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

KIMBERLY FLAHARTY,	)	
	)	
Employee-Appellant,	)	
	)	
v.	)	C. A. No. 02A-06-006-JEB
	)	
AVON PRODUCTS,	)	
	)	
Employer-Appellee.	)	

Submitted: January 21, 2003
Decided: March 17, 2003

Appeal from a Decision of the Industrial Accident Board.
Decision Reversed and Remanded.

OPINION

Appearances:

Robert P. LoBue, Esquire, Wilmington, Delaware.
Attorney for Appellant Kimberly Flaharty.

Francis X. Nardo, Esquire, Wilmington, Delaware.
Attorney for Appellee Avon Products.

JOHN E. BABIARZ, JR., JUDGE

This is the Court's decision on Claimant Kimberly Flaharty's appeal of a decision of the Industrial Accident Board ("Board"). Claimant petitioned the Board for workers' compensation benefits because of back injuries allegedly caused by her job duties at Avon Products ("Employer"). For the reasons explained below, the Board's decision denying Claimant's petition is reversed, and the cause is remanded to Board to enter an award consistent with the factors outlined in the final section of this Opinion.

FACTS

Claimant began working for Avon in May 1989. She soon began a job referred to as "the bin-filling job," which required her to lift boxes off pallets and place them on shelves. The boxes weighed anywhere from 50 to 80 pounds. There is some dispute as to when Claimant's back problems began, but she experienced pain at least as early as 1996, and possibly earlier. In March 1997, Claimant hurt her back at home, and she missed approximately two months of work. When she went back to her job, her back problems continued, and she had surgery for disc herniation in April 1999. She returned to work five months later with no restrictions, although she still had back pain. She did not file for workers' compensation benefits. During 2000, she had no back problems.

In March or April 2001, Claimant again developed back pain. On April 5, 2001, she left work because of severe pain, and has not worked since then. She again had surgery for disc herniation again in May 2001. She filed for workers' compensation benefits, claiming that her work duties were a substantial cause of the injury which necessitated the second operation and her subsequent disability. Employer opposed her petition. After holding a hearing, the Board denied her petition. Claimant filed a timely appeal to this Court. Briefing is complete and the issues are ripe for decision.**STANDARD OF REVIEW**

In reviewing a decision of the Board, the Court's role is to determine whether the Board's findings are supported by substantial evidence and are free from legal error.[1] Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion.[2] When parties present testimony from expert witnesses, the Board is free to choose between conflicting opinions, and either opinion will constitute substantial evidence for purposes of appeal.[3] The Court does

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[1]*Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del.Super. 1979). *See also* Del. Code Ann. tit. 19, § 3323f(a).

[2]*Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del.1998).

[3]*Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

not weigh the evidence, determine questions of credibility or make factual findings.[4] It merely determines if the evidence is legally adequate to support the Board's findings.[5]

DISCUSSION

The parties do not dispute that Claimant had a recurrent disc herniation that required surgery in May 2001. The issue is whether there is substantial evidence to support the Board's conclusion that Claimant's heavy lifting as a bin filler at Avon is a substantial cause of the problem that led to her disability. Claimant argues that her injury is a result the cumulative detrimental effect of repetitive lifting. She further asserts that there is no evidence to support the Board's decision because the testimony of the carrier's medical expert , which the Board relied upon, was contradictory and based on incomplete information. Claimant asserts that the substance of the testimony offered by the parties' medical experts was the same, although carrier's expert carefully avoided the phrase "substantial cause." Employer argues that the Board's opinion is supported by substantial evidence and is free from legal error.

Testimony was presented from two expert medical witnesses. Claimant's

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[4] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del.1960).

[5] Del. Code Ann. tit. 29, § 10142(d).

physician, Stephen J. Rodgers, M.D., testified that because of her history of back problems, Claimant should not have been doing the heavy lifting, twisting and bending that her job required. Dr. Rodgers stated his opinion that Claimant's work activities at Avon from November 1999 until April 2001 were a substantial factor of her recurrent herniation and surgery.

At Employer's request, Claimant was examined by Andrew Gelman, M.D., in February 2001, in preparation for the hearing. He advised Claimant to avoid repetitive bending, kneeling and lifting weights more than 20 to 25 pounds.[6] Although these are precisely the activities that led up to her second surgery, Dr. Gelman stated in his deposition that he did not consider Claimant's work activities a substantial cause of her back problems.[7] He based this opinion on the absence of documented complaints associated with her work,[8] although he acknowledged that Claimant told her physician in 1997 that she believed that her back pain was related to her job. Dr. Gelman stated that if there was a causal connection between Claimant's work and her back problems, he "would have expected some track record

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[6]Tr. at 93.

