IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM WOODWARD,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 01A-01-001-CG
	)	
U E & C CATALYTIC,	)	
	)	
Appellee.	)	

Date Submitted: July 12, 2001
Date Decided: August 14, 2001

ON APPEAL FROM THE INDUSTRIAL ACCIDENT BOARD. **AFFIRMED.**

ORDER

Edward B. Carter, Kimmel, Carter, Roman & Peltz, P.A., Wilmington, Delaware, Attorney for Appellant.

Nancy Chrissinger Cobb, Chrissinger & Baumberger, Wilmington, Delaware, Attorney for Appellee.

GOLDSTEIN, J.

This is an appeal by the claimant from a decision of a Workers' Compensation Hearing Officer on behalf of the Industrial Accident Board ("Hearing Officer") dated December 22, 2000.

On October 9, 1992, claimant below and Appellant, William Woodward, sustained a compensable injury to his neck and left shoulder while working as a boilermaker for employer below and Appellee, U E & C Catalytic ("Employer"). Woodward received total disability benefits and permanent impairment benefits. Woodward returned to work as a boilermaker without restrictions in 1994.

On May 4, 2000, Woodward filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board, alleging a recurrence of total disability ongoing from September 22, 1999 and requesting payment of medical expenses including surgery to his cervical spine performed in 2000. On October 16, 2000, the Hearing Officer held a hearing to consider Woodward's petition. On December 21, 2000, the Hearing Officer issued her decision denying Woodward's petition. Woodward subsequently appealed that decision to this Court pursuant to 19 *Del. C.* § 2350.

At the October 16, 2000 hearing, Woodward described the work accident in 1992 where he injured his neck and left shoulder. Woodward was referred to Dr. Brent Noyes, who performed surgery on Woodward's left shoulder. Dr. Bruce Rudin performed surgery on Woodward's neck at the C5-6 level in 1994. Woodward testified that he had a good recovery as a result of the surgery and returned to the same type of work he had done before as a boilermaker. Woodward stated that he subsequently began to experience pain in

his neck and that his right arm began to go numb. Woodward returned to Dr. Noyes and then to Dr. Rudin, who took Woodward out of work on September 22, 1999. Dr. Rudin performed surgery in April 2000 to alleviate Woodward's symptoms. Woodward testified that the surgery eliminated the numbness in his right arm, but he continued to have pain in his neck.

Christine Woodward testified on behalf of her husband at the hearing. Mrs. Woodward testified that, from 1994 to 1999, her husband continued to have neck pain. In the Spring of 1999, Woodward's right arm became numb and he was forced to cradle it to his side. Mrs. Woodward described her husband's difficulty with daily activities subsequent to the 1992 work accident.

Dr. Bruce J. Rudin, an orthopedic surgeon, testified by deposition on behalf of Woodward. Dr. Rudin testified that he first saw Woodward for his work injury in November 1993. Dr. Rudin performed an anterior cervical discectomy at C5-6 on Woodward's neck in January 1994 and performed a second cervical spine surgery on April 27, 2000. Dr. Rudin explained that the 1994 surgery involved removing the entire disk and fusing the spine together. The second surgery revealed a sizable disc herniation in the neuroforamin at C6-7.

Dr. Rudin testified that it was his opinion that Woodward's accident in 1992 contributed to Woodward's current problems which led to the filing of his petition. Dr. Rudin explained that he believed Woodward would not have required the 2000 surgery if he had not had the 1994 surgery. Dr. Rudin explained that the 1994 surgery placed additional stress across the adjacent disc segments, causing those segments to wear. Normally, that stress

would be absorbed by the C5-6 disc, but due to the spinal fusion at that level, the stress had to be absorbed by the discs adjacent to it. Dr. Rudin opined that, although Woodward had some early mild degeneration to the adjacent discs at the time of the 1994 surgery, he did not believe Woodward would have required the 2000 surgery had he not had the 1994 surgery. Dr. Rudin summarized:

> [M]y feeling is that if he hadn't had the fusion in between and low level degeneration he wouldn't be where he is. It's just that it's too soon, it's too many levels, and it's just too unlikely to have occurred spontaneously. So while it is possible, I think it's fair, and I think I can say within a reasonable degree of medical probability, if he hadn't had a previous spinal fusion, limiting motion in that portion of his neck, he wouldn't have placed additional stress across the adjacent segments and then had that portion of his neck wear.

