IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BARRETT BUSINESS SERVICES, INC D/B/A ENTERPRISE MASONRY,	)	
	)	
Employer-Below/Appellant,	)	
	)	
v.	)	
	)	**C.A. No. N18A-05-005 CEB**
ROBERT EDGE	)	
	)	
Claimant-Below/Appellee.	)	

Submitted: January 29, 2019
Decided: May 1, 2019

MEMORANDUM OPINION

Upon Consideration of Appeal
from the Industrial Accident Board.
REVERSED and REMANDED

William D. Rimmer, Esq., Heckler & Frabizzio, 800 Delaware Avenue, Suite 200, P.P. Box 128, Wilmington, DE 19899. Attorney for Employer-Below/Appellant.

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BUTLER, J.

INTRODUCTION

Claimant Robert Edge ("Claimant") was an employee of Enterprise Masonry ("Employer") for 12 years.[1] On May 11, 2017, at approximately 8:45 a.m., Claimant was erecting scaffolding at a work site when he fell off the back of a scaffold to the ground, a distance of 6'7".[2] It does not appear there were any eyewitnesses to the fall, but Claimant was able to stand, walk and told others he had hurt his left hip. The safety glasses he was wearing caused a cut under his left eye.

Enterprise Masonry was a subcontractor on the jobsite. The general contractor was EDIS Construction. EDIS had a safety officer on site. When the safety officer was apprised of the fall, he decided that the appropriate course was to call for an ambulance and have Claimant checked out at the hospital.

Even before his fall, Claimant was not a healthy man. He was a long term tobacco smoker and had a long history of high blood pressure. The Employer's expert witness noted evidence of a number of mini-strokes that had gone untreated.[3]

Upon arrival at the emergency room at approximately 10:25 a.m., Claimant's high blood pressure was noted and some remedial measure was undertaken – exactly what is not clear from the record. In addition, the cut on Claimant's cheek caused

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[1] *Robert Edge v. Barrett Business Service, Inc., d/b/a Enterprise Masonry*, No. 1463402, at 18 (Del. I.A.B. Apr. 19, 2018).

[2] *Id.* at 19.

[3] Id.

by the safety glasses was stitched. At some point during the stitching – at approximately 12:45 p.m., or 4 hours after the fall – Claimant had a "TIA," a transient ischemic attack, or "mini-stroke." The attack lasted only seconds, but was witnessed by the medical professionals in the room. It was thereupon decided to undertake more aggressive measures to reduce Claimant's blood pressure. The hospital administered a tissue plasma activator, "TPA," or clot buster to the Claimant.

We will discuss the battle of the competing experts in this case presently. But what the experts did agree on is that the intravenous medication intended to reduce Claimant's blood pressure following the TIA caused a "rapid reduction, from 210 to 150, further starved the Claimant's brain of blood and severely exacerbated the stroke."[4] As the Board explained Claimant's expert's testimony, "Because of the chronic nature of the high blood pressure, the body had taken some steps to adapt to the higher pressure and now you have a rapid and significant drop off."[5] The Board said "there was already a problem with the blood flow to the brain and now they reduced it even further consequently increasing the effects of the stroke."[6]

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[4] *Robert Edge v. Barrett Business Service, Inc., d/b/a Enterprise Masonry*, No. 1463402, at 22 (Del. I.A.B. Apr. 19, 2018).

[5] *Id.* at 4.

[6] *Robert Edge v. Barrett Business Service, Inc., d/b/a Enterprise Masonry*, No. 1463402, at 4 (Del. I.A.B. Apr. 19, 2018).

The record reflects that Claimant was eventually brought to surgery at about 6 p.m. and it was noted that two of his cerebral arteries were substantially occluded. While the surgeon was able to remove the clots sufficient to implant stents and improve blood flow, Claimant had suffered substantial effects from the stroke and became completely disabled.

PROCEEDINGS BEFORE THE BOARD

The central players in the proceedings before the Board were two expert witnesses, one for each side, both testifying by deposition. For the Claimant, neurologist Dr. John Townsend testified; the Employer's expert was neurosurgeon Dr. Stephen Fedder. While there was very little dispute as to the facts, the two came to opposite conclusions as to their meaning.

