IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DUPONT HOSPITAL FOR CHILDREN,	)	
	)	
Employer-Appellant,	)	
	)	**C.A. No. 00A-09-012 WCC**
v.	)	
	)	
DEBRA A. PATTIE,	)	
	)	
Employee-Appellee.	)	

Submitted: February 1, 2001
Decided: May 24, 2001

O R D E R

Appellant DuPont Hospital for Children's Appeal from the Industrial Accident Board Decision. Affirmed.

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CARPENTER, J.

This 24th day of May, 2001, upon consideration of DuPont Hospital for

Children's (the "hospital") appeal from the decision of the Industrial Accident Board (the "Board"), the following findings have been made:

1. On April 8, 1997, Debra A. Pattie (the "Employee"), a nurse at DuPont Hospital for Children for over twenty years, injured her left knee during a work-related accident when she fell on a set of stairs.[1] As a result, she received workers' compensation benefits and subsequently filed additional compensation for permanent impairment to her left lower extremity and for approval for a proposed total left knee replacement. The Board held a hearing on August 10, 2000 and heard testimony from the Employee and deposition testimony from two medical experts: Dr. Craig D. Morgan, the Employee's treating physician, and Dr. David K. Saland, an expert testifying on behalf of the hospital. Agreeing with Dr. Morgan's recommendation, the Board found that the proposed surgery was reasonable, necessary, and causally related to the Employee's work accident.[2] However, the Board found that it was premature to make a permanent impairment award because the impairment had not become "fixed". The hospital appeals the Board's decision in its finding that the work

[1] The Employee explained that while she was carrying her infant son up stone steps to his day care, she tripped and fell on her knees.

[2] The Board also awarded attorney's fees and medical witness fees to the Employee.

accident necessitated the surgery and the weight given to Dr. Morgan's expert opinion.

2. This Court's standard of review for an appeal from a Board decision is to determine whether there was substantial evidence to support the Board's findings and conclusions.[3] The Court does not sit as trier of fact with authority to weigh evidence, determine questions of credibility, nor make its own factual findings and conclusions.[4] Weighing the evidence and determining questions of credibility, which are implicit in factual findings, are functions reserved exclusively for the Board.[5] Where the medical evidence is in conflict, the Board is free to accept the testimony of one expert over contrary opinion testimony, and the substantial evidence

[3] *DiSabatino Bros. Inc. v. Wortman*, Del. Supr., 453 A.2d 102 (1982).

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

[5] *Breeding v. Contractors-One-Inc*., Del. Supr., 549 A.2d 1102, 1106 (1988)*; Conner v. Wells Fargo*, Del. Super., C.A. No. 92A-11-006, Goldstein, J. (Oct. 4, 1994)(ORDER).

requirement would be satisfied.[6] Only where there is no satisfactory proof in support of a factual finding of the Board may this Court overturn it.[7]

[6] *Carpenter v. Mattes Electric*, Del. Super., C.A. No. 96A-07-005, Quillen, J. (Apr. 9, 1997)(Letter Op.) at 3.

[7] *Id*.

3. During the hearing, the Employee testified that prior to the accident, she never had any problems with her left leg[8]. About two weeks after the work accident in April 1997, she developed pain in her left knee and was eventually referred to Dr. Morgan in July 1997. She described Dr. Morgan's various procedures and treatments to alleviate her pain, which he administered over the next two to three years. These treatments either were unsuccessful or provided only temporary relief. She also described her limitations due to the pain, stating that she cannot wear sandals due to the lifts; she has to take stairs one at a time; she cannot go on vacations that require walking; and, she cannot play with her kids when they run outside. In addition, she stated that since the fall, she became a clinical information specialist, which is a desk job, because she physically could not do the job of a floor nurse. She also admitted that at the time of the fall, she weighed 225 pounds and that at the time of the hearing, she weighed 265 pounds. She acknowledged that a weight loss would be beneficial, but she stated that she has always had a weight problem, and because she is unable to exercise, it is more difficult to lose weight.

