IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CHRISTIANA CARE HEALTH SYSTEM, VNA	)	
Employer-below, Appellant,	)	
v.	)	C.A. No. 02A-08-009 JRJ
JANICE M. TAGGART	)	
Claimant-below, Appellee.	)	

Date Submitted: January 27, 2003
Date Decided: March 18, 2004

M E M O R A N D U M O P I N I O N

On Appeal from the Industrial Accident Board.
Decision AFFIRMED.

Maria Paris Newill, Esquire, Heckler & Frabizzio, The Corporate Plaza, Suite 200, 800 Delaware Ave., P.O. Box 128, Wilmington, Delaware, 19899-0128, for Employer-Appellant.

Jessica Lewis Welch, Esquire, Doroshow, Pasquale, Krawitz, Siegel & Bhaya, 1202 Kirkwood Highway, Wilmington, Delaware, 19805, for Claimant-Appellee.

JURDEN, J.

This is an appeal from a decision of the Industrial Accident Board ("IAB" or "Board") granting the claimant's petition for worker's compensation. After oral argument and a review of the record below, as well as the parties' written submissions, the Court concludes that the IAB's decision must be **AFFIRMED**.

I. PROCEDURAL POSTURE

On March 27, 2002, Janice M. Taggart (hereinafter "claimant" or "Taggart") filed a Petition to Determine Compensation Due with the Industrial Accident Board seeking benefits arising out of an injury she sustained while working as a nurse for Christiana Care Visiting Nurse Association (hereinafter "employer" or "VNA"). The claimant alleged, and the Board agreed, that during the course of her employment with VNA she developed lymphedema[1] in her left arm as a result of carrying two work bags over her shoulder. In defense of the claim, the employer argued, *inter alia*, that Taggart's lympedema was due to her 1994 cancer surgery and was unrelated to her work activities with VNA.

On August 2, 2002, the IAB held a hearing on the claimant's petition. Deciding in favor of the claimant on August 9, 2002, the IAB awarded Taggart total disability compensation at the stipulated weekly rate of $449.60 for the periods of March 13 through 16 and March 22 through May 1, 2001. The IAB also awarded Taggart medical

[1] Lymphedema is the medical term for swelling caused by the buildup of fluid in the soft tissue due to a blockage of the lymphatic system. The lymphatic system is part of the circulatory system and consists primarily of lymph vessels, nodes, and tissues. The lymphatic system removes impurities from the circulatory system and produces cells that are necessary for fighting infection. Lymphedema in cancer patients results from scarring after the surgical removal of lymph nodes or after radiation therapy. The lymphatic system becomes obstructed and swelling in the arms or legs is the result. *See* pamphlet entitled "Lymphedema Program: Prevention and Management," released by Christian Care Health System, attached to Employer / Appellant's Opening Brief ("Employer's Op. Brief") (Docket No. 6) at Exhibit D.

witness fees pursuant to 19 *Del. C.* § 2322(e), and attorney's fees pursuant to 19 *Del. C.* § 2320. The employer filed a timely appeal of the IAB's decision.

II. FACTS DERIVED FROM WITNESS TESTIMONY

A. Overview

In September of 1994, Taggart was diagnosed with breast cancer and underwent a modified masectomy to her left breast in October 1994. As part of the surgery several of Taggart's lymph nodes were removed, a procedure that augmented Taggart's chances of developing lymphedema. For years after the breast cancer surgery she was periodically checked by her oncologist[2] for any recurrence of cancer and specifically for any swelling of her left arm.

Taggart began her employment with VNA in September 2000. As part of her daily work routine as a visiting nurse, Taggart usually carried an equipment bag and a file bag to each patient's home. In March of 2001, after working for approximately six months with VNA, Taggart woke up one morning with pain in her left arm that grew increasingly worse throughout the day. There was no specific or identifiable industrial accident that caused the pain. Over the next several weeks, the swelling in Taggart's arm continued and spread. Taggart's primary care physician suspected lymphedema, prescribed physical therapy, and placed Taggart on total disability. When the swelling did not diminish, the primary care physician recommended that Taggart consult her oncologist. The oncologist also suspected lymphedema and referred Taggart to the surgeon who removed the cancerous tissue from the claimant in 1994. The surgeon also diagnosed lymphedema, and based on the claimant's statements about her work duties,

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[2] An oncologist is a tumor specialist.

the surgeon believed that the lifting of the file and equipment bags could have exacerbated Taggart's condition.

Once Taggart filed for workers' compensation benefits, the employer's insurance carrier directed her to Dr. Greg Pahnke, a specialist in surgical oncology, for a medical evaluation. Dr. Pahnke concluded that Taggart's lymphedema was not causally related to her work activities and the employer subsequently denied the claimant's petition. Taggart was then seen by Dr. Stephen Rodgers, a specialist in occupational medicine, who concluded that the claimant's lymphedema was causally related to her daily work routine of lifting and carrying bags on her shoulder.

