**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| GIANT FOODS, | ) | |
| | ) | |
| Employer-Below/Appellant, | ) | |
| | ) | |
| 5. | ) | C.A. No. 00A-07-014-FSS |
| | ) | |
| GARY FOWLER, and | ) | |
| RAYTHEON CONSTRUCTORS, | ) | |
| | ) | |
| Claimant-Below/Appellee. | ) | |

Submitted: June 15, 2001
Decided: September 28, 2001

**OPINION AND ORDER**

Upon Employer's Appeal from the Industrial Accident Board -- ***AFFIRMED***

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**Henry C. Davis, Esquire, 207 East Market Street, Georgetown, Delaware, 19947. Attorney for Claimant-Below/Appellee.**

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**SILVERMAN, J.**

Former employer, Giant Foods appeals the Industrial Accident Board's July 24, 2000 decision granting Gary Fowler's Petition to Determine Additional Compensation Due. Preliminarily, the Court must determine the proper parties to this appeal. Fowler filed two, separate petitions, which the Board heard at the same hearing. The Board denied his petition against Raytheon and granted his petition against Giant. Raytheon did not appeal the decision in its favor. Fowler did not appeal either decision. In its appeal, Giant also disputes the Board's substantive finding that Fowler's second injury was a "recurrence" of a previous injury, already compensated by Giant.

**I.**

On December 4, 1998, Gary Fowler was injured while working as a carpenter for Giant. He fell and hurt his left shoulder and neck. Fowler won compensation from Giant for the injury. On September 21, 1999, while working for Raytheon, Fowler was hurt again. As he was breaking down a scaffold, Fowler "grabbed a piece of lumber weighing 80 -100 pounds" and "felt something pull down his neck and into his right shoulder."

On September 24, 1999, Fowler filed a Petition to Determine Additional Compensation Due against Giant. On February 2, 2000, he re-filed that petition. He also filed a separate Petition to Determine Compensation Due against Raytheon, Inc.,

and requested that both matters be heard at one hearing. The petitions, however, were never consolidated. On July 13, 2000, the Board held a single hearing on the two petitions, Nos. 1137560 (Giant) and 1152495 (Raytheon).

At the hearing, Dr. Rowe testified, by deposition, for Fowler. He stated that Fowler "had left rotator cuff tendonitis and a possible rotator cuff tear." Dr. Rowe stated that Fowler's injury resulted from the 1998 and 1999 incidents, and that Fowler required surgery on his left shoulder. Dr. Rowe, however, could not specifically attribute the tear to one or the other work injuries.

Dr. David Sopa testified, by deposition, for Giant. He examined Fowler and reviewed Fowler's records. He testified that Fowler "has an exacerbated chronic neck strain or a herniated disk in the neck." He did not diagnose any shoulder problem. Meanwhile, Dr. Mohammad Kamali testified for Raytheon. He opined that Fowler had a "right shoulder sprain, neck sprain, and a left shoulder sprain with impingement." He further testified that Fowler's rotator cuff tear was "of uncertain origin" and could be "from ordinary wear and tear." Dr. Kamali did not believe the tear caused Fowler's current symptoms.

The Board concluded initially that Fowler's "shoulder problems are causally related to a work injury and are compensable." It then decided that Fowler's shoulder problems were "properly classified as a recurrence of a prior injury, " since

the 1999 incident occurred "in the normal duty of his employment" and "cannot be considered a 'genuine intervening event.'" The Board found that Giant was responsible for treatment.

On July 24, 2000, the Board granted Fowler's petition against Giant and denied his petition against Raytheon. The Board also granted Fowler's attorney's fees. On July 28, 2000, Giant filed a notice of appeal with this Court. To date, neither Fowler nor has Raytheon challenged the Board's decisions.

**II.**

As mentioned, Giant claims that Raytheon should be a party to this appeal. Giant asserts that the two petitions were "handled as one consolidated matter by the Board." And, Giant claims that its failure to include Raytheon in the Notice of Appeal's caption was "purely typographical error."

Raytheon maintains that it is not a proper party because Giant limited its appeal to No. 1137560 and did not include No. 1152495 in the caption. Thus, Raytheon argues that Giant's appeal does not concern No. 1152495. Raytheon disputes Giant's claim that the caption is "purely typographical error." Rather, Raytheon asserts, it is a jurisdictional defect.

As also mentioned, Giant further claims that the Board incorrectly determined that Fowler's "current left shoulder problems are a recurrence" of his 1998

injury. Rather, Giant argues that Fowler's 1999 injury was an aggravation of the 1998 injury. Giant maintains that the 1999 injury could not be a "recurrence" since the 1999 injury started on the right and radiated to the left, (the 1998 injury started on the left and radiated to the right), the 1999 injury's pain was "a lot more severe," and the treatment for the 1999 injury was related to the left shoulder.

**III.**

The Court's authority on appeal is limited by 29 *Del. C.* § § 10142 and 10161(a)(8). It does not reexamine evidence, much less make its own factual findings. The Board's decision stands so long as there are no legal errors and substantial evidence supports its factual findings.[1] Substantial evidence, to a reasonable mind, is adequate to support a conclusion.[2] A medical expert's opinion "constitutes substantial evidence to support the Board's finding."[3] When the Board

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[1] *General Motors Corp. v. Jarrell*, Del. Super., 493 A.2d 978 (1985).

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

[3] *Lohr v. ACME Mkts.*, Del. Super., C.A. No. 98A-05-020, Cooch, J. (Feb. 24, 1999) Order at *2 (citing *DiSabatino v. Wortman*, Del. Super., 453 A.2d 102,

relies on an expert's opinion, which is backed by substantive evidence, the Court will not disturb the Board's decision.

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106 (1982)), *aff'd*, Del. Supr., 734 A.2d 641 (1999).

## IV.

### a. Raytheon

The Board found Giant responsible for treatment and granted Fowler's petition seeking compensation from Giant. It denied Fowler's petition seeking compensation from Raytheon. As mentioned, Giant appeals the Board's ruling in No. 1137650. In its notice of appeal, Giant did not reference No. 1152495. It did not notice Raytheon's counsel, nor include Raytheon on the praecipe.

In Giant's subsequent motion to Amend the Case Caption, it states that the two petitions were filed in the alternative, and that because Petitions No.1137560 and No. 1152495 were both disposed of at a single hearing, they were "handled as one consolidated matter by the Board." Giant further states that because the Board identified both defendants in the same caption in its decisions, the Board "treat[ed] both petitions as being consolidated as one matter before the Board." Finally, Giant asserts that Raytheon was "omitted from the Notice of Appeal . . . [as] . . . purely typographical error."

Despite Giant's assertions, the two petitions remain separate matters. None of the parties requested the petitions be consolidated. Therefore, the proper parties to Giant's appeal are only Giant and Fowler. Raytheon won and Fowler lost. Neither has chosen to appeal the Board's ruling on Fowler's petition against Raytheon.

Giant claims that the only reason Raytheon is not in this appeal is because Giant made a typographical error in the caption. As discussed above, however, this is not simply a matter of how the appeal was captioned. If Giant had attempted to drag Raytheon into the appeal by adding Raytheon to the caption, presumably Raytheon would have moved for its dismissal. The Court would conclude as it does here, that Raytheon, and most importantly, Fowler, agree with the Board's decision that Raytheon was not to blame. Besides, considering the Court's substantive decision discussed below, Giant's attempt to bring Raytheon into the appeal is moot.

**b. The Merits**

As mentioned, the Board found that Fowler had a compensable work injury. Next, the Board determined that Fowler's 1999 injury was a "recurrence" of the 1998 injury. This Court must determine whether the Board's ruling on Fowler's petition against Giant, No. 1137560, is correct.

The standard for determining whether a second injury is an "aggravation," for which the second employer pays, or a "recurrence," for which the original employer remains liable, is set out by the Delaware Supreme Court in *Standard Distrib. Co. v. Nally*.[4] The Supreme Court held that the question turns on a question of fact, "whether there has been a new injury or worsening of a previous injury

[4] Del. Supr., 630 A.2d 640 (1993).

attributable to an untoward event."[5] As a matter of law, an "untoward event" is "a genuine intervening event . . . which brings out a new injury."[6] Shifting responsibility from one employer to another requires "a second accident or event, beyond the normal duties of employment."[7]

As presented above, Dr. Rowe testified that if the original injury "quieted down . . . but was still somewhat inflamed, it's going to be more prone to injury with the second injury." He agreed that Fowler's condition "was created by the first incident." Meanwhile, the Board concluded that, "Dr. Sopa's suggestion that [Fowler had] a herniated disk" was disproven by an MRI. Dr. Kamali testified that Fowler's shoulder problems, in his opinion, were biologically based. And, he did not think that the 1999 incident was responsible for Fowler's present left shoulder condition. In its decision, the Board stated that it "accepted Dr. Rowe's testimony that the current left shoulder problems are the result of a combination of the two incidents."

As mentioned, Giant contends that the 1999 injury is wholly new and separate from the 1998 injury, reasoning that the 1999 accident involved much more

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5 Id. at 645.

6 Id.

7 Id. at 646.

severe pain, that it began on "the right and radiated to the left," and that "his left shoulder was worse following his 1999 incident." Giant further asserts that "there was no suggestion that [Fowler] sustained a rotator cuff tear to his left shoulder as a result of the 1998 accident, until after the 1999 accident." Finally, Giant claims that the 1999 injury was an "aggravation" rather than a "recurrence," since "[i]t was only after his 1999 accident, with a new employer, performing new job duties" that Fowler's left shoulder condition appeared.

The Board disagreed with Giant. Based on medical expert testimony, Fowler's testimony and a safety supervisor's testimony, the Board determined that "the [1999] incident was not a traumatic accident or event." The Board stated that the incident was part of the "normal duty of his employment" and not an "untoward event." The Board concluded that Fowler's "current left shoulder problems are properly classified as a recurrence of a prior injury" and that Giant was responsible for treatment. The Board's finding may be debatable, but it is supported by substantial evidence. Based on the record, the Court sees no reason that justifies disturbing the Board's decision.

## V.

For the foregoing reasons, the Industrial Accident Board's decision is **AFFIRMED**.

**IT IS SO ORDERED.**

Judge

oc: Prothonotary (Appeals Division)