[8] **The Employee also testified that due to a childhood disease, she had a series of surgeries to correct a curvature on her right leg and wears a one-inch lift in her shoe to compensate for the two-inch right leg length discrepancy.**

Next, Dr. Morgan, an orthopedic surgeon and the Employee's treating physician, testified by deposition. He stated that he first saw the Employee on July 22, 1997 due to complaints of left knee pain after the fall in April 1997 and had not treated her prior to this injury. He stated that an MRI showed that she had a cartilage defect, in that the cartilage fell off the medial knuckle of the knee. As a result, in September 1997, he performed OAT surgery,[9] in which he transferred cartilage to the place where it fell out. In October 1997, he gave her a cortisone injection in her knee, and in December 1997, he stated that she developed some pes bursitis,[10] where he applied anti-inflammatory ointment. In March 1998, he testified that her pes bursitis returned and that he recommended arch supports, which would also benefit her abnormal right lower extremity. At the September 1998 visit, he noted that she reported an increase of pain in the left knee, and the MRI revealed avascular necrosis, where the bone loses its blood supply and dies. In February 1999, an arthroscopic procedure was done to determine whether the problem developed from scar tissue or avascular necrosis. He found that she had a large amount of scar tissue and removed it, but he also believed that she has a component of avascular necrosis. Despite the removal, he stated that she complained of increased pain within three months.

[9] OATS is an acronym that stands for osteochondral autograft transfer surgery.

[10] He explained that pes bursitis was where the hamstring tendons insert on the tibia

Eventually, he ordered synvisc injections,[11] which also proved unsuccessful. He ultimately recommended a total knee replacement and explained the reasons why:

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bone below the knee and a bursa helps lubricate the tendons, which causes pain in the knee.

[11] Dr. Morgan explained that synvisc is a new injectable substance with some anti-inflammatory properties that unloads the joint by acting like a hydraulic shock absorber. (Dr. Morgan's Dep. at 23-24.)

> Due to chronic pain, an MRI proven area of avascular necrosis, loss of cartilaginous clear space with diminishing space of hyaline cartilage. Also, in an individual that doesn't have -- that has all these other things, a weight problem, and an abnormal right lower extremity and limb length discrepancy.[12]

He further opined that her need for surgery was causally related to the fall in April 1997, and when asked whether the Employee's weight contributed to her impairment, he stated that "[i]t's a contributing factor in all of her lower extremity problems."[13]

He also stated that the Employee could lose over 100 pounds and while that would substantially unload the work on her knees, it would not make her avascular necrosis disappear since the bone was dead. He also stated that when she developed problems on her left side, which prior to the fall was her "good" leg, the abnormalities on the right side were also a contributing factor. When asked if he was aware of Dr. Saland's statement that the Employee did not have a limp, Dr. Morgan responded, "I don't put much credence into anything else that guy says when he says she has a normal gait pattern. She never will have a normal gait pattern until she addresses the problems in

[12] (Dr. Morgan's Dep. at 30-31.)

[13] (Dr. Morgan's Dep. at 45.)

both of her knees."[14] He stated that after knowing the Employee for three to four years, she "always, always, always has a limp."[15]

[14] (Dr. Morgan's Dep. at 36-37.)

[15] (Dr. Morgan's Dep. at 36.)

Dr. Saland, an orthopedist, who had not performed orthopedic surgery for 15 years, testified for the hospital by deposition. He testified that he saw the Employee on two occasions. He conducted an orthopedic examination on June 28, 1998 and stated that as a result of the accident on April 8, 1997, the Employee suffered from a contusion to the cartilage within the left knee. Because the Employee complained of pain in her left knee after she fell in April 1997, Dr. Saland opined that the accident contributed to her present condition and that she became symptomatic on April 8, 1997. He again examined the Employee on June 28, 2000. The Employee told him that after the surgery in February 1999, the pain never went away and that she had no leg pain when she sat, but if she stood, walked for a long period, or extended her leg, she would have pain. During this physical examination, he noted that "she was able to walk without a limp."[16] While he had no disputes or objections to the treatment that the Employee had received in Dr. Morgan's care, he further opined that she did not need a total left knee replacement, explaining:

> that the articular surface of the knee according to the operative notes is in good condition and that the patient's complaints are pain, and that without significant structural changes within the knee I don't consider her a good candidate for a total knee replacement at this time.[17]

[16] (Dr. Saland's Dep. at 18.)

[17] (Dr. Saland's Dep. at 20.)

He explained that the total knee replacement is typically performed when there has been unimprovable damage to the surface of the knee joint, i.e., the bones rub against one another because the cartilage is gone, and that the Employee's knee did not meet that criteria. He also stated that a significant weight reduction would likely relieve or at the least reduce her knee complaints since the excess weight puts more than the normal amount of wear and tear on the joints. But he stated that even with a weight loss of 100 pounds, he would not recommend a total knee replacement, explaining:

> It's been my experience and my understanding that to perform surgery for only a subjective complaint of pain is frequently not successful. If the complaint of pain is consistent with anatomic abnormality such as severe degenerative arthritis of the knee then the patient has a chance of having her pain relieved by resurfacing the knee. But where the surface of the knee is a good condition and the patient's primary complaint is of pain, in my opinion operating just to relieve the pain has a significantly diminished chance of success and based upon that I would not recommend it.[18]

4. First, the Court finds that the Board did not err in accepting the testimony of Dr. Morgan. In this case, it was a battle of the experts, and the Board accepted the expert opinion of Dr. Morgan. The Board is free to accept the medical testimony of

[18] (Dr. Saland's Dep. at 39-40.)

one expert witness over that of another,[19] and absent a clear error of law or fact, the Court will not interfere with the Board's credibility determination.