B. <u>Taggart's Testimony (The Claimant)</u>

Taggart states that after her 1994 cancer surgery she was not counseled against lifting things with her left arm. In order to prevent the onset of lymphedema, Taggart testified that she was only advised to watch for any injuries to the arm, to avoid needle sticks as well as blood pressure cuffs on that arm, and to watch out for infection or trauma. (Tr. 12-13, 29-30, 33-34)[3] Although she was aware she needed to be very cautious with her left arm, Taggart says she was also told that she could "go ahead with [her] normal activities." (Tr. 33) It was not until the spring of 2001, after Taggart was diagnosed with lymphedema, when she learned that masectomy patients are normally advised not to lift with the affected arm. (Tr. 29, 33-34) Taggart also testified that if she had been given a weight restriction for lifting after surgery she would have abided by it. (Tr. 52)

[3] Throughout this Opinion, "Tr. __" will refer to specific pages of the transcript from the IAB hearing held on August 2, 2002 (Docket No. 3) (also attached as the Compendium to Appellee's Answering Brief, Docket No. 8).

After her surgery, Taggart obtained an associate's degree in nursing in 1996 and began employment as a nurse starting in March 1997. (Tr. 8-15) Taggart's employment with VNA started in September 2000. (Tr. 141) The daily work duties of a visiting nurse employed by VNA consisted of visiting five to ten patients in their homes per day. In addition to providing medical assistance, Taggart usually carried an equipment bag and a file bag to each home. (Tr. 16-17) She testified that the equipment bag, which contained a box of gloves, bandages, a blood pressure cuff, a stethoscope, thermometers, scissors and other items, weighed approximately eight (8) to ten (10) lbs. (Tr. 16, 97) Taggart also testified that the file bag containing each day's work files weighed approximately twenty (20) lbs. VNA provided these bags to its employees (Tr. 114), and Taggart consistently carried them on her left shoulder during her daily work routine. (Tr. 179) In her employment with VNA, Taggart explained that there was "more lifting of equipment and bags on a daily basis" than in her previous jobs as a nurse. She specifically noted that she did not have to carry a file bag prior to working at VNA because her patients were located in the same building. (Tr. 28)

Taggart testified that after the surgery she was regularly screened by her oncologist, Dr. Guarino, and that he specifically noted that there was no swelling in her left arm from 1994 until 2001. (Tr. 15, 57) In March of 2001, after working for approximately six months with VNA, Taggart woke up one morning with pain in her left arm and her arm became increasingly sore throughout the day as she kept lifting the work bags on and off of her shoulder. (Tr. 18, 43) By the end of the day, she noticed swelling in her left arm and she could barely move her arm. (Tr. 19) Taggart testified that on that particular day, her shoulder pain and swelling were different than any symptoms she had

experienced before. (Tr. 50) She also testified that there was no specific traumatic injury or identifiable industrial accident during her employment with VNA. (Tr. 20)

Over the next several weeks, the swelling continued, spreading from the left side of her neck down into her left arm and into her fingers. (Tr. 19-20) Taggart's primary care physician prescribed physical therapy and placed her on total disability from March 13-16, 2001. (Tr. 70-71). When the swelling did not diminish, the primary care physician suspected lymphedema and recommended that Taggart consult Dr. Guarino, her oncologist. (Tr. 21) Dr. Guarino also suspected lymphedema. (Tr. 21) March 2001 was the first time either physician diagnosed Taggart as having lymphedema. (Tr. 57- 58) Dr. Guarino referred Taggart to Dr. Dickson-Witmer, the surgeon who performed the masectomy on the claimant in 1994. (Tr. 21-22, 59) Dr. Dickson-Witmer also diagnosed lymphedema, and based on the claimant's statements about her work duties, Dr. Dickson-Witmer believed that the lifting of the bags exacerbated Taggart's condition. (Tr. 22-23, 50-51, 68)

The claimant sustained other injuries before and after the diagnosis of lymphedema in March 2001. While working as a nurse at the Rockford Center in the summer of 1999, the claimant injured her back and neck when some shelves fell on the right side of her neck. That incident caused no swelling in her left arm. (Tr. 25) A few weeks later, Taggart re-injured her neck and back while helping some co-workers lift a heavy patient. (Tr. 37) Taggart received workers' compensation benefits for both of these incidents. (Tr. 37) Her oncologist specifically noted that there was no swelling in the claimant's left arm as a result of either of these accidents. (Tr. 15) After recovering from these injuries, the claimant went back to work on a full duty, full time schedule. In

addition, while Taggart was receiving treatment for the lymphedema in September 2001, she was involved in a motor vehicle accident. (Tr. 46) Although there was no damage to her vehicle, the claimant injured her neck area at the base and on the right hand side. (Tr. 29-30, 51)

