IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HAPPY HARRY'S DISCOUNT DRUGS	)	CIVIL ACTION NUMBER
Employer-Appellant	)	02A-09-008-JOH
v.	)	
DALE SOLTIS	)	
Employee-Appellee	)	

Submitted: February 20, 2003
Decided: March 21, 2003

MEMORANDUM OPINION

Appeal from the Industrial Accident Board -
Decision - ***AFFIRMED***

Eric D. Boyle, Esquire, of Chrissinger & Bumberger, Wilmington, Delaware, attorney for appellant

Michael I. Silverman, Esquire, of Silverman & McDonald, attorneys for appellee

HERLIHY, Judge

Happy Harry's Discount Drugs appeals the Industrial Accident Board's decision that employee Dale Soltis' neck injuries were causally related to a job related motor vehicle accident. The Board held that medical testimony stating the neck injury was consistent with the mechanism of the accident and Soltis' credible testimony were sufficient to award benefits. Happy Harry's argues that because Soltis' medical expert witness could not state to a medical probability that the injury was causally related to the accident and Soltis failed to present any other creditable evidence as to causation, the Board erred in granting Soltis benefits. Delaware law does not, however, require a medical expert testifying before the Board to state that with reasonable medical probability an injury was caused by a certain traumatic event.

The Court finds there is substantial evidence to uphold the Board's award of benefits to Soltis. The Board's award is **AFFIRMED.**

Facts

Dale Soltis, age fifty-five, has been employed by Happy Harry's for several years. On May 9, 2001, while working in Happy Harry's maintenance department, he was a passenger in one of its vans when it struck a curb, blowing the tire and damaging the rim. Soltis extended his left arm to brace himself for the shock from the impact. He immediately noticed wrist pain and sought medical assistance the next day. When he informed his employer of his wrist condition, Happy Harry's referred him to Concentra Managed Care. Soltis began treatment with Concentra Managed Care and Dr. Randeep Kahlon. He returned to work approximately two months after the accident, but eventually underwent wrist surgery in the spring of 2002. The parties do not dispute the causal relationship of the van accident and that injury.

In the fall of 2001, however, Soltis began suffering headaches and pain radiating from his neck, which at times traveled down to his fingertips. In November 2001 -- six months after the accident and five months after returning to work -- Soltis sought treatment for his neck, and Dr. Kahlon referred him to Dr. Bruce Katz. After performing an EMG and a MRI, Dr. Katz diagnosed Soltis as having a collapse of the C6-7 disc space and he administered a nerve block injection. The injections continued and have apparently been successful insofar as his headaches have returned less frequently and with less severity and the pain no longer travels to his arms.

Soltis never had any prior neck problems and experienced no intervening trauma to the neck between the van accident and the first appearance of his symptoms. He saw no doctors and was not taking any prescription pain medication between June and November, 2001. Soltis explains that he is reluctant to go to doctors and that he had hoped the headaches would subside on their own. That is why he did not seek treatment from the time when the headaches first started in October until November.

He filed a petition before the Industrial Accident Board seeking worker's compensation benefits. He then filed a Petition to Determine Compensation Due on April 2, 2002, with regard to the neck injuries. The parties have reached an agreement with regard to compensation for the wrist injury, so the sole issue is the compensability of Soltis' neck problems.

Dr. Katz, an orthopedic surgeon, testified by deposition on behalf of Soltis. He explained that an x-ray taken revealed some collapse of the C6-7 disc space but that he was unable to conclude if it was trauma induced. Furthermore, the December 2001 MRI of the cervical spine revealed a right lateral disc herniation and possible bilateral herniation at C6-7 and the December 2001 EMG was positive for a left C7 radiculopathy as well as bilateral carpal tunnel. The doctor

was unable to state with reasonable medical certainty that Soltis' neck problems are directly related to the van accident. But, Dr. Katz testified that he found Soltis' complaints to be credible because of his positive response to the treatment provided. Concerning the relationship of Soltis' neck injuries to the van accident Dr. Katz, when questioned, said:

> Mr. Silverman: Are you able to say to a medical probability that Mr. Soltis' condition to his neck and arm is directly related to the accident?
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> Dr. Katz: No.
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> Mr. Silverman: Would you go to offer an opinion to the Board that Mr. Soltis' injury that he claims his numbness to his left arm and his neck consistent with the mechanics of the injury in May of 2001?
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> Dr. Katz: Consistent.
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> *****
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> Mr. Silverman: And again, he comes to you and he's reporting neck and arm pain and you believe that's consistent with the mechanics of jamming your arm in an accident?
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> Dr. Katz: Yes.
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> *****
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> Mr. Boyle: You indicated on direct testimony that the mechanism of injury could be consistent with these types of complaints. You're basing that on what he told you in more of a bracing type of an injury where he jammed this injury?
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> Dr. Katz: No, basically the patient was involved in a motor vehicle accident and he sustained damage to his wrist. There was enough force in the accident to substantially damage his wrist and I'm sure there was enough force in the accident to sustain damage to the neck.[1]

On cross-examination, Dr. Katz conceded that his tests had revealed some degenerative findings, such as spondylosis, or arthritis of the neck, and calcification of the disc, and that a man

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[1] Tr. Bd. Hr'g of 8/2/02 at 37 - 41.

of Soltis' age could have developed such symptoms absent any trauma. The doctor, however, explained that in light of the force of the accident -- force capable of breaking Soltis' wrist -- it was possible that any underlying degenerative condition was aggravated by the work accident.

Andrew J. Gelman, D.O. testified by deposition on behalf of Happy Harry's. Gelman concluded that Soltis' symptoms resulted from insidious arthritis, a degenerative condition of long standing duration, wholly unrelated to the accident. This degenerative condition was characterized as moderate to severe for an individual of Soltis' age. Dr. Gelman based his opinion on Soltis' medical records, the fact that Soltis had no neck complaints from May until November 2001, and the conservative type of treatment Soltis was given immediately after the incident. If the accident had caused a soft tissue or sprain injury to Soltis' neck, Dr. Gelman would expect some symptoms to have arisen sooner than six months after it. On cross-examination, Gelman admitted that Soltis had no preexisting back complaints before the accident and that it was possible that the mechanism of injury that Soltis described could cause a neck injury.

The Board awarded Soltis benefits for his neck injury. It found Dr. Katz' testimony more persuasive than that of Dr. Gelman. It accepted his testimony that the mechanism of Soltis' injury was consistent with the force to cause his writ to be broken. The Board expressly acknowledged that Dr. Katz could not state his opinion with reasonably medical certainty. His findings, the Board noted, were consistent with MRI and EMG findings.

The Board also based its award on a finding that Soltis was credible. There was no record of a prior neck injury and he responded well and quickly to the nerve block treatment. The Board was not persuaded by Dr. Gelman's testimony.

Standard of Review

On appeal from the Industrial Accident Board, this Court is to determine whether its decision is supported by substantial evidence and free from legal error.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] This court does not sit as the trier of fact with authority to weigh the evidence or determine issues of credibility.[4]

Discussion

An employee seeking worker's compensation benefits has the burden of establishing a work-related injury and its extent.[5] In a personal injury action in a court, the plaintiff must show that by reasonable medical probability the accident caused the injury.[6] In actions before the Board, however, that standard has been lowered.[7] The question presented here is whether the quantum of proof Soltis presented meets even that lower standard and meets the necessary substantial evidence requirement.

In *General Motors Corp. v. Freeman*,[8] the Delaware Supreme Court first addressed the issue of quantum of proof, particularly medical evidence, needed to obtain and sustain an award. There, Freeman was burning trash pursuant to his employment when the wind changed, causing the whole dump to go ablaze. He accidentally inhaled smoke and coughed violently. He also

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[2] *Street v. State,* 669 A.2d 9, 11 (Del. 1995).
[3] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del. 1994).
[4] *Boulevard Electric Sales v. Webb,* 428 A.2d 11, 13 (Del. 1981).
[5] *Histed v. E.I. duPont de Nemours & Co.,* 621 A.2d 340, 343 (Del. 1993).
[6] *Money v. Manville Corp. Asbestos Comp. Trust Fund,* 596 A.2d 1372, 1377 (Del. 1991).
[7] *Air Mod Corp. v. Newton,* 215 A.2d 434 (Del. 1965).
[8] 164 A.2d 686 (Del. 1960).

wiped his eyes with his gloves, thereby introducing some foreign substance into his eye. Freeman sought treatment after work and was given an eye patch to wear. Once the patch was removed, he noticed severe impairment to his vision. He suffered a detached retina, which eventually led to complete blindness in the eye. The medical evidence was that Freeman had myopic type eyes, a condition that the experts stated would predispose him to retinal detachment. Freeman's expert testified that it was possible that trauma could have caused the detachment, but that it was only one of many possible causes. General Motor's expert testified that the most common cause of retinal detachment is in an eye in which the retina is already diseased and that neither smoke nor the entry of a foreign substance into the eye could have caused it directly.

General Motors argued that since the testimony was to the effect that the injury was at most a possibly -- not a probably -- caused as a result of the trauma, the evidence was insufficient for an award. The court ruled:

> We do not agree, however, with the defendant's contention, or with the authorities which he cites, that the causal connection must in all cases be proved solely by the testimony of medical experts to the extent that the causal connection amounts to a "probability" that the injury was the result of the trauma. We agree that an award cannot stand on medical testimony alone, if the medical testimony shows nothing more than a mere possibility that the injury is related to the accident. But this does not mean that in every case the testimony of medical experts must show at least a probability that the injury was caused by the trauma. If the testimony of these experts should show that the injury was possibly the result of the trauma and such testimony is supplemented by other creditable evidence tending to show that the injury occurred directly after the trauma and without interruption, we think that such evidence would be sufficient to sustain an award… . We think that such testimony should be considered in the light of all the evidence, particularly where the injury occurred directly and uninterruptedly after the trauma.[9]

The court found sufficient evidence to support the Board's award, noting that 1) Freeman did not have a detached retina before the incident, 2) his eyesight was impaired immediately after

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[9] *Id*. at 688-89 (citations omitted).

the trauma, 3) he promptly received medical treatment, and 4) the doctor estimated that the retina had become detached from six months to a year before the examination, a period corresponding roughly with the time elapsing between the trauma and the examination.[10]

The Supreme Court revisited the issue five years later in *Air Mod Corp. v. Newton*.[11] In that case Air Mod claimed that there was a lack of expert medical testimony as required to establish a causal connection between a slip and fall at work and a serious back disability. The injury Newton suffered, and about which the controversy swirled, was a fall on December 30, 1960. While he saw a doctor on January 9, 1961, he did not mention the fall. He signed a statement two weeks later, in effect, denying falling. But he had surgery in April during which an extruded disc was removed. Air Mod pointed to the absence of any expert evidence to establish with reasonable medical certainty that the fall described by Newton caused his condition. One of Newton's doctors testified that the fall described "could result" in the back injury, while another found the injury to be "consistent" with Newton's description of the fall. That doctor was the othopaedic surgeon who removed the extruded disc. He said that due to the lack of neck pain complaints prior to the December fall and that such an extruded disc would be painful, the injury was recent. The Court held:

> Admittedly, from a legal point of view, a more positive causal connection between the [fall] and the plaintiff's disability would be desirable; and, unquestionably, the "reasonable medical certainty" test, furnishing probability of causation rather than mere possibility, is preferable when obtainable. We must recognize, however, the understandable reluctance of medical witnesses to be dogmatic as to causation of a physical condition. In the thinking and reasoning of a physician, we realize, the realm of probability and the realm of possibility often overlap. Semantics must give way in the search for a fair a just result; and the distinction between words like

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[10] *Id*. at 689.

[11] 215 A.2d 434 (Del. 1965).

> "possible", "probable", "reasonable certainty", and the like, may not be overemphasized. A "could have" answer of a medical witness, such as we have here, may not be isolated and considered alone; it must be considered in the light of all of the other evidence in the case. In the instant case, considering the medical testimony in the light of all of the evidence, we have reached the conclusion that it is sufficient to establish the requisite causal connection and to sustain the award.[12]

A more recent case that dealt with this issue of the quantum of medical testimony was *Harvey v. Layton Home*.[13] In that case, the claimant alleged that as a result of her exposure to soaps, detergents and bleaches while working at the Layton Home, she had developed occupational asthmatic-bronchitis and chronic obstructive pulmonary disease. Layton Home maintained that her condition was not caused by her employment, but rather by her twenty year smoking habit, obesity, ordinary exposure to household products, and asbestos exposure at home. Harvey presented two doctors who testified that her condition was caused by her work and Layton Home presented a doctor who testified that it was not. The Board found a lack of causation and denied her request for compensation.

On appeal, Harvey argued that the opinion given by Dr. Hunt, Layton Home's expert, was an insufficient basis for the Board's rejection of her claim. Harvey argued that an opinion rendered by a medical doctor must be given to a reasonable degree of medical probability in order for it to be relied upon by the Board. According to Harvey, Dr. Hunt's opinion was speculative because he did not know the exact amounts of detergents and bleaches to which she was exposed during her employment and therefore did not have all of the facts necessary to reach a conclusion. The Superior Court discussed *Air Mod Corp.* at length and concluded:

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[12] *Id.* at 438 (citations omitted).

[13] Del. Super., C.A. 91A-12-13, Bifferato, J. (Oct. 19, 1992), *aff'd* Del. Supr., No. 505, 1992, Veasey, C.J. (Jan. 27, 1993).

> Dr. Hunt testified that he did not know the actual quantity of soaps and bleaches to which Harvey was exposed. However, Dr. Hunt's testimony did amount to a possibility that causation between Harvey's work condition and asthma was wanting. His testimony was supplemented with other credible evidence which shows a lack of causation. Therefore, Dr. Hunt's medical testimony was proper testimony which could be considered by the IAB when reaching its final conclusion.[14]

Harvey's doctors, on the other hand, had testified that her medical condition resulted from her work circumstances. The issue in the *Harvey* case, therefore, was really whether the Board's decision to deny benefits based on Dr. Hunt's "possibility" testimony, plus other evidence, was substantial evidence. Implicitly, part of this issue was whether the claimant, Harvey, had met her burden of proof. In a sense, therefore, the *Harvey* case was not one involving quantum of proof for a claimant. Even so, the point remains that the Board's decision based on medical evidence of possibility was sustained.

From this review of the case law, it is clear that an award cannot stand on medical testimony alone if the medical testimony shows nothing more than a mere possibility that the injury is related to the accident; a court reviewing a Board's finding of causation must look beyond expert testimony and buzz words like "medical certainty" and consider all of the evidence tending to support a finding that the accident caused the injury (or did not as in *Harvey*). But how much and what types of supplemental evidence is sufficient to support an award?

In the case at hand, Soltis had no history of back or neck problems. He was involved in a van accident that was serious enough to break his wrist. But symptoms from his neck problem did not appear until months later. There was no known intervening trauma that occurred between

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[14] *Id.* at 4.

the accident and the onset of symptoms. Soltis' expert, Dr. Katz, testified that he was unable to state to a medical probability that Soltis' neck complaints were directly related to the accident, but he did testify that Soltis' condition was "consistent" with the mechanism of the injury in the van accident particularly because the force inflicted on his body was sufficient to break his wrist. Dr. Katz also testified that he found Soltis to be credible because he had a good response to the treatment. He also said that the MRI and EMG test findings supported Soltis' complaints.

There was, therefore, more evidence that "just" Dr. Katz's "consistent" opinion. There was no dispute about the wrist injury. The test findings were objective and there was the prompt positive response to the treatment. Based on the quantum of proof upheld in *Freeman, Air Med,* and *Harvey,* this Court finds the Board's decision is supported by substantial evidence. The Court, nevertheless, must express some unease because one of the points made in *Freeman* was that the injury occurred directly after the trauma. In *Freeman* the symptom onset was much sooner. In *Air Med,* too, the employee felt symptoms right away. Here the symptoms, as Soltis testified, began about five months after the van accident (the wrist surgery, however, was nearly a year later). The point is that there must be a limit reached and caution exercised, especially with delayed symptom onset, when the medical opinion is not expressed as "reasonably probable" or "within reasonable medical probability," even though the bar is lower before the Board.

Since there is substantial evidence to support the Board's decision, it must be affirmed.[15]

Conclusion

For the reasons stated herein, the decision of the Industrial Accident Board is **AFFIRMED**.

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[15] *M.A. Hartnett, Inc. v. Coleman,* 226 A.2d 910 (Del. 1967).

J.