IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MICHAEL LEWIS,	)	
	)	
Employee/Appellee,	)	C.A. No. 01A-06-003
	)	
5.	)	
	)	
SCOTTI MUFFLER,	)	
	)	
Employer/Appellant.	)	

Submitted: September 26, 2001
Decided: December 27, 2001

ORDER

Upon Appeal from a Decision
of the Industrial Accident Board

AFFIRMED

David A. Arndt, Esq., of Doroshow, Pasquale, Krawitz, Siegel & Bhaya, Dover, Delaware, for Employee/Appellee.

Sean Dolan, Esq., of Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, for Employer/Appellant.

WITHAM, J.

I. FACTUAL AND PROCEDURAL BACKGROUND

Michael Lewis v. Scotti Muffler
C. A. No. 01A-06-003
December 27, 2001

1. This 21st day of December, 2001, upon consideration of the briefs of the parties, and the record below, it appears to the Court that this is the appeal of Scotti Muffler ("Employer") from a decision of the Industrial Accident Board granting Michael Lewis ("Claimant") workers' compensation benefits. The Board found that Claimant established compensability under either the "substantial factor" or the "but for" test of causation. Employer appeals this decision for the reason that substantial evidence of causation does not exist in the record. The Court finds that there is substantial evidence in the record to support the Board's holding that Claimant's employment was the proximate cause of his injury. For this reason, the Board's finding of compensability is affirmed.

2. In this case, the Claimant began working for the Employer in July 2000, as an apprentice mechanic or trainee. He helped other mechanics to perform exhaust and brake work, and assisted with lifting and mounting tires. He swept and maintained the shop, picked up boxes and salvage parts, and threw these parts into big dumpsters.

3. Claimant testified that he started feeling stiffness and pain in his neck in mid-September of 2000, while at work. Claimant told Lynn Limpert, the corporate Secretary for Scotti Muffler, about the pain. Ms. Limpert testified that Claimant informed her about his neck pain on a workday morning, and he told her he awoke with the pain. She applied liniment to Claimant's neck. 4. Thereafter, on the morning of September 27, 2000, Claimant awoke with excruciating pain in his shoulder and went to the emergency room at Kent General Hospital, where he saw Dr. Webb. The

medical records from this visit report left-sided neck, upper back and shoulder pain. In addition, the report shows that Claimant awoke one morning with the pain and does not remember any stress, trauma, injury, or over-use that might have caused it and has never had problems like this previously. Claimant was released from work for three days as a result of this visit.

5. Claimant testified at the hearing that he started experiencing the pain of his injury at work. Then, he woke up the next day and the pain was worse. He couldn't recall one specific thing he was doing when the pain at work started. He testified that when he told the emergency room doctor that he awoke with the pain, he knew his neck had hurt him the day before, but the current level of pain was worse when he awoke.

6. Claimant returned to work on October 1, 2000. Upon his return, Claimant said he gave a light-duty note to the Employer. The medical records do not show that a light-duty note was issued, and the Employer representatives testified that they do not have a record of it. Claimant testified that when he went back to work, he also had a tire-lifting incident related to his neck. On this day he felt a pop in his neck while putting a tire up. He felt pinching, burning, pain and numbness in his left upper extremity.7. Because of this pain, he went back to the Kent General Hospital emergency room on the same day (October 1st) and saw Dr. Webb a second time. The records show that Claimant experienced pain in the left arm with numbness in the thumb, but Claimant did not mention the tire-lifting incident. He had occasional neck

pain with shooting pains up the midline of the posterior neck. Once again, Dr. Webb's medical report stated that there is no history of trauma, stress, strain or overuse to explain any of this. Claimant simply woke up with this discomfort on September 18, 2000. Claimant was referred to a neurologist by Dr. Webb.

8. On October 5, 2000, Claimant presented to Dr. Leitzinger at Kent Medical Care because he was not getting pain relief with the prescriptions from the emergency room. Dr. Leitzinger's records show that symptoms initiated, without trauma, on September 25, 2000. Dr. Leitzinger referred Claimant to Dr. John B. Coll.