On cross-examination, Taggart stated that she had ongoing shoulder pain and nerve pain in her upper left extremity since the 1994 surgery. (Tr. 35) When she slept on her left arm, she often awoke with numbness and tingling in her left arm that would dissipate once the nerve relaxed. (Tr. 35) Whenever the claimant developed any new symptoms of swelling or pain she went to her doctor because she feared a recurrence of cancer. On these visits she was specifically checked for swelling in the left arm, but she was never diagnosed with lymphedema prior to March 2001. (Tr. 47-48) At the time of the Board hearing, the claimant was working full-time under certain restrictions, although she still suffered from ongoing pain and some swelling (Tr. 24-27, 52)

C. <u>Dr. Rodgers' Testimony (The Claimant's Expert)</u>

Dr. Rodgers testified by deposition and stated that his opinions were within a reasonable degree of medical probability. (Tr. 54) The employer stipulated that Dr. Rodgers was a specialist in occupational medicine.[4] He noted that Taggart had several lymph nodes removed from her left armpit during her 1994 surgery and, under the best of circumstances, some of her lymphatic channels would have been destroyed in the process (Tr. 55) Dr. Rodgers testified that it is common knowledge among doctors in general that certain kinds of activities can cause lymphedema. In reviewing a pamphlet from the

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[4] *See* Deposition of Dr. Rodgers (hereinafter "Rodgers Dep.") (attached to the IAB Record (Docket No. 3) as Claimant's Ex. #1) at 2, Line 12-20.

National Lymphedema Network,[5] Dr. Rodgers noted that most patients who undergo cancer surgery are instructed to "avoid lifting with the infected arm, never carry heavy handbags or bags with over the shoulder straps on your infected side." (Tr. 56)

In reviewing the claimant's medical history and the records of Dr. Guarino, Taggart's oncologist, and Dr. Dickson-Witmer, Taggart's surgeon, Dr. Rodgers testified that the claimant had a successful recovery from her 1994 surgery and the records revealed no mention of any swelling in her left arm until the spring of 2001. During the course of time from Taggart's 1994 surgery onward she was having regular annual or semi-annual check-ups with her oncologist. (Tr. 57, 88) Dr. Rodgers was certain that Dr. Guarino would have been checking for any swelling in the left arm because lymphedema was a known complication of such surgery. (Tr. 57-58, 88) Significantly, numerous medical records completed by Dr. Guarino from 1996 through 2000 specifically state that there was no swelling in Taggart's left arm.[6] (Tr. 58)

Dr. Rodgers also testified that the pressure of Taggart's equipment and file bags across her collarbone and shoulder caused Taggart's lymphedema. (Tr. 74) Dr. Rodgers formed his opinion after (1) an extensive review of the claimant's medical records and treatment history,[7] (2) a review of literature delineating the common causes of

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[5] *See* Employer's Op. Brief at Exhibit D.
[6] Dr. Rodgers noted that particular records mentioned the absence of swelling in the claimant's left arm, including Dr. Guarino's records dated June 1996, February 1997, December 1997, June 1998, January 1999, and July 2000. Dr. Rodgers also noted that while the records mentioned some swelling in Taggart's neck in 1999, those same records specifically state that there was no swelling in the left arm area. (Tr. 58)
[7] *See* Rodgers Dep. at 3, 12, and generally.

lymphedema,[8] and (3) a physical examination of the claimant on November 7, 2001. According to Dr. Rodgers, during the examination Taggart described her work activities "in some detail." (Tr. 61).

In summarizing his review of the claimant's medical records, Dr. Rodgers noted that there was never a diagnosis of lymphedema until the spring of 2001. (Tr. 63) In March 2001, Taggart noticed swelling in her lateral neck and left arm and ultimately went to see her family doctor. On April 2, 2001, the family doctor noted, "continues with swelling and pain in the left arm." (Tr. 65) The records of Taggart's oncologist, surgeon, and family doctor indicate the claimant was diagnosed with lymphedema in April 2001. (Tr. 65-66) At that time, the oncologist specifically advised Taggart to minimize the activity with her left arm, but there is no evidence proving that the claimant was advised not to lift anything with her left arm prior to 2001. (Tr. 66, 93)

In support of his causation opinion, Dr. Rodgers testified that while cancer surgery is "associated with the possibility" of developing lymphedema, if a patient does not "develop lymphedema immediately after surgery or . . . from radiation therapy, which [Taggart] did not have, then generally the patient is safe as long as [that person] prevent[s] it from ever occurring." (Tr. 74) After stating that even carrying a bag weighing less than twenty (20) pounds could lead to this medical condition in such a patient, Dr. Rodgers said that he was not concerned that there was no record of any one particular lifting event that caused Taggart's pain because "it's something that comes on gradually." (Tr. 75) On cross-examination Dr. Rodgers was asked to read from a brochure from the National Lymphedema Network. That brochure indicates that upwards

[8] *See* Rodgers Dep. at 3-6, 10.

of five percent of breast cancer survivors are afflicted with lymphedema from the first year of survival and that the lifelong affliction rate is reported to be thirty to forty percent. (Tr. 85)

The Board noted in its decision that on cross-examination defense counsel established that:

> Dr. Rodgers did not inquire as to the weight of the bag Claimant was lifting. He did not inquire as to the length of time, distance, or number of times Claimant had to lift this bag or bags. Nor did he inquire as to her length of employment with VNA or how long she had been engaged in these activities. Not did he inquire as to any other possible causes, such as activities of daily lifting, house work, yard work, family care, elder care, sports or exercise.[9]

Dr. Rodgers also testified on cross-examination that his opinion on causation was based on the claimant's medical history, the causal nexus suspected by her treating physicians, and the absence of any other known cause. He also stated that the claimant was the source of her medical history.[10]

When asked what standard limitations are placed on patients after undergoing a masectomy, Dr. Rodgers was not sure what patients were told in 1994, but at the time of his deposition in August 2002, he indicated that patients are generally instructed to protect the arm from injury, overuse and pressure. (Tr. 80) On cross examination, Dr. Rodgers was asked about Taggart's medical records which revealed notations about some swelling in the neck in 1999 and some complaints about her upper left extremity (Tr. 81-84) But on redirect examination, Dr. Rodgers verified that although a medical record lists neck swelling in 1999, that same record specifically notes that there is no swelling in Taggert's left arm. (Tr. 88, 91) Dr. Rodgers confirmed that there was no *unusual*

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[9] Bd. Dec. at 4; *see also* Tr. 77-80.
[10] *See* Rodgers Dep. at 44; Tr. 86.

exertion or specific lifting event, but the cumulative detrimental effect of the ordinary stress and strain of carrying the work bags over the left shoulder aggravated Taggart's underlying predisposition for lymphedema. (Tr. 85)

D. Dr. Pahnke's Testimony (The Employer's Expert)

Dr. Pahnke's testified by deposition on behalf of the employer. The claimant stipulated that he was an expert in general surgery, surgical oncology and cancer surgery.[11] At the request of the employer's insurance company, Dr. Pahnke examined the claimant one time on July 11, 2001, and reviewed her medical history. (Tr. 129, 151) He indicated that he thought he was seeing Taggart for a second opinion regarding the diagnosis of lymphedema and only afterwards did he realize that it was a defense examination for workers' compensation. (Tr. 129) When defense counsel asked Dr. Pahnke to provide an opinion within a reasonable degree of medical probability, the doctor was unfamiliar with that standard, but he agreed to indicate if he could not provide an opinion within that standard after counsel explained it.[12]

Dr. Pahnke testified that between 15 and 25 percent of breast cancer patients who undergo a masectomy ultimately develop some form of lymphedema, and four to five percent develop severe lymphedema which interferes with the use of the affected arm.[13]

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[11] *See* Deposition of Dr. Greg Pahnke (hereinafter "Pahnke Dep.") (attached to the IAB Record (Docket No. 3) as Employer's Ex. #1) at 3-4.

[12] Dr. Pahnke's deposition includes the following exchange:

> Q: Doctor, I'm going to ask that all of the opinions that you provide here today be within a reasonable degree of medical probability. Are you familiar with that legal standard?
> A: No. If you would redefine it for me, please?
> Q: That the opinions that you will provide are more reasonably medically probable than not?
> A: Probable than not, okay.
> Q: And that if it's just a possibility, then that's not the degree of the opinion and if you cannot provide an opinion to that standard, I would ask that you so indicate.
> A: Okay.

See Pahnke Dep. at 6; Tr. 129.

[13] Pahnke Dep. at 39; *see also* Tr. 143.

Dr. Pahnke explained that when lymph nodes are removed by surgery, lymphatic fluid[14] cannot escape as it should and the buildup of fluid causes swelling. (Tr. 143) Dr. Pahnke specifically stated that lymphedema "can be insidious without any known cause. It is normally related to the surgery primarily." (Tr. 144) He also testified that a person like the claimant, who has had lymph nodes removed due to cancer surgery and is obese, is at a greater risk of developing lymphedema. (Tr. 132)

Dr. Pahnke's Examination of the Claimant and Review of Her Medical History

When Dr. Pahnke examined Taggart in July 2001, his "primary focus was [providing] a second opinion for the lymphedema . . . and whether or not [he] could elicit by examination or by history a recurrent cancer as a cause."[15] He observed that Taggart had lymphedema in her arm, upper neck and shoulder on her left side without the recurrence of cancer. While the claimant's medical records reveal that Taggart had swelling in her left arm in March