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

The hospital argues that Dr. Morgan's opinion regarding the proposed surgery did not come from reasoned consideration of all the pertinent factors, but instead came from his "off-the-cuff" guesses. The hospital appears to base its argument, not on Dr. Morgan's testimony regarding the need to perform the knee surgery, but on the doctor's initial permanency rating of 80%. It is this testimony, on an issue that is not even a subject of the appeal, that they argue should cause Dr. Morgan's entire testimony to be discounted. While Dr. Morgan admitted that his initial permanency rating was "off-the-cuff", this does not dictate that his entire deposition should be discounted as surmise and conjecture and thus unreliable. It clearly was not. In providing his initial rating to counsel, Dr. Morgan conditioned it by stating that it was "not to be an official permanency rating at this time"[20] and, in fact, Dr. Morgan subsequently provided an official permanency rating using the AMA standards.[21] The Court finds that Dr. Morgan's initial permanency statement did not cast a cloud of doubt over his entire testimony. At best, this argument is a desperate attempt by the hospital to create some reason to doubt the opinion given by a nationally

[20] (Dr. Morgan's Dep. at 34.)

[21] In his deposition, Dr. Morgan initially placed an 80% permanent disability on the Employee's left lower extremity and stated that it was based primarily on the amount of pain. He admitted that this rating was an "off-the-cuff number" and was not based on the AMA guidelines. However, after his most recent examination of the Employee on July 27, 2000, he changed his impairment rating to 30%, which was calculated according to the AMA guidelines. He further stated that this subsequent calculation was made without considering pain.

recognized expert, which contradicted their own doctor who only saw the Employee on two occasions, two years apart.

Contrary to the hospital's argument, there is no evidence that Dr. Morgan's recommendation was not generally accepted in the field. Prior to recommending the knee replacement, Dr. Morgan first tried to improve the Employee's condition with more conservative means, which all proved unsuccessful. Furthermore, while Dr. Saland may have disagreed with Dr. Morgan's recommendation and believed that the Employee was not a proper candidate for such a surgery, this does not render Dr. Morgan's opinion as unreliable or unaccepted. It only establishes that the experts have conflicting opinions, and the Board was free to resolve this conflict by accepting Dr. Morgan's opinion over Dr. Saland's opinion.

5. Having found that the Board did not abuse its discretion in accepting Dr. Morgan's opinion, the Court also finds that there was sufficient evidence presented to prove a causal nexus between the 1997 fall and the proposed total knee replacement surgery. While the hospital argues that the record contained no competent substantial evidence that the Employee's pain resulted from her fall or that her knee symptoms were caused by the fall, the Court finds these arguments completely meritless. Even though Dr. Morgan acknowledged that there were other contributing factors to the Employee's condition, the Court finds that the record contains sufficient evidence to

substantiate that the fall necessitated the proposed surgery. Both experts opined that the accident contributed to the Employee's present condition and that she became symptomatic on April 8, 1997. In addition, the hospital must take the Employee as they find her,[22] that is, in her overweight condition and with her lower extremity abnormalities. And even if the Employee lost a significant amount of weight, Dr. Morgan believed that it would not relieve her total pain since her avascular necrosis would remain present. Despite these contributing factors to her left knee condition, Dr. Morgan still concluded that the proposed surgery was causally related to the work-related fall in April 1997.[23] As such, the Court finds that there is substantial evidence in the record to support the Board's findings.

6. Based on the reasons set forth above, the decision of the Industrial Accident Board is AFFIRMED.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.

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

[23] *But cf. Jordan v. Sears Roebuck & Co.*, Del. Super., C.A. No. 95A-05-013, Silverman, J. (Nov. 29, 1995)(ORDER). *Jordan* is distinguishable to the present case. In *Jordan*, the Court affirmed the Board's finding that the employee's disability and surgery were not causally related to her fall at work. But, the expert testimony relied upon by the Board was that the disability and surgery were consequences of her pre-existing conditions and that the fall did not contribute to her knee problems. In the case sub judice, both experts agreed that the 1997 fall contributed to her present condition along with her pre-existing conditions.