidents in this case, the Board analogized this case to *Nally* as a means to determine if what happened to Parson in 2011 was a recurrence or an aggravation. In refining prior decisional law on the standard to determine recurrence or aggravation, the Court in *Nally* said:

> The use of the word "aggravation" by this Court in *Facciolo* indicates that the injury must be worsened by the second event before the second carrier will be liable. In a literal sense "aggravation" means that a condition is "made worse, more serious, or more severe." *Webster's Ninth New Collegiate Dictionary,* 64 (1990). The employee's physical condition after the second event may appear worse, or more serious, because of the appearance, or reappearance, of symptoms which, from a medical standpoint, suggests an aggravation. In order to fix carrier responsibility, however, the analysis must proceed to the causation stage to determine if the changed condition is attributable to a new industrial accident. In short, the question is not whether the employee's pain or other symptoms have returned but whether there has been a new injury or worsening of a previous

[1] 630 A.2d 640 (Del. 1993).

> injury attributable to an untoward event.[2]
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> The rule we endorse for determining successive carrier responsibility in recurrence/aggravation disputes places responsibility on the carrier on the risk at the time of the initial injury when the claimant, with continuing symptoms and disability, sustains a further injury unaccompanied by any intervening or untoward event which could be deemed the proximate cause of the new condition. On the other hand, where an employee with a previous compensable injury has sustained a subsequent industrial accident resulting in aggravation of his physical condition, the second carrier must respond to the claim for additional compensation.[3]

The Supreme Court, in enunciating these rules, acknowledged there "is an element of arbitrariness" in them.[4] That's an understatement. As the Supreme Court inferred, there is a disconnect between the law and medicine in recurrence/aggravation cases[5] and this case is one such manifestation. The application of these rules can border on the ridiculous. For instance, suppose a worker suffers a herniated disk in a work-related incident, but then suffers a second incident and the herniation is now more extreme? And clearly, there was an event but just how "untoward" must it be? These rules also *strongly* suggest that to be an aggravation, the second incident must cause a new injury. Why is that a new injury and not an "aggravation?" What is an "untoward event?"

Nally's application is in successive carrier insurance cases and by the Supreme

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[2] *Id.* at 645.

[3] *Id.* at 646 (citation omitted).

[4] *Id.*

[5] *Id.* at 645.

Court's admission, is an arbitrary rule to determine which carrier pays. It was built on two prior other successive carrier opinions: *DiSabatino & Sons, Inc. v. Facciolo*[6] and *Mr. Pizza, Inc. v. Schwartz*.[7] The Court notes that the concurring opinion in *Schwartz* recommended abolishing the unusual exertion rule for those injured in the course of their employment. Specifically, the Court stated, "[w]hile not problem free, it is a fairer standard of recovery for those injured in the course of their employment."[8]

The Court earlier ruled the Board erred in using the *Nally* standard. Instead, this Court held, the Board should have used the standard the Supreme Court set forth in *Duvall v. Charles Connell Roofing*.[9] Though factually different from this case, the Court believes (and still believes) the *Duvall* test to be more fair, more rational, and easier to utilize in analyzing a recurrance/aggravation issue. Without any precedent in a situation of a single carrier, the choice of *Duvall*, for those reasons, seemed more appropriate. What makes the law in this area murky, however, is that *Duvall* was decided between *Facciolo* and *Schwartz,* and *Nally*.

As noted, *Duvall* did not involve successive carrier, as is the case here. The City did not change carriers between Parson's 2009 injury and his 2011 injury. In *Duvall*,

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[6] 306 A.2d 716 (Del. 1973).

[7] 489 A.2d 427 (Del. 1985).

[8] *Schwartz*, 489 A.2d at 433.

[9] 564 A.2d 1132 (Del. 1989).

recovery is possible where, "irrespective of previous condition, an injury is compensable if the ordinary stress and strain of employment is a substantial cause of the injury."[10] Duvall had a prior back condition, which, not caused by a prior work-related injury, became symptomatic when he lifted an eighty pound bundle of roof shingles in the course of his employment. There was no cumulative work stress involved; he was undertaking normal duties and there was a definitive incident. In short, the difference between the two cases is that Duvall's injury was not a prior work-related injury, which of course, is significant. But yet the test is better, and so is the fact that this case does not involve two insurers. Parenthetically in *Nally*, he incurred pain when planting his foot in moving a beer keg.

The Supreme Court in *Nally* touched on *Duvall's* abandonment of the usual exertion rule. But it also said *Duvall* did not overrule *Facciolo* and *Schwartz* in utilizing the unusual exertion rule in recurrence/aggravation cases.[11] Although, when one examines the cause and injury in Schwartz's twisting motion while lifting a five gallon carton of milk, which the Supreme Court found to be unusual exertion, one has to have questions about the application of "unusual."[12]

The trouble here is several-fold. First, there is no decision of this Court or the

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[10] *Id.* at 1136.

[11] *Nally*, 630 A.2d at 644.

[12] *Schwartz*, 489 A.2d at 432.