9. On October 6, 2000, Claimant saw Dr. Coll for an initial consultation. Dr. Coll's records state that Claimant's symptoms started abruptly upon awakening about two weeks ago, and have been increasing steadily since. Claimant had severe pain that started at the left side of his neck, shoulder, shoulder blade area and into his left upper arm, with numbness and paresthesia in his left hand and forearm. Dr. Coll ordered an MRI which showed a large disk herniation to the left at the C5-6 level, as well as degeneration at several other disk levels which was more advanced than what would be expected for a thirty-three year-old man. Dr. Coll took Claimant out of work at this time.10. Claimant again saw Dr. Coll on October 30, 2000. There was no change in Claimant's condition. Dr. Coll advised Claimant that the herniated disk at C5-6 must be excised if Claimant were to experience improvement. Surgery is currently scheduled for June 6, 2002, at St. Francis.

11. On November 7, 2000, Claimant saw Dr. Coll a third time. At this visit, Claimant noted some improvement in his pain and he informed Dr. Coll of specific dates concerning the development of his symptoms. Specifically, Dr. Coll's November 7th records show that Claimant reported he felt a pulling sensation, stiffness, and pain in his neck on September 16th while working. Claimant stated to Dr. Coll that he went to the front office at work and told his boss's wife (Lynn Limpert) about these symptoms. She then gave him some liniment to put on his neck. The next day Claimant woke up with pain radiating into the left arm and shoulder.

12. On January 3, 2001, Claimant filed a Petition to Determine Compensation Due seeking total disability and medical expenses from "on or about September 26, 2000." On May 16, 2001, a hearing was held before the Board. 13. Dr. Coll testified for the Claimant, based upon his examinations of the Claimant as well as a review of the medical records. He opined that the disk herniation at C5-6 is related to Claimant's work activities at Scotti Muffler.[1] He thought that, although Claimant has some disk degeneration a bit more advanced than he would expect a thirty-three-year-

[1] Defendant asserts that "a plain reading of Dr. Coll's deposition indicates that he had absolutely no detailed understanding of what the claimant did, from a physical standpoint, during his employment at Scotti Muffler." However, the testimony of Dr. Coll (as well as corroborating testimony of Claimant and Scotti Muffler President, Charles Limpert) provides relevant evidence that a reasonable mind might accept as adequate to show that Dr. Coll did understand the nature of Claimant's work. Dr. Coll testified:

> I know that [Claimant] trained as a mechanic, that he did some general cleanup work, that he did some overhead work dealing with the mufflers, that he also had to take the mufflers and lift them and/or throw them above, over into a dumpster. And he did some general cleanup work and lifted things, tires, and that kind of thing also.

old man to have, the overhead work (lifting and throwing things above the level of his head) put strain on the disk in the neck. Due to this strain, Claimant's symptoms manifested in mid-September. He had an additional, severe increase in symptoms after the October 1st tire-lifting incident. Dr. Coll believed Claimant exacerbated the condition which manifested in September. Dr. Coll related that Claimant's treatment to date, as well as the future surgery, has been reasonable and necessary and is related to the injury complained of in September 2000.14. Dr. Spieker testified for the Employer. He agreed with the diagnosis of Claimant's medical condition reached by Dr. Coll. Dr. Spieker does not dispute the reasonableness and necessity of Claimant's treatment so far, or the need for surgery. Dr. Spieker believes Claimant's symptoms are more consistent with a degenerative condition, and does not believe that Claimant's work activities put him at any higher risk for the occurrence of this disk herniation. Regarding the susceptibility of muffler installers or tire installers to neck injuries, Dr. Spieker testified that there is no documentation that these professions have an increased risk based upon their job duties.

15. Dr. Spieker performed a defense medical evaluation on March 17, 2001. Claimant brought a typed history of his symptoms, and Dr. Spieker also took an oral history. Dr. Spieker testified that he did not recall Claimant specifically saying the neck was bothering him prior to September 27th, nor did Claimant tell Dr. Spieker that he applied cream to the neck at work. These specifics were in the written document Claimant brought with him.