[7]*Id.* at 90.

[8]*Id.* at 91.

of documentation pointing to activities specifically at Avon."[9] In other words, Dr. Gelman offered a critique of the record-keeping rather than a medical opinion based on Claimant's symptoms, history, medical reports and job duties. In fact, he was unfamiliar with her job description until confronted with it on cross-examination.

When Dr. Gelman considered the causation question in light of Claimant's actual work duties, that is, lifting 50 to 80 pound boxes all day, he stated more than once that bending and lifting such weights were "risky" tasks for her because of her history of back problems.[10] Dr. Gelman also stated that it was "foolish" of Claimant's physician to have released her to work without restrictions after the first operation.[11] He stated that Claimant's everyday activities such as walking contributed to her injury and also acknowledged that the repetitive bending and lifting were a contributing factor.

It is a rare case indeed where this Court reverses a Board decision based on the testimony of a medical expert. However, this is such a case. The Court finds no medical evidence to support the Board's finding that Claimant's second back

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[9] *Id.* at 91.

[10] *Id.* at 95-96.

[11] Gelman Deposition at 25.

operation and subsequent disability were not caused by her job duties of heavy, repetitive, daily lifting as well as bending. Although Dr. Gelman used the magic words to express his opinion that Claimant's work was not a substantial cause of her injuries, he stated that the repetitive bending and lifting were a contributing factor.

He also stated that he distinguished between a contributing factor and a substantial cause,[12] and the Board accepted this proposition. However, the Delaware Supreme Court does not. In *Duvall v. Charles Connell Roofing*, the Court held that under the usual exertion rule a work injury is compensable if the ordinary stress and strain of employment is a substantial cause of the injury, even if the claimant had a pre-existing injury. In so holding, the Court made the following statement:

> Although a worker with a pre-existing condition may be more prone to injuries relating to that state, a pre-existing condition alone will not produce an injury. **Some other contributing factor must be present. When that factor is the everyday stress and strain of a worker's job, he or she should not be denied on a theory which finds no support in the statutory enactments of the General Assembly**.[13]

In this case, Employer argues at one point that Claimant had a history of back problems and thus there can be no causal connection between her work and the

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[12]Gelman Dep. at 27.

[13]564 A.2d 1132, 1134 (Del.1989) (emphasis added).

second surgery. At other points, Employer argues that Claimant was symptom-free at least for the duration of 2000 and thus there cannot be a causal connection between her work and the injury. Despite these inconsistent arguments, the record is clear that Claimant had a pre-existing back condition prior to the second surgery and ultimate disability. Since *Duvall*, the law in Delaware has been that under the usual exertion rule a work injury is compensable even if the claimant had a pre-existing injury if the ordinary stress and strain of employment is a substantial cause of the injury. In this case, Dr. Rodgers testified that Claimant's job duties were a substantial cause of the injury, while Dr. Gelman testified that they were a contributing factor. The result is the same. Claimant suffered a compensable work injury and is entitled to recover for her resulting disability.

Furthermore, the Board misstated the law when it wrote that Claimant has the burden of proving that her job duties were "the substantial cause" of her herniation and surgery. *Duvall* requires a showing that one's work was "a substantial cause," indicating that there can be more than one such cause. Common sense dictates that if everyday activities such as standing and walking helped cause Claimant's injury, daily bending and lifting heavy boxes would also be a substantial cause.

Claimant seeks compensation for a period of total disability beginning on April

6, 2001 and ending August 27, 2001, when she was released to light or sedentary duty following her back surgery. The Board's opinion states that when Claimant left Avon, she was earning $16.80 per hour and her average work week was 45 hours, for a weekly wage of $756. The Board is instructed to enter an award of total disability consistent with these factors, pursuant to Del. Code Ann. tit. 19, § 2324.

Claimant also seeks an award of partial disability based on the labor market survey stipulated to at the hearing. The survey identified 14 sedentary or light duty positions which meet Claimant's restrictions, which pay an average weekly wage of $499.36. It is the Board, not any doctor, who should set the percentage to a claimant's disability,[14] and the Board is ordered to do so in this case, consistent with the above-mentioned factors.

For all these reasons, the Board's decision is reversed, and the cause is remanded to the Board to enter an order granting an award of benefits as described above.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

[14]*GMC v. McKenney*, 269 A.2d 878 (Del. Super. 1969).

JEB,jr/rmp/bjw
Original to Prothonotary