Supreme Court dealing with recurrence/aggravation cases where the carrier has not changed from the first incident to the next, as here.[13] While there might be some support for establishing an arbitrary rule which bypasses medicine to hold one of two carriers liable, that policy does not exist here. Second, Parson's back pain which came on as he lifted the trash bag was clearly a worsening - aggravation as the doctors testified - of his pre-existing work- related injury. He did not have the pain the day before or the hour before.

Nally and *Duvall* are factually distinct from this case, as noted, and the Supreme Court has left such cases, as this, in cyberspace between them. *Only* because of the Supreme Court's statement that *Duvall* did not overrule *Facciolo* and *Schwartz* in recurrence/aggravation cases is this Court, upon reflection, compelled to reverse its prior ruling and hold that the Board's application of *Nally,* by analogy, to this single carrier case, was correct. Only the Supreme Court can rectify this decisional law quagmire.

In its motion for reargument, the City also objects to two other portions of this Court's earlier decision. One objection is that the Court erred in directing the Board on remand to consider Parson's bills in relation to the 2009 injury. The City is correct that, as the Board recognized, it had before it a petition to determine compensation due which

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[13] In *Wohlsen Constr. v. Hodel*, 1994 WL 762657 (Del. Super. Dec. 15, 1994), this Court held the Board did not err in its application of *Nally*, as the employee's situation was similar to a successive carrier case. The employee in *Hodel* suffered a compensable injury to his lower back while working for the employer. He subsequently left working for the employer and had a second injury while self-employed and not insured for workers' compensation.

related only to the 2011 injury. There was no petition for additional compensation due relating to the 2009 injury. The Board could not properly make an award for additional compensation due under that procedural circumstance.

The City, however, misapprehends the earlier remand. Since the Court found the Board used the incorrect test, a decision reversed in this opinion, the remand was not as constricted as the City desires. Parson was free to add a petition for additional compensation due.

The City further argues that, "there was no controversy before the Board as to whether any medical bills were reasonable and related to the 2009 [sic]."[14] It is unclear whether in making ths argument the City is reading the same January 20, 2012 Board decision this Court is:

> An awkward issue is raised at this point. Both of Claimaint's petitions have been denied. However, there are medical bills out there (including a surgical proposal). While the Board does not agree that these medical bills are related to a January 2011 work injury, the evidence is strong that those bills are related to the 2009 date of injury. However, technically, the only petition filed with respect to the 2009 injury was for permanent impairment. Thus, the Board cannot make an award or even a finding of medical expenses related to the 2009 injury in this decision.[15]

Of course, the Board said it was unclear if there were a dispute about the reasonableness and necessity of the bills in relation to 2009. But the language above

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[14] City's Mot. for Rearg., at 3.

[15] *Parson v. City of Wilmington*, Nos. 1336626 & 1364716, at 14 (Del. I.A.B. Jan. 20, 2012) (footnote omitted).

should have rung bells. Further, the City now knows what the bills are and may want to act promptly to avoid penalties for delayed payment. In any event, that portion of the Court's decision stands, remanding the matter to the Board, which would enable Parson to pursue his medical bills as they related to the 2009 injury.

Another portion of the Court's earlier decision to which the City objects is that it is not entitled to utilization review of the medical bills. It is not. It chose to contest the relationship of those bills to the 2011 injury as it was entitled to do. Accordingly, it forfeited its right to utilization review of those bills. In other words, since under 19 *Del. C.* § 2322F(j), it did not acknowledge the bills were related to the injury, it forfeited its right to utilization review at any stage.

This Court ruled in *Poole v. State*[16] that when a carrier or employer does not acknowledge that a compensable work injury has occurred, there is no utilization review. Absent the City's acknowledgment, forfeiture results. The City seeks to differentiate *Poole* from this case by contending there were two separate cases and that it was not contesting the 2009 injury.

The City misses the point, and the mark. By contesting the relationship of the bills, it forfeited utilization review. *Poole* applies to whenever an employer/insurer contests whether the injury is work related, if the bills are reasonable and necessary, or are related to recurrence or an aggravation, etc. *Poole* held that the Board cannot delegate its function

[16] *Poole v. State*, C.A. No. 11A-04-012 (Del. Super. Dec. 4, 2012).

to the utilization review process the determination of whether medical expenses are reasonable and necessary. The injury has to be acknowledged as compensable and the only issue is the amount of the expense in light of Delaware Practice Guidelines (DPGs).

The Board, even though it strongly urged the City to ante up, also said the reasonableness and necessity of the bills as they related to the 2009 injury was possibly in dispute. Therefore, upon remand, if the City still disputes the reasonableness and necessity of the medical expenses as to the 2009 injury, the Board makes *all* necessary decisions and there is no utilization review. If, however, the City now takes the position before the Board that the bills are reasonable and necessary, but wants utilization review just to the amount within DPGs, it is entitled to utilization review.

The City needs to reread and understand *Poole*.

Conclusion

For the reasons stated herein, the Motion for Reargument of the City of Wilmington is **GRANTED in part** (as to the test to be applied), **and DENIED in part** (as to the scope of remand and the application of *Poole v. State*).

IT IS SO ORDERED.

/s/ Jerome O. Herlihy

J.