16. Dr. Spieker testified that disk herniations can be caused by trauma or they can be non-traumatic or degenerative. It was his opinion that the common progression of a degenerative disk herniation is first manifested with vague, intermittent neck pain. Pain may last for a while. It may go away for a few days, a few months, a few weeks, a few years. Then it may progress again. It is more common that somebody has intermittent neck pain over a varying amount of time, rather than an acute episode without trauma, but he has seen both circumstances.

17. Dr. Spieker could not state with medical probability that the tire-lifting episode in October caused Claimant ˛s injury. On the other hand, he could not say with medical probability that the injury was going to happen anyway, without this incident. Dr. Spieker testified that it is possible that the tire-lifting incident aggravated Claimant ˛s injury; however, it was also possible that the symptoms were going to go away on their own. He did not think that one could give an opinion either way, based on medical certainty.18. The Board accepted the testimony of Dr. Coll over the testimony of Dr. Spieker and found that the Claimant had met his burden to prove that his work activities, or a work accident, caused his neck injury. The Board stated:

> Dr. Coll believes that Claimant ˛s work activities and, in particular, the tire-lifting incident stressed his cervical disks to a degree that caused the herniation. Dr. Spieker, on the other hand, believes that the herniation occurred as a natural result of the

> degenerative process. . . . [T]he Board accepts Dr. Coll's opinion over that of Dr. Spieker.[2]

II. CLAIMS OF THE PARTIES

19. The sole issue raised by the Employer on appeal is a purported lack of substantial competent medical evidence on the issue of causation. Employer argues that there was no substantial evidence to provide a foundation for Dr. Coll's testimony in order to establish a causal relationship between Claimant's medical condition and his employment; therefore, the Board erred as a matter of law when it ruled that Claimant's injury was compensable. In contrast, Claimant argues that there was substantial competent medical and non-medical evidence sufficient to support the award, and the Board's Decision should be affirmed.

III. STANDARD OF REVIEW

20. "The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency."[3] The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence[4] which is defined as evidence "a reasonable mind

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[2] Bd. Dec. at 7.

[3] Stoltz Management Co. V. Consumer Affairs Bd., Del. Supr., 616 A.2d 1205, 1208 (1992); General Motors Corp. v. Freeman, Del. Supr., 164 A.2d 686, 688 (1960).

[4] Freeman at 688; Johnson v. Chrysler Corp., Del. Supr., 213 A.2d 64, 66-67 (1965).

might accept as adequate to support a conclusion."[5] 21. It is within the Board's discretion to accept the testimony of one expert over another when their testimonies are conflicting but supported by substantial evidence.[6] It is the exclusive province of the Board, rather than the Court, to reconcile inconsistent testimony,[7] to resolve conflicts in testimony and to decide which witnesses are credible.[8] This Court does not weigh evidence, determine questions of credibility or make its own factual findings.[9] It merely determines if the evidence before the Board is legally adequate to support the factual findings.[10] However, the Court's review of questions of law is de novo.[11]

IV. DISCUSSION

22. In a workers' compensation case the Board must determine whether there is a proximate cause between the employee's work and the employee's

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[5] Oceanport Ind. v. Wilmington Stevedores, Del. Supr., 636 A.2d 892, 899 (1994); Battista v. Chrysler Corp., Del. Super., 517 A.2d 295, 297 (1986), app. dism., Del. Supr., 515 A.2d 397 (1986); Olney v. Cooch, Del. Supr., 425 A.2d 610, 614 (1981).

[6] Goicuria v. Kauffman's Furniture, Del. Supr., No. 485, 1997, 1998 WL 67720 (Feb. 5, 1998) (en banc) (ORDER); Coleman v. Dept. of Labor, Del. Super., 288 A.2d 285, 287 (1972).

[7] Simmons v. Delaware State Hosp., Del. Supr., 660 A.2d 384, 388 (1995).

[8] Johnson at 66.

[9] Id.

[10] 29 Del. C. § 10142(d).

[11] Duvall v. Charles Connell Roofing, Del. Supr., 564 A.2d 1132 (1989).

injury.[12] The origin of a compensable injury, or its proximate cause, may be established under the "substantial factor" test or the "but for test," depending upon whether or not there was an identifiable accident.[13]

23. In the case sub judice, the Employer argues that Dr. Coll had no basis, no foundation, for his medical opinion because his theory of causation is based on Claimant's untrue and "modified" medical history. It is Employer's position that once Claimant found out that he did not have medical benefits he manipulated the record, after November 7th, in order to get workers' compensation. Employer states:

> It is patently obvious that the claimant simply manipulated the history of the onset of this problem in order to support his subsequent claim for workers' compensation benefits. And it was this manipulated history that formed the basis of Dr. Coll's opinions.[14]

24. Under Employer's theory, if Dr. Coll relied on anything other than written medical records prior to November 7, 2000, in order to form his opinion as to

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[12] Id.; State v. Steen, Del. Supr., 719 A.2d 930, 934 (1998).

[13] Steen at 934; Duvall at 1136 (standing for the proposition that "substantial factor" analysis is used when the ordinary stress and strain of employment may aggravate a pre-existing condition, but there is no identifiable industrial accident; on the other hand, when there is a distinct, identifiable industrial accident that allegedly causes the onset of symptoms, a "but for" test is used to determine compensability of any resultant injuries).

[14] Emp. Op. Br., Arg.

causation, such opinion is speculative. Employer considers all statements of Claimant made on or later than November 7th, as well as his testimony at the hearing regarding the events of causation, tainted and unreliable. Furthermore, it is alleged that such statements are irreconcilable with early medical reports.

25. As Employer sees it, "the" medical evidence of causation in this case consists only of the written medical records before November 7, 2000. Employer states that:

> this is not a case where the history was either not taken or was confused. The initial medical records from BayHealth Medical Center, as well as the initial records from Dr. Coll make it abundantly clear that detailed information concerning the history was, in fact, requested, and was, in fact, given. The later history didn't become clearer. It completely changed.[15]

26. The Employer certainly had the right to present its theory to the Board regarding the alleged modifications in the medical history. It is also obvious that the Claimant had the right to respond to Employer's concerns, and to present evidence rebutting Employer's theory.

27. The important point, however, is that the function of reconciling inconsistent testimony, or determining credibility is exclusively reserved for the

[15] Id.

Board.[16] In this case, it does not matter if the Employer believes that Claimant's testimony cannot be reconciled with his initial medical records, or if the Employer thinks that the initial medical records are the only believable evidence of causation. The resolution of this conflict remained solely within the province of the Board. It is exclusively the Board's role to resolve conflicts in the testimony and to weigh the credibility of each witness.[17] The Board's decision may not be disturbed by this Court absent an abuse of discretion.[18] This Court will not weigh the evidence or determine the credibility of witnesses.[19]28. In the present case, Dr. Coll and the Board were able to reconcile Claimant's testimony after November 7th with his initial medical records. Neither the Board or Dr. Coll felt that Claimant had changed his medical history. Rather, they concluded that he had only supplemented it. From the facts in the record, this Court cannot say that it was an abuse of discretion for the Board to hold, as it did, that Claimant was more concerned with getting pain relief at the time of his initial treatment than providing an accurate history.

29. Dr. Coll testified that Claimant was in a great deal of pain and was focused on getting relief, initially. After the pain eased up somewhat (as noted in Dr.

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[16] Simmons at 388.

[17] Branum v. Franklin Co., Del. Supr., No. 394, 1993, 1994 WL 175599, Walsh, J. (Apr. 29, 1994)(ORDER).

[18] Simmons at 388.

[19] Disabatino Bros., Inc. v. Wortman, Del. Supr., 453 A.2d 102, 106 (1982); Johnson at 66.

Coll ˛ s record of the November 7th visit), Claimant provided Dr. Coll with more details about the exact origination of his symptoms. Dr. Coll also noted that it is not unusual for a patient to view the acute episode as the initiation of the injury, and to disregard or not understand the significance of lesser symptoms prior to the acute onset; therefore, he may not have recognized or reported the initial symptoms as causative of the acute episode.

30. This is a plausible explanation of Claimant ˛ s initial statements if the Board found him a believable witness. Claimant could honestly say he was not aware of any unusual stress, trauma, or over-use to cause the type of pain he experienced upon awakening. He may have thought he had just been doing his regular job. He didn ˛ t consider that to be ˆ over-use, ˘ ˆ unusual ˘ or ˆ traumatic ˘ activity. The day before he had been feeling pain and stiffness, not the extremely bad pain that brought him into the emergency room.31. Causation is an issue ˆ where medical evidence may be supplemented by other credible evidence. ˘ [20] ˆ [L]ay testimony can bolster uncertain medical evidence on the issue of causation. ˘ [21] The Board could consider the Claimant ˛ s testimony as evidence of causation if it found, as it did here, that his testimony was ˆ credible and consistent. ˘ [22]

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[20] Street v. State, Del. Supr., 669 A.2d 9, 12 (1995).

[21] Custom Iron Shop v. Roxbury, Del. Super., C.A. No. 99A-03-014, 1999 WL 743307 at *2, Barron, J. (Aug. 6, 1999) (ORDER).

[22] Id.

32. Testimony in the record established that the Employer considered Claimant to be an excellent employee with a good work ethic. The Board heard the Claimant's testimony and adjudged him to be a credible witness, howbeit a poor historian. Even the initial medical records, upon which the Employer wishes to rely, verify the Board's conclusion that Claimant was a poor historian. For example, On October 1, 2000, Claimant saw Dr. Webb and told him that his symptoms started about September 18, 2000. Four days later, on October 5, 2000, Claimant reported to Dr. Leitzinger that symptoms initiated on September 25, 2000. Also, Claimant and Lynn Limpert both testified that Claimant experienced symptoms at work prior to September 27, 2000; however, when Claimant saw Dr. Spieker on March 17, 2001, he did not mention any symptoms prior to September 27th. 33. The Claimant has the burden of establishing a work-related injury and the extent of the injury. In the instant case, the Board found that Claimant established compensability for his injuries under either a "substantial factor" test or a "but for" test of causation. Substantial competent medical and non-medical evidence exists in the record to support the Board's finding that Claimant's work was a substantial factor in causing Claimant's injuries.[23]

> The substantial factor standard of proximate cause permits the employee to recover in the absence of an identifiable accident, notwithstanding a pre-existing condition, if the employee can demonstrate through expert testimony that his or her ususal

[23] Therefore, the Court does not reach the "but for" theory of causation also set forth by the Board.

> employment was a material element and a substantial factor in bringing it about.
>
> Conversely, the employee ˛s injury is not compensable, if the employer can demonstrate through expert medical testimony that the injury would have been sustained by the employee, even in the absence of the usual stress and strain of his or her employment.[24]

34. Claimant demonstrated through the expert testimony of Dr. Coll that his usual employment was a material element and a substantial factor in bringing about the disk herniation. The Board, properly accepted the testimony of Dr. Coll on the issue of causation, because his opinion was supported by substantial competent evidence of causation as set forth above. 35. Dr. Coll testified that, in his medical opinion, the disk herniation is related to Claimant ˛s activities working at Scotti Muffler. He stated that although Claimant had some disk degeneration a bit more advanced than he would expect in a thirty-three-year-old man, he still believed that the overhead work—lifting, throwing things above the level of his head—put strain on the disk in the neck, bringing about the initial symptoms which manifested before the tire-lifting incident on October 1st. Dr. Coll thought that the tire-lifting incident, also occurring in the usual course and scope of Claimants employment, exacerbated Claimant ˛s already-manifested work-related condition.

[24] Steen at 935 (citations omitted).

36. Conversely, the Employer could not demonstrate, through expert medical testimony, that Claimant's injury would have been sustained by the employee anyway, even in the absence of the usual stress and strain of his employment. In fact, Dr. Spieker testified that it was possible that the tire-lifting episode aggravated Claimant's condition. He said it was also possible that the pain Claimant was experiencing was going to go away. He could not give a medical opinion either way.

37. Under Steen/Duvall, Claimant established that his usual working conditions were a substantial factor causing his heretofore asymptomatic, pre-existing condition to develop into a frank herniation. Employer's expert did not establish that the injury would have happened even in the absence of the employment.

For the foregoing reasons, the Decision of the Industrial Accident Board is AFFIRMED.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution