IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PATRICIA JEPSEN,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 02A-11-003 HDR
	)	
UNIVERSITY OF DELAWARE - NEWARK, and INDUSTRIAL ACCIDENT BOARD,	)	
	)	
Appellees.	)	

Submitted: June 4, 2003
Decided: August 28, 2003

Walt F. Schmittinger, Esq., Dover, Delaware, for Appellant.

David G. Culley, Esq., Wilmington, Delaware, for Appellee.

Upon Appeal from a Decision of the Industrial Accident Board
REVERSED & REMANDED

RIDGELY, President Judge

This is the appeal of Claimant Patricia Jepsen ("Jepsen") from a decision of the Industrial Accident Board ("Board") denying her Petition to Determine Additional Compensation Due following a compensable industrial accident incurred while in the service of her employer, the University of Delaware. Having considered the parties' briefs and the record below, the Court concludes that the Board made errors of law which require reversal and remand of this case to the Board.

A. Background

Jepsen worked as a telephone operator for the University of Delaware from February 1995 until January 2000. In her job, she frequently cradled the telephone with her shoulder while typing, which caused increasing numbness in her right arm and pain in her neck. On January 13, 2000, she awoke with severe pain to her neck. She was hospitalized and diagnosed with large herniations of three discs in her neck which were displaced to the right at C4-5, C5-6, and C6-7. Jepsen underwent a discectomy with fusion and plating from C4 through C7 on January 16, 2000.

Jepsen returned to work on March 6, 2000 and was released from care by her surgeon, Dr. Koyfman, on June 28, 2000. On her original petition for compensation, the Board determined that Jepsen's work environment was a substantial cause of her cervical injury and awarded total disability benefits for the period of January 13 through March 6, 2000, medical expenses in the amount of $24,864.49 as well as attorney's and medical witness fees.[1]

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[1] Board Decision of May 20, 2002 at p. 9-10.

Initially upon her return to work, Jepsen worked half days at her former position as an operator, but transferred to the geography department because her former work as an operator was too hard on her neck. During the year she was able to work in the geography department, she had a gradual worsening of the neck pain and headaches.[2]

In the Spring of 2001, Jepsen sought medical care from her primary care physicians for headaches and chronic neck and shoulder pain.[3] On August 24, 2001 Jepsen returned to Dr. Koyfman with head, neck, and left arm pain and reduced appreciation to pinprick in her entire left upper extremity.[4] Jepsen's final visit with Dr. Koyfman was on August 31, 2001, at which time he took her out of work,[5] ordered labwork, and referred Jepsen back to her primary physician. Jepsen has been out of work since that time.

Jepsen filed a Petition to Determine Additional Compensation Due on the appropriate Board form[6] seeking total disability under 19 *Del. C.* § 2324, displaced

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[2] Board Decision of November 8, 2002 at p. 2.

[3] Board Decision of November 8, 2002 at p. 3.

[4] Board Decision of November 8, 2002 at p. 5.

[5] Hearing Transcript at p. 67 and Claimant's Ex. 4.

[6] *See* Rules of the Industrial Accident Board for the State of Delaware, CDR 65-400-011 (2003), Rule 6(A), (hereinafter "Board Rule").

> No formal pleading or formal statement of claim or formal answer shall be required of any party to any action before the Board, but each person making written request for a hearing shall file with the Department, on forms to be furnished by the

(continued...)

worker status, medical and transportation expenses, and medical witness and attorney's fees based on a cumulative detrimental effect theory with disability beginning January 13, 2000.[7] The Board found that Jepsen did not meet her burden of proof and denied her petition in a decision November 8, 2002. Jepsen asserts two grounds for appeal: first, that the Board erred in finding that Jepsen did not suffer a recurrence of her work related injury, and second, that the Board refused to address medical bills associated with Jepsen's surgery that remain unpaid despite being determined compensable by the Board's May 20, 2002 decision.

B. Standard of Review

This court's role in reviewing a decision of the Board is to determine whether the decision is supported by substantial evidence and is free from legal error.[8] Substantial evidence has been defined to mean, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] This Court does not weigh the evidence, determine questions of credibility, or make its own

[6](...continued)
Department, a statement giving substantially the information requested on said forms.

[7] Pre-Trial Memorandum dated July 31, 2002.

[8] 29 *Del. C.* § 10142(d); *General Motors v. Freeman,* 164 A.2d 686, 688 (Del. 1960).

[9] *Olney v. Cooch,* 425 A.2d 610 (Del. 1981), *quoting Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966).

factual findings.[10]

C. Discussion

The Board, in determining that Jepsen had not met her burden of proof, disregarded the opinions of Jepsen's three treating physicians, Drs. Koyfman, Nisnisan, and Sommers, in favor of employer's physician, Dr. Fink.[11] Treating physicians have great familiarity with a patient's condition and their opinions should be given "substantial weight."[12] However, as finder of fact, the Board is entitled to discount the testimony of any witness on the basis of credibility, provided it states specific, relevant reasons for so doing.[13]

In this case, the Board's stated reason for discounting the treating physicians' testimony was that the testimony did not "meet the legal standard of medical probability."[14] However, since 1960 the Delaware Supreme Court has consistently held that expert medical testimony in terms of "possibility" supplemented by other creditable testimony is sufficient to meet the claimant's burden of proof in worker's compensation cases.[15] Although opinions couched in terms of "probability" are

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[10] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965).

[11] Board Decision of November 8, 2002 at p. 16.

[12] *Diamond Fuel Oil v. O'Neal,* 734 A.2d 1060, 1065 (Del. 1999).

[13] *Turbitt v. Blue Hen Lines, Inc.,* 711 A.2d 1214, 1216 (Del. 1998), *citing Lemmon v. Northwood Constr.,* 690 A.2d 912 (Del. 1996).

[14] Board Decision of November 8, 2002 at p. 16.

[15] *See General Motors Corp. v. Freeman*, 164 A.2d @ 688-9.

preferable to opinions based on "possibility," the Court has specifically held that medical expert testimony that an injury is "consistent with" claimant's statements or "could have" resulted therefrom, when considered in light of all of the evidence, is "sufficient to establish the requisite causal connection" to sustain an award of worker's compensation benefits.[16]

The Board, therefore, has erroneously applied a higher legal standard for medical causation opinions than claimant is required to meet. The Board's stated rationale for discounting the testimony of the three treating physicians is therefore invalid. The decision then lacks relevant reasons that provide an adequate basis upon which the Board may disregard the opinions of qualified medical experts who were also treating physicians.

The Board's bolstering of the Employer's expert through use of the same erroneous legal standard ("Dr. Fink *properly* couched his opinions in terms of medical probability" emphasis added) was also error.

Without applying the appropriate legal standard for medical expert testimony, "the Board's factual findings cannot be the product of an orderly and logical deductive process, and the decision cannot stand."[17]

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[16] *Air Mod Corp. v. Newton,* 215 A.2d 434, 438 (Del. 1965); *see also State of Delaware v. Cephas,* 637 A.2d 20 (Del. 1994); *Diamond Fuel Oil v. O'Neal,* 734 A.2d 1060 (Del. 1999).

[17] *Walden v. Georgia Pacific Corp.,* 1994 Del. Super. LEXIS 335 (Del. Super. Ct.
(continued...)

D. The Medical Bills

The Board refused to address the compensability of the medical bills for Jepsen's hospitalization at the time of her surgery, which were determined to be compensable in the original Board decision of May 20, 2002. The sole reason given was that the "surgery was not an issue before the Board...as it was addressed during the prior hearing in May 2002."[18]

An issue is before the Board if it is the subject of a petition submitted to the Board or is appropriately noticed at the Pretrial Hearing.[19] An issue is not properly before the Board if the opposing party was not given proper notice of the issue prior to the hearing.[20]

In this case, Jepsen filed the appropriate Board forms to initiate the petition which indicated that she was seeking medical expenses with an onset of disability January 13, 2000. There is no limitation as to dates the expenses were incurred in the petition. Medical expenses are also placed at issue in the July 31, 2002 Pretrial Memorandum executed by the parties and the Board. Review of the Exhibits demonstrates that proper notice was provided to the employer, in that a demand

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[17](...continued)
1994), *citing Baker v. Board of Adjustment of Rehoboth Beach*, 488 A.2d 1303 (Del. 1985) (internal quotes omitted).

[18] Board Decision of November 8, 2003 at p. 17-18.

[19] *See* Board Rules No. 6 and 9.

[20] *General Motors Corp. v. Smith*, 1985 Del. Super. LEXIS 1001at *6 (Del. Super. Ct. 1985).

letter dated December 11, 2001 was sent to employer's attorney with the Christiana Care bill attached as Exhibit 19 of that letter. In addition, review of the hearing transcript shows that employer's position at the time of the hearing was that the bills had been paid. Employer did not raise improper notice or inappropriate presentation before the Board.

The Worker's Compensation Act provides claimants recourse at any time the employer and claimant cannot reach agreement on the amount of compensation or benefits.[21] The Board, upon notice from either party, "shall determine the matter in accordance with the facts and the law and state its conclusions of fact and rulings of law."[22] It is apparent that Jepsen and her employer are unable to agree on the payment of these medical expenses, despite the fact that the bill was ordered compensable in the May 20, 2002 decision. Jepsen properly included medical expenses in her Petition before the Board, and medical expenses were placed at issue in the Pretrial Memorandum. The employer was given adequate notice that the bill was at issue prior to the hearing. The Board, therefore, erred in its refusal to consider the medical expenses at issue.

For the foregoing reasons, the decision of the Industrial Accident Board denying Jepsen's Petition to Determine Additional Compensation is hereby **REVERSED**, and the case is **REMANDED** for further proceedings consistent herewith.

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[21] *See* 19 *Del. C.* § 2345.

[22] *Id.*

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August 28, 2003

/s/ Henry duPont Ridgely
President Judge

oc: Prothonotary
xc: Order Distribution