The Claimant's expert had two different theories to explain the relationship between the accident and the stroke. Borrowing heavily from research papers supplied to him by Claimant's counsel, Dr. Townsend offered that there is evidence to support the proposition that strokes can be caused by trauma to the carotid artery. The stroke here originated in the left carotid artery, which is the side on which Claimant fell.

The second theory propounded by Claimant's expert was that strokes may be caused by transient plaque that becomes displaced in one area and travels to another artery that is already partially occluded and this new, additional plaque is just enough

to close off the arterial blood flow and trigger a stroke. There was indeed some evidence of non-calcified plaque in the carotid artery at the time the surgeons performed the thrombectomy at approximately 6 p.m. that evening.[7]

The Employer's expert conclusion proceeded from the fact that Claimant was in very poor health, with uncontrolled hypertension and a demonstrable history of previous mini-strokes that had been untreated. The stroke he suffered in the hospital ER was simply coincidental with his fall earlier in the day. While the intravenous effort to control his runaway blood pressure by the TPA was within the standard of care, his blood pressure was a long standing health problem that Claimant had not treated and this was the cause of his stroke, not his fall from the scaffold.

Thus, at least three choices were presented to the Board by the expert testimony: 1) the stroke was a coincidence, unrelated to the fall, 2) the fall caused trauma to the carotid artery itself, which caused a stroke, or 3) embolic, non-calcified plaque was loosened by the trauma of the fall, travelled to the carotid artery and was the proverbial straw that broke the camel's back, causing the stroke.

In its findings, the Board noted that the experts agreed that the intravenous TPA injection dramatically magnified the results of the stroke. But in attempting to reconcile the opposing expert opinions on causation, the Board sidestepped endorsing any of them, ruling instead that, "The fact that Claimant's hypertension

[7] Townsend Dep., p. 19–20.

was a pre-existing condition, latent or not, does not matter, he was in the hospital being treated for injuries related to the fall at work. Simply put, but for the work accident Claimant would not have been in the Emergency Room that day ultimately getting treated for hypertension."[8] The Board ruled that the stroke was a work related injury and awarded compensation to the Claimant.

ANALYSIS

The Court well appreciates the difficult factual question placed before the Board in this case. Strokes surely arise from any number of factors and assigning causation to any one is quite problematic. On the other hand, the Board's task is not so daunting: its duty is discharged if it can conclude that the workplace accident was even one cause "but for" which the stroke would not have occurred.[9] The Board found Claimant's expert, Dr. Townsend to be the more credible of the two experts. This was certainly within the Board's prerogative to do.[10]

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[8] *Robert Edge v. Barrett Business Service, Inc., d/b/a Enterprise Masonry*, No. 1463402, at 22 (Del. I.A.B. Apr. 19, 2018).

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

[10] *Steppi v. Conti Elec., Inc.*, 2010 WL 718012 at *3. ("It is well-settled law that the Board may accept the opinion testimony of one expert while summarily disregarding the opinion testimony of another expert.").

The Employer has argued on appeal that the Board ignored the "timeline" of the Claimant's experience in the emergency room. Employer argues that the Claimant came in for stitches to his eye and x-rays to the injuries to his hip and shoulder and it was only while getting his eye stitched, some 2 hours after arrival at the ER and 4 hours after his fall, that he developed evidence of a stroke. From there, Employer argues, Claimant's treatment and the causes for the treatment bifurcated into 1) treatment for his fall and 2) treatment for an unrelated mini-stroke that he happened to have in the hospital.

The Employer's argument assumes that the stroke was unrelated to the fall, the central question put to the Board. In its decision, the TIA and its treatment with TPA were simply shoveled in with the rest of the treatment for Claimant's direct injuries. The Board made no finding whether the TIA was caused by the workplace accident, ruling instead that "but for the work accident Claimant would not have been in the Emergency Room that day ultimately getting treated for hypertension."[11] That statement simply begs the question whether the treatment for hypertension was related to the workplace accident.

