IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PATRICK H. HINES,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No: 02A-12-004 RSG
	)	
DELAWARE RECYCLABLE PRODUCTS,	)	
	)	
Appellee.	)	

Submitted: July 22, 2003
Decided: October 1, 2003

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

Gary S. Nitsche, Weik, Nitsche & Dougherty, Wilmington, Delaware, Appellant.
Michael R. Ippoliti, Esquire, Wilmington, Delaware, for Appellee.

ORDER

Gebelein, J.

Patrick H. Hines ("Appellant" or "Claimant") is appealing a decision of the Industrial Accident Board ("IAB" or "Board") in which the Board denied Appellant's Petition to Determine Additional Compensation Due. Upon review of the parties submissions and the record below, the Court concludes that the Board's decision must be reversed.

NATURE AND STAGE OF THE PROCEEDINGS

On May 31, 2002, Claimant filed a Petition to Determine Additional Compensation Due with the IAB alleging that he injured his low back in a work-related accident while working for Delaware Recyclable Products on March 28, 2002. On November 19, 2002, a hearing was held by the Industrial Accident Board, before Worker's Compensation Hearing Officer Christopher Baum, pursuant to title 19, section 2301B(a)(4) of the Delaware Code.[1] A decision was issued on December 2, 2002, denying Claimant's petition. Appellant filed a timely notice of appeal from the Board's decision on December 13, 2002. Briefing by the parties is complete.

STATEMENT OF FACTS

Claimant was employed as a lead equipment operator for Delaware Recyclable Products ("DRP" or "Employer") when he was injured in a work-related accident. His job involved operation of a bulldozer with some authority to direct other workers. Claimant worked approximately fifty-four (54) hours per week and his job did not normally involve any heavy lifting. On March 28, 2002, Claimant was injured while operating his bulldozer when an electrical wire grounded on the frame of his bulldozer and sparks showered down. In a panicked attempt to avoid the sparks, Claimant tried to exit through a sealed door and injured his back. The sparks settled down and Claimant was eventually able to exit the bulldozer through the other door.

Claimant was out of work for a brief period of time as a result of low back pain in 1995,

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[1] DEL. CODE ANN. tit. 19, § 2301B(a)(4) (Supp. 2002) provides: the hearing officers shall have: "[t]he power, with the consent of the parties, to conduct hearings, including any evidentiary hearings required by Part II of this title, and to issue a final decision determining the outcome of such hearings. In such circumstances, the hearing officer's decision has the same authority as a decision of the Board and is subject to judicial review on the same basis as a decision of the Board."

however, no worker's compensation claim was made. Claimant also saw a physician in early 1996 for back complaints. In August of 2000, Claimant went to the emergency room with back pain after tripping at work. He had difficulty walking for three to four days. In May of 2001, Claimant was again out of work because of back pain. On June 17, 2001, an MRI was taken which revealed a herniated disk. Claimant was referred to Dr. Magdy Boulos for a surgical opinion, who never advised Claimant that he recommended surgery. Claimant was prescribed narcotics and anti-inflammatory medication for his back problems.

Claimant's January 15, 2002 medical record noted the existence of back pain and a prescription for pain medication. In late January of 2002, Claimant saw Dr. Barry Bakst for an opinion as to what could be done for his constant back pain. During his appointment, Claimant indicated that he had radiating pain in both legs on a daily basis with more symptoms on the right than the left and that his back bothered him with prolonged standing and sitting, but none of his symptoms prevented him from continuing to work in excess of forty hours per week.

On March 19, 2002, Claimant saw his family physician, Dr. Sheelmohan Sachdev, for continuing low back pain. He previously had pneumonia and the coughing bothered his back a great deal sometimes causing him to wake at night. The doctor did not indicate that Claimant needed surgery, but suggested that it may be a solution for the problem. Following his work-related accident on March 28, 2002, Claimant sought treatment from Dr. Stephen Beneck who gave him two epidural injections, a course of chiropractic care and some physical therapy. Dr. Beneck took him out of work and issued disability slips which Claimant sent to DRP. At some point, Claimant was released to sedentary work. His last communication with DRP was around August of 2002 and Claimant has not been offered any type of sedentary work despite not having

been told that he is no longer employed by DRP.

Dr. Beneck, who practices in physical medicine and rehabilitation, testified by deposition on behalf of Claimant. He has provided treatment for Claimant since he first examined him on April 1, 2002. In his opinion, Claimant was totally disabled as a result of his March 28, 2002 work accident. Dr. Beneck testified that Claimant had first been seen in his office by Dr. Bakst in January of 2002. He saw Claimant in April because he was having an urgent problem and needed to be seen immediately. Claimant indicated that he had been having his usual back problems when he suffered a "new injury" at work while operating his bulldozer. He explained that he had twisted his back while trying to get out of the bulldozer causing an immediate increase in his low back pain.

Dr. Beneck was familiar with Claimant's prior back problems and the surgical evaluation by Dr. Boulos. Despite the fact that Claimant had missed some time from work due to his back pain, Dr. Beneck opined that there was no evidence of any long-standing inability to work because of those complaints. In addition, Dr. Beneck believed that Claimant's inability to work was the result of the March 28, 2002 accident which cause a sudden, severe exacerbation of the problem. On August 23, 2002, the doctor recorded that while Claimant was still unable to be a heavy equipment operator, he could work a sedentary job.[2] Both Dr. Beneck and Dr. Bakst had the same findings as to Claimant's reflexes and motor strength. Dr. Beneck also agreed that upon his examination on April 11, 2002, Claimant no longer displayed low back spasm and had a normal straight raising test. An MRI was taken of Claimant's back in May 2002, which showed

[2]The Board noted that neither party has a copy of this alleged note. In addition, the Board noted that the earliest note in the parties' possession is dated October 4, 2002, that concerns Claimant's ability to return to sedentary work.

no objective worsening of Claimant's condition since the July 2001 MRI.

Dr. Alan J. Fink, a neurologist, testified by deposition on behalf of Employer. At the time of his examination on November 7, 2002, he opined that Claimant could not work as a bulldozer operator as of that date, but that he was capable or working a sedentary light duty position within about a week after his March 28, 2002 accident. Dr. Fink reviewed Claimant's medical records from 1995 on and recited the history during his deposition. He also reviewed the MRIs from July of 2001 and May of 2002. Dr. Fink indicated that the studies were essentially identical and if anything, the second was slightly better. Furthermore, Dr. Fink indicated that there was no objective evidence of anatomical worsening of Claimant's low back condition. He also felt that both his clinical examination and that conducted by Dr. Beneck following the March 28 work accident were identical to the exams that Dr. Bakst and Dr. Boulos performed prior to the work injury. Dr. Fink stated that, if one accepted Claimant's subjective pain complaints following March 28, he would have been out of work for at least a week, but he could work full time in a "truly sedentary light duty position."

Matthew P. Williams, the district manager for DRP, testified on behalf of Employer. He indicated that for the past five years, Claimant has been lead equipment operator, meaning that he usually ran a bulldozer, but also had the authority to direct other workers. Mr. Williams did not consider Claimant's job heavy duty, nor did his job involve a lot of heavy lifting. Mr. Williams and Claimant spoke in April or May of 2002 and Claimant indicated that he wanted to return to work, but his doctor had not yet released him. Claimant is still considered an employee of DRP and could return to work if he has been released to sedentary to light duty work. Mr. Williams agreed that Claimant followed the proper reporting procedure concerning the March 28, 2002

incident. To the best of Mr. Williams' knowledge, Claimant's hourly rate was $18.30 and he averaged 52.5 hours per week, earning time and a half for working over forty hours.

ISSUES ON APPEAL

Appellant filed a timely notice of appeal claiming that the Board committed an error of law by concluding that Claimant's overt pre-existing conditions disqualified him from a claim of disability. In addition, Appellant argues that the Board improperly applied the principles set forth in the *Reese v. Home Budget Center* decision.[3] Appellant contends that the hearing officer committed clear error when he concluded that if Claimant's prior condition had been present but asymptomatic then made symptomatic by the work accident that only then would it be compensable under *Reese*.[4]

Employer, in response, argues that the Board properly exercised its authority in applying the facts to the law and that the decision was supported by substantial evidence. Based upon the evidence presented at the Board hearing, Employer claims that the record demonstrates that Claimant had missed work numerous times as a result of his low back condition prior to his March 28, 2002 industrial accident. Employer also contends that the record contains substantial evidence to support the Hearing Officer's conclusion that there was no causal relation between the work incident and Claimant's post accident pain. Finally, Employer asserts that Claimant's own medical expert agreed that there is no medical evidence to suggest a worsening of

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

[4] *Id.* at 910 (holding that "[i]f the injury serves to produce a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established.").

Claimant's condition as a result of the March 28, 2002 accident.

STANDARD OF REVIEW

The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[5] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[6] Substantial evidence requires "more than a scintilla but less than a preponderance" to support the finding.[7] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[8] It merely determines if the evidence is legally adequate to support the agency's factual findings.[9] If the record below contains substantial evidence to support the findings of the Board, then that decision will not be disturbed.[10]

DISCUSSION

The Delaware Worker's Compensation Act provides that employees are entitled to compensation "for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and

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[5] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66-67 (Del. 1985).

[6] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.,* 517 A.2d 295, 297 (Del. Super. Ct. 1986), *app. dism.,* 515 A.2d 397 (Del. 1986).

[7] *Onley v. Cooch,* 425 A.2d 610, 614 (Del. 1981) (quoting *Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

[8] *Johnson v. Chrysler Corp.,* 231 A.2d at 66.

[9] DEL. CODE ANN. tit. 29 § 10142(d) (1997).

[10] *Adams v. Nabisco,* 1995 WL 653435 (Del. Super.).

remedies."[11] The issue presented before this Court is whether the IAB erred in holding that Claimant's most recent back injury was not the causal result of his March 28, 2002 work-related accident.

In a workers' compensation case, the claimant must establish a causal connection between the accident and the injury by a preponderance of the evidence.[12] Because Appellant asserts that his back injury arose as a result of a specific, identifiable work accident, the compensability of any resultant injury is decided exclusively by the applying the "but for" standard of causation.[13] Under this standard, the accident need not be the sole cause of the injury. "If the accident provides the 'setting' or 'trigger,' causation is satisfied for the purposes of compensability."[14]

The Delaware Supreme Court has held that a pre-existing disease or infirmity whether overt or latent does not bar an employee's claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability.[15] If the injury produces a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established.[16] In work-related claims, such as personal injury claims sounding in tort, the employer takes the employee as he finds

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[11] DEL. CODE ANN. tit. 19, § 2304 (1995).

[12] *General Motors Corp. v. Freeman*, 157 A.2d at 892.

[13] *State v. Steen,* 719 A.2d 930, 932 (Del. 1998).

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

[15] *Id.* (citing *General Motors Corp. v. McNemar,* 202 A.2d 803, 806-807 (Del. 1964).

[16] *Id.* (citations omitted).

him.[17]

Because the Board determined that Claimant's low back and radicular legs pains were symptomatic prior to the March 28, 2002 accident, the issue becomes whether the accident precipitated or accelerated the previous condition. When qualified experts give conflicting medical testimony, it is within the Board's discretion to rely on either opinion and it will be deemed as substantial evidence for purposes of the Board's decision.[18] Thus the Board was free to accept the testimony of Dr. Fink. The Hearing Officer provided a detailed explanation addressing his acceptance of Dr. Fink's over that of Claimant and Dr. Beneck.[19] He concluded that Claimant's subjective complaints were insufficient to justify disability after the March 28, 2002 accident. The Board also relied upon the objective comparison of the July 2001 MRI taken prior to the accident and the May 2002 MRI taken after the accident, which were virtually identical and displayed no objective worsening of Claimant's physical condition. The Board erred, however, in the application of the legal principles set forth in *Reese.*

In this case, Appellant's claim for compensation is linked to a specific undisputed work-related accident; therefore, it is unnecessary to quantify causation pursuant to the decision set forth in *DuVall v. Charles Connell Roofing*.[20] Based upon the testimony of Dr. Beneck and

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[17] *Id.*

[18] *DiSabatino Bros. v. Wortman*, 453 A.2d 102, 106 (Del. 1982); *see also Hendrickson v. Capriotti's,* 1999 WL 743954 (Del. Super.) (citing *Downes v. State*, Del. Supr., No. 20, 1993, Holland, J. (March 30, 1993) (ORDER) at 2.

[19] *See Addocks v. Voshell,* 579 A.2d 1125 (Del Super. 1989) (holding that when there is conflict in undisputed evidence, the fact finder has a responsibility to specifically address inconsistencies and explain how it resolved them).

[20] *See DuVall v. Charles Connell Roofing,* 564 A.2d 1132 (1989) (holding that under the usual exertion rule a work injury is compensable even if the claimant had a pre-existing injury if the ordinary stress and strain of employment is a substantial cause of the injury). *See also Reese,* 619 A.2d at 911.

Claimant, the evidence is clear that Claimant was able to work prior to the accident and unable to work after the March 28, 2002 accident. In addition, when Claimant's job description was clarified to Dr. Fink, he indicated that Appellant was incapable of working as an equipment operator eight months after the accident. Dr. Fink also concurred that Appellant could have continued to work with his prior back history but for the accident. Claimant's injury is compensable based upon the principles set forth in *Reese.* Claimant's overt pre-existing disease or infirmity does not disqualify him from a worker's compensation claim because his injury, in combination with his infirmity, aggravated his previous condition to produce the disability.[21]

The Board's decision to deny compensation for Claimant's injury is not supported by substantial evidence when viewed under a proper reading of the legal standard. For that reason, it must be REVERSED.

WHEREFORE, this case is REMANDED to the Board for further proceedings consistent with this decision.

IT IS SO ORDERED.

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The Honorable Richard S. Gebelein

Orig: Prothonotary
cc: Gary S. Nitsche, Weik, Nitsche & Dougherty, Wilmington, Delaware, Appellant.
Michael R. Ippoliti, Esquire, Wilmington, Delaware, for Appellee.

[21] *Reese,* 619 A.2d at 910.