Dr. Rudin later reiterated that, while he could not state with reasonable medical probability that Woodward's work injury in 1992 was the sole and exclusive reason for Woodward's current complaints, he believed that the accident accelerated the degenerative process.

Dr. John B. Townsend, III, a neurologist, testified by deposition on behalf of Employer. Dr. Townsend examined Woodward on August 21, 2000 and reviewed Woodward's medical records. Dr. Townsend testified that Woodward's medical records revealed that Woodward initially had left-sided neck and shoulder problems. Woodward's 1994 cervical surgery was premised upon a 1993 MRI showing a defect at the C5-6 level. Woodward's medical records showed no medical treatment between the end of 1994 and the Spring of 1997. Dr. Townsend testified that Woodward's complaints beginning in 1999

centered on the right side of his neck. Prior to 1999, there was no medical documentation to show that Woodward had complaints as to the right upper extremity.

Dr. Townsend testified that Woodward's 1993 MRI showed signs of preexisting cervical arthritis that affected the C6-7 level as well as the C5-6 level. Dr. Townsend testified that he could not, within a reasonable degree of medical probability, relate the disc herniation at the C6-7 level to Woodward's 1992 work injury. Dr. Townsend explained:

> [Woodward] didn't have a disc herniation at C6-7 in 1992. He was evaluated at that time and was found to have a left-sided C5-C6 herniation; was operated on, did well; went back to work in full duty capacity as boilermaker. I would anticipate if the patient had a C6-7 right-sided disc at that time that it would have been operated on or he would have persistent complaints from the time of the injury in an ongoing fashion.

Dr. Townsend testified that he would not have expected right sided complaints to have taken seven years to appear. Dr. Townsend opined that the surgical procedure performed in April 2000 was reasonable and necessary based upon Woodward's complaints, but was not necessitated by the 1992 accident.

Dr. Townsend testified that, although Woodward had preexisting degenerative changes at the C6-7 level that could make it more likely to have a disc herniation at that level over time, he could not state with medical probability that the 1994 surgery played a role in Woodward's new disc herniation in 1999 or the requirement for surgery in 2000. Dr. Townsend stated that he believed that Woodward would have come to require the cervical surgery even if the 1992 accident had not occurred.

Dr. Andrew J. Gelman, an orthopedic surgeon, testified by deposition on behalf of Employer. Dr. Gelman testified that he examined Woodward on March 8, 1995 and December 28, 1999 and that he had reviewed Woodward's medical records. Dr. Gelman opined that Woodward's most recent course of care, the second surgery at the C6-7 level, was not related to the 1992 work injury. Dr. Gelman testified that, prior to the 1992 surgery, Woodward had degenerative changes at multiple levels, C3-4, C4-5, and C5-6. Woodward also had some bulging at the C6-7 level.

Dr. Gelman stated that, prior to the summer of 1999, Woodward had no right-sided complaints. The disc herniation revealed on the 1999 MRI was not present in 1992 or 1993. That herniation was at the C6-7 level and was right-sided. Dr. Gelman opined that he could not relate the disc herniation to the 1992 accident. Dr. Gelman testified that he believed Woodward's right-sided radicular symptoms were, "a combination of both degenerative spur changes and disk irregularities at the C6-7 level." Dr. Gelman stated that he believed the degenerative spur changes predated the 1992 accident.

Dr. Gelman testified that he could not differentiate the source for he C6-7 disease process "in attempt to separate out any stress as a result of those C6-7 changes versus the long-standing degenerative changes at multiple cervical spine levels." Dr. Gelman reiterated that he did not believe the 1992 work accident played any role in the C6-7 pathological process and that the 1994 surgery played, "very little role, if any" in necessitating Woodward's 2000 cervical surgery.

In her written decision, the Hearing Officer initially found that Woodward carried the burden of proof to show, "by a preponderance of the evidence that but for his work accident he would not have experienced a recurrence of total disability or required additional medical treatment, including surgery in 2000." The Hearing Officer determined that Woodward did not meet his burden to show that the right arm and neck problems he experienced beginning in 1999 were causally related to the 1992 work accident. The Hearing Officer therefore denied Woodward's Petition to Determine Additional Compensation Due.