[11] *Robert Edge v. Barrett Business Service, Inc., d/b/a Enterprise Masonry*, No. 1463402, at 22 (Del. I.A.B. Apr. 19, 2018).

The Board credited the testimony that the Claimant's blood pressure increased temporarily as a result of the accident, a finding that has some support in the record.[12] But the Board did not relate the increase in blood pressure to the mini-stroke and, so far as is apparent in the record, neither did Claimant's expert. Perhaps the Board's expertise in workplace injuries made some facts so obvious they did not need stating, but the Board may not rely on its own expertise in the face of expert witness testimony.[13]

Likewise, the Board found that the administration of TPA caused a dramatic drop in blood pressure, which caused dramatic effects on the stroke. But the Board did not make a finding whether and how the administration of the TPA was a result of the accident. Indeed, the Board made no specific finding, opting instead to make a broad finding that because Claimant was in the ER from a workplace injury, treatment for blood pressure and administration of TPA was a result of the workplace injury, by-passing the testimony that the TPA was administered in response to the mini-stroke.

The Court does not presume that the Board intended to set new precedent making the Employer the general health insurer of its employees. But in order to

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[12] *Id.*; Townsend Dep., pp. 27 and 46.

[13] *See generally Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d. 1214 (Del. 1998) (Board may not substitute institutional or administrative experience for medical testimony).

sustain the Board's ruling, a reviewing Court must be able to see that the Board has found that "but for" the workplace accident, the stroke and its aftermath would not have occurred. There was at least some expert testimony that this was true, but in adopting the broad approach that it did, the Board did not rely on these expert theories.

The Court is therefore not convinced it has a record before it capable of review on appeal.

At the risk of further complicating the matter, it may be useful to consider the variety of positions taken by the experts. Claimant's expert offered two separate and distinct theories of causation but the evidence supporting either theory was perhaps somewhat less than compelling. On the other hand, both theories were supported by some evidence and they were not mere guesswork. This ambiguity calls to mind a line of cases in the area of worker's compensation law dealing with just such difficulty.[14]

The Board here was presented with at least 2 proposed explanations for why and how the stroke in this case was caused by the accident. Perhaps they were not

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[14] *See, e.g., General Motors Corp. v. Freeman,* 164 A.2d 686 (Del. 1960) (competing experts testifying to the cause of a detached retina; evidence of a possible cause within scope of employment may be sufficient when supplemented by other evidence showing injury directly after the trauma); *Jepsen v. University of Delaware-Newark*, 2003 WL 22139774 (Del. Super. Aug. 23, 2003) (expert testimony that injury is "consistent with" or "could have" resulted from workplace injury, considered with other evidence, may be sufficient). *Accord., Steppi v. Conti Elec., Inc.*, 991 A.2d 19 (Del. Mar. 16, 2010) (TABLE).

posited with the kind of certainty that might accompany, say, a broken arm caused directly by a fall. But the Board did not rely upon the expert findings. In ruling in the broadest terms possible that the accident caused the employee to go to a hospital where he was treated for high blood pressure, the Board effectively broadened the liability of the employer to that of general insurer and ignored the basic question of causation of the stroke.

That cannot abide.

In sum, a holding that the Employer must pay compensation for any treatment that occurs in a hospital after a workplace injury is inconsistent with the Worker's Compensation law. The mere fact that the condition was discovered at the same time does not equate to but for causation. On the other hand, expert opinion on causation coupled with other evidence has been found sufficient in a number of cases.

The Claimant in this case may be deserve the compensation ordered in the Board's prior decision. By this Opinion, the Court does not mean to suggest that he is not. The Court remands only because the Board's decision does not articulate findings on causation sufficient to allow the reviewing Court to engage in appellate review of its findings. On the other hand, the Board may determine that it must hear more testimony before it can make its findings on causation. Therefore, the Court

REVERSES the Board's ruling and **REMANDS** for such further proceedings as the Board may deem necessary consistent with this opinion.

IT IS SO ORDERED.