IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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| LORRAINE JOSE, | ) | |
| | ) | C.A. No. 02A-08-001 JTV |
| Claimant Below / | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| PLAYTEX APPAREL, | ) | |
| | ) | |
| Employer Below / | ) | |
| Appellee. | ) | |

*Submitted: January 6, 2003*
*Decided: April 29, 2003*

Craig T. Eliassen, Esq., and William W. Pepper, Sr., Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorneys for Appellant.

John J. Klusman, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware. Attorney for Appellee.

*Upon Consideration of Claimant's Appeal From*
*The Industrial Accident Board*
**AFFIRMED**

**VAUGHN, Resident Judge**

**ORDER**

***Jose v. Playtex Apparel***
C.A. No. 02A-08-001 JTV
April 29, 2003

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. The claimant, Lorraine Jose, appeals from a decision of the Industrial Accident Board ("Board") which denied her Petition to Determine Compensation Due. Ms. Jose worked on an assembly line for Playtex Apparel. She claimed to have injured her wrists while at work on April 13, 2000 and also to have injured her shoulder in a separate occurrence on November 28, 2000. The employer contended that her injuries were not work related. The Board concluded that the claimant failed to establish that her work activity was the cause of the injuries.

2. On the first date, April 13, the claimant was working as a picker. Pickers manually stock orders by reading order forms with one hand and pulling the merchandise with the other hand, all the while keeping pace with the moving assembly line. She complained of pain in her wrists, the left more than the right. The company doctor, Aaron Green, diagnosed "overuse syndrome" and placed her on light duty work status. At the time she was four or five months pregnant. Despite the work duty restrictions, pain persisted and on May 15, 2000 Dr. Green ordered her not to work for a month. On June 13, she returned to work but was told by her supervisor that she would not be restricted to light duty work. She resumed her usual work as a picker but after two hours the pain prevented her from working and she was sent home again. This time she remained out on maternity leave until after the birth of her child. On November 1, 2000 she returned to work. She was given light duty placing stickers on bras. The next day and the day after that, however, her supervisor instructed her to work as a hanger. Hangers stand in one

spot on the assembly line with a box on a stand and pick up one piece of merchandise at a time, put a tag on it, hang it on a hanger and put it in the box. She next worked on November 7. On that day she complained to her supervisor that she was supposed to be working light duty. He, however, told her to continue as a hanger. She worked for two hours, and then, after seeing Dr. Green, was again given light duty work. Between then and November 28 she worked sometimes as a picker, sometimes as a hanger, and sometimes at a light duty job. On the 28th, before beginning a light duty job, she complained of tingling in her fingers and arm. She could not work and was sent home by her supervisor. He instructed her to return the next day. She did so and was seen by Dr. Green. He again placed her on light duty. On November 30, 2001, the claimant began physical therapy, which was paid for by the employer. On February 5, 2001, the claimant's supervisor informed her that her injuries were not work related and that she was being placed on medical leave. She did not return to work and on February 6, 2002, after exhausting medical leave, she was terminated.

3. The scope of review for appeal of a Board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.[1] "Substantial evidence" is defined as "such relevant evidence as a reasonable mind

[1] *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. LEXIS 264 (Del. Super. 2000); *see Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

might accept as adequate to support a conclusion."[2] On appeal, the Court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[3] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.[4]

4. At the Board hearing, deposition testimony was received from two physicians, Dr. Rowe and Dr. Ger. Dr. Rowe was a treating physician. He first saw the claimant on September 4, 2001. She was referred to him by Dr. Perry Herman, a physiatrist. Dr. Rowe testified that her medical records indicated that she was treated by Dr. Green in May 2000 for the problem to her wrists. The records further indicated that Dr. Green believed she had an overuse syndrome to both her right and left wrists. A diagnosis was made by Dr. Green about a week later of right wrist overuse and median nerve irritation.

5. When Dr. Green saw her on November 29, 2000, her symptoms included pain in her left hand and elbow that radiated into her left shoulder. She had numbness in her left arm. The records further indicate that in November, after the claimant developed her shoulder problem, Dr. Green diagnosed her condition as acute exacerbation of her underlying left median nerve neuropathy with some overlying tenosynovitis. Dr. Herman began seeing the claimant in December 2000. He performed an EMG, which was essentially normal. Her wrist pain had

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[2] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *see Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

[3] 213 A.2d at 66.

[4] *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3 (Del. Super. 1999).

apparently resolved itself, but she continued to complain of elbow pain and numbness in her hands. When Dr. Herman saw her at another visit about a month later, the claimant reported left shoulder pain along the entire shoulder and also into the trapezius muscle. Dr. Herman felt that she had a rotator cuff tendinitis and subacromial bursities with an associated bicipital tendinitis and AC joint pain. Dr. Rowe diagnosed her shoulder condition as follows:

> I have to say that I agree with Dr. Herman and Dr. Green's diagnosis, that she has had an inflammation from an overuse and basically's it's a bursitis and tendinitis. It's an inflammation to the bursa and tendons of the rotator cuff. She also has irritation to the muscles of her neck and trapezius. And I believe that's consistent with the activities that she was doing at work. That mechanism could add up to these kind of problems. And there is no history of any other injury. There's no history of other activities. So I would believe it was caused by those activities at work in November 2000.

When asked whether, if the Board were to determine that her work activities were not the sole cause of her various complaints, they would at a minimum be a substantial cause of her complaints, he responded "absolutely."

6. On cross-examination, Dr. Rowe was asked about a note that Dr. Green had written on February 7, 2001. That note read as follows:

> She was seen initially at Healthworks on April 17, 2000, by myself for complaints of hand and wrist pain. The diagnosis at the time was bilateral median nerve irritation due to overuse, although the underlying cause was suspected to be due to pregnancy. . . Bilateral carpal

> tunnel syndrome is a rare entity as it relates to work.

Dr. Rowe interpreted the note as meaning that the underlying problem with the nerve was due to the pregnancy and the overuse problem was work-related. Dr. Rowe did not agree that bilateral carpal tunnel syndrome is a rare entity as it relates to work, and that it depends upon the type of work. When asked whether it is typical in a pregnant lady to have bilateral carpal tunnel as opposed to one hand or arm, he replied that he did not know. He did agree that carpal tunnel syndrome can stem from pregnancy because of swelling, edema and retained fluids.

7. Dr. Ger's testimony was presented by the employer. He saw the claimant on May 2, 2002. With respect to the April 2000 incident, he testified that carpal tunnel syndrome is very common in women during pregnancy. It is caused by fluid retention. He further testified that carpal tunnel syndrome that develops during pregnancy is usually bilateral because the fluid retention affects both sides. If the condition were caused by work, he testified, there would be a greater expectation that it would be unilateral. He also testified that the absence of carpal tunnel syndrome symptoms in the previous seven years that she had worked at Playtex Apparel would also point toward the pregnancy being the cause of the condition. In his opinion, the April 2000 complaint was probably related to her pregnancy, as opposed to work. With regard to the shoulder problem which arose in November 2000, Dr. Ger thought it significant that she was generally holding or carrying her new baby with the left arm. His opinion was as follows:

> Well, as I stated in my conclusion, I stated that it is possible that her current left shoulder difficulties are

> related to her work, but I cannot state this with any degree of medical certainty. . . So I cannot state with medical certainty that her shoulder symptoms were related to her work. It is probably just as likely that they are related to her taking care of her child.

He also felt that if the shoulder problem was work-related, that it would subside within weeks of not working, which did not occur.

8. The burden is on the claimant to prove by a preponderance of the evidence that she is entitled to compensation.[5] In this case the Board found Dr. Ger's testimony on causation more persuasive than Dr. Rowe's testimony, (and, by implication, the opinions of Dr.'s Green and Herman). It accepted the testimony of Dr. Ger that the April 2000 bilateral wrist injury was related to her pregnancy, not her work activities. The Board found persuasive the testimony that bilateral wrist pain in pregnant women is likely caused by the pregnancy, whereas work-related wrist pain is generally unilateral. The Board also thought it significant that the wrist problem resolved itself after the pregnancy ended. The Board also accepted the testimony of Dr. Ger on the issue of the shoulder injury. It accepted his testimony that it was just as likely that the shoulder injury was caused by the handling of the new baby as by work activities. The Board accepted Dr. Ger's testimony that it was to be expected that the shoulder problem would subside after the claimant stopped working, whereas this did not occur.

9. The claimant contends that the Board's conclusions on causation are not

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[5] *Johnson v. Industrial Accident Board*, 1994 Del. Super. LEXIS 278, at *5 (Del. Super. 1994); *see Lawson v. Chrysler Corp.*, 199 A.2d 749, 751 (Del. Super. 1964).

supported by substantial evidence. She relies largely upon the case of *Diamond Fuel Oil v. O'Neal*.[6] In *Diamond Fuel*, the claimant worked for a fuel oil company. He was frequently exposed to fuel oil. He developed a kidney disease. His treating physician and another physician were of the opinion that the kidney disease was probably caused by exposure to fuel oil. A third doctor testified that no one could state to a probability that the exposure to fuel oil caused the condition. In other words, the third doctor did not state that the exposure to fuel oil was not the cause of the condition, only that no doctor could say whether it was or wasn't. The Board held on the basis of the third doctor's testimony that the claimant had failed to establish causation. The Supreme Court held that the Board's decision was not supported by substantial evidence. *Diamond Fuel* is distinguishable from this case, however. There, unlike here, the doctor upon whom the Board relied did not express a direct opinion about the cause of the claimant's condition. The court expressly noted that the circumstances of that case did not present the typical situation where two experts express conflicting opinions as to the cause of an injury, each supported by substantial evidence.

10. In this case, the doctors expressed conflicting opinions as to the cause of the claimant's injuries. Dr. Ger attributed the wrist problem to the claimant's pregnancy, and thought it as likely that the shoulder problem was caused by handling the new baby as by work activities. The reasons underlying his opinion were explained. The Board has discretion to accept the testimony of one expert over that of another expert when evidence is in conflict and the opinion relied upon

[6] 734 A.2d 1060 (Del. 1999).

is supported by substantial evidence.[7] Dr. Ger's opinions are supported by substantial evidence and the Board's adoption of his opinions was an appropriate exercise of its fact finding function.

11. Accordingly, the Board's determination that the claimant failed to meet her burden of proof that her injuries were caused by work activities is ***affirmed***.

**IT IS SO ORDERED.**

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Resident Judge

oc: Prothonotary
cc: Order Distribution
File

[7] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *DiSabatino v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *General Motors Corp. v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977) (rev'd on other grounds by *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989)); *Butler v. Ryder M.L.S.*, 1999 Del. Super. LEXIS 29, at *5-6 (Del. Super. 1999).