In support of her determination, the Hearing Officer stated that she accepted the testimony of Dr. Townsend and Dr. Gelman. The Hearing Officer explained:

> Neither Dr. Townsend nor Dr. Gelman agrees with Dr. Rudin's theory that Claimant's 1994 cervical surgery at C5-6 caused stress and an acceleration of degenerative changes in the adjacent disc at C6-7. . . . I agree with Dr. Townsend that I would not expect Claimant's right-sided complaints to take seven years to appear had they been related to the work accident. I also agree with Dr. Townsend that the heavy labor that Claimant performed after returning to work following the 1994 surgery predisposed him to developing additional cervical problems. Likewise, I agree with Dr. Gelman's conclusion that whatever occurred during the 1992 work accident played no role in the C6-7 pathological process. Dr. Gelman believes that bulging and spur formation at C6-7 pre-dated the 1992 work accident and were the cause of the right-sided radiculopathy that developed in 1999.

The Hearing Officer stated that she rejected Dr. Rudin's testimony, explaining that he "did not address the role of natural wear and tear in the development of the degenerative process over a seven-year period." The Hearing Officer continued:

> While Dr. Rudin's theory concerning the stress to adjacent discs caused by the C5-6 fusion may certainly be medically possible, given the existence of degenerative findings in Claimant's condition from the time of the work accident, his release to return to work along with his ability to perform heavy duty labor without restrictions for a period of at least four years, and the gap in his medical treatment from 1994 to 1999, I do not find that Claimant has proven a causal connection by a preponderance of the evidence.

The role of this Court, in reviewing a decision of the Board, is to determine whether the Board's factual findings are supported by substantial evidence. *Histed v. E. I. duPont de Nemours*, Del. Supr., 621 A.2d 340, 342 (1993). "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Olney v. Cooch*, Del. Supr., 425 A.2d 610, 614 (1981). It is the Board's role, rather than the Court's, to resolve conflicts in testimony and to decide which witnesses are credible. *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66 (1965). Where testimony is introduced by deposition, rather than in person, the Court may reject the Board's determinations if those findings have no satisfactory proof grounded in the underlying depositions. *Walbert v. General Metalcraft*, Del. Super., Terry, J., C. A. No. 97A-04-003 (Nov. 26, 1997), Mem. Op. at 9 (citing *Children's Bureau v. Nissen*, Del. Super., 29 A.2d 603, 609 (1942)).

Woodward argues that the Hearing Officer's decision should be reversed because her determinations were not supported by substantial evidence in the record and because the Hearing Officer erred as a matter of law by applying the wrong standard for compensability. According to Woodward, the Hearing Officer, in essence, required Woodward "to show that the new herniation was substantially caused by his old work injury

as opposed to merely being a trigger or providing the setting for the injury as required by Reese [v. Home Budget Center, Del. Supr., 619 A.2d 907 (1992)]." (Emphasis in original).

In her written decision, the Hearing Officer initially determined that Woodward was required to show that, "but for his work accident he would not have experienced a recurrence of total disability or required additional medical treatment, including surgery in 2000." The issue of the appropriate test to demonstrate proximate cause, as it relates to injuries in the workers' compensation context, has been considered previously. Specifically, the Supreme Court has stated that the "but for" test and the "substantial factor" test are, as Woodward argues, different standards for determining proximate cause. *State v. Steen*, Del. Supr., 719 A.2d 930, 932 (1998)(citing *Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1097 (1991)).

The "but for" test has been set forth as, "the defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." *Id.* (quoting W. Keeton, Prosser and Keaton on the Law of Torts 266 (5th ed. 1984)). The "substantial factor" test can be summarized as, "the defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." *Id.* (quoting Prosser and Keaton on Torts, 266).

In the context of a specifically identifiable accident, the compensability of the resulting injury must be determined using the "but for" standard exclusively. *Id.* (citing *Reese,* 619 A.2d at 910) Only when a claimant seeks recovery for an injury that was not the

result of a specific trauma, but rather was due to gradual and ordinary job-related stress, should the Court apply the "substantial factor" standard to determine proximate cause. *Id.* at 933 (citing *State v. Cephas*, Del. Supr., 637 A.2d 20, 27)).

In the instant case, Woodward seeks recovery for injuries resulting from a specifically identifiable trauma: the October 9, 1992 work accident. Therefore, the Court finds that the Hearing Officer correctly determined that Woodward's petition involved injuries alleged to have resulted from a specifically identifiable accident and correctly applied the "but for" standard to determine proximate cause.

Although Woodward initially argues, as quoted above, that the Hearing Officer erroneously applied the "substantial factor" test, rather than the "but for" standard to the facts of this case, later in his opening brief, and in his reply brief, he argues that "the Board incorrectly used the 'but for' analysis in this case. The Board should have followed the substantial factor test. . . . ." Woodward argues that the term, "accident" includes the cumulative effect of the ordinary stress and strain of employment, and therefore, "even if the end result was independently inevitable at some time in the future if the accident in question was the substantial cause of accelerating that condition, it is compensable." To that extent, the Court finds Woodward's reliance on *Duvall v. Charles Connell Roofing*, Del. Supr., 564 A.2d 1132 (1989), is misplaced. *Duvall* utilized employed the "substantial cause" test for probable cause due to "the difficulty of identifying a specific link between regular job-related duties and the aggravation of preexisting ailments." *Reese*, 619 A.2d 907, 911. *Reese*

determined that the test is inapplicable where there is an undisputed work related accident. *Id.*

The Court notes that Woodward filed a Petition to Determine Additional Compensation Due with the Board due to a recurrence of total disability, noting the date of the injury as October 9, 1992. "Recurrence" has been defined as the "return of an impairment without intervention of a new or intervening accident." To the extent that Woodward now argues that the 2000 disability is a separate injury resulting from ordinary stress and strain of his employment, the Court finds that Woodward did not present this argument to the Hearing Officer and the Court will not consider it for the first time on appeal.

Woodward also argues that the Hearing Officer's finding that Woodward's disability and medical expenses were not related to the 1992 work accident are not supported by substantial evidence. Specifically, Woodward argues that the Hearing Officer ignored the testimony of Dr. Rudin as to how the degenerative process taking place in Woodward's cervical spine was accelerated as a consequence of he work injury in 1992. Woodward argues it is "totally illogical" that the trauma to Woodward's neck, the subsequent surgery, and his return to work would have no effect on his need for the 2000 surgery.

Basically, Woodward argues that the Hearing Officer should have accepted Dr. Rudin's testimony that Woodward's injury was a result of the stress placed on his cervical spine at C6-7 as a result of the 1994 spinal fusion at C5-6. Woodward argues that the Hearing Officer instead accepted that the "illogical suppositions" of Dr. Gelman and Dr.

Townsend that Woodward's disc herniation at C6-7 occurred spontaneously and that Woodward's subsequent surgery was not related to the 1992 accident or the 1994 spinal fusion.

It is well-settled that the Board is free to accept the testimony of one expert witness over the testimony of another as long as its decision is based upon substantial evidence in the record below. *DiSabatino Bros. v. Wortman*, Del. Supr., 453 A.2d 102 (1982). The Court cannot find that the Hearing Officer "totally ignored" Dr. Rudin's testimony that Woodward's injury was the result of his 1994 surgery, as Woodward contends. Rather, the Hearing Officer stated that, "Dr. Rudin's theory concerning stress to the adjacent discs caused by the C5-6 fusion may certainly be medically possible." However, the Hearing Officer rejected Dr. Rudin's theory, "given the existence of degenerative findings in [Woodward's] condition from the time of the work accident, his release to return to work without restrictions for a period of at least four years, and the gap in his medical treatment from 1994 to 1999."

In conclusion, the Court cannot find that the erred by accepting the testimony of Dr. Gelman and Dr. Townsend over that of Dr. Rudin. As quoted in detail above, the Hearing Officer provided sufficient basis for her findings. The Court finds that those findings are supported by substantial evidence in the record.

Therefore, for the foregoing reasons, the decision of the Industrial Accident Board below is hereby **AFFIRMED.**

IT IS SO ORDERED.

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Carl Goldstein, Judge

oc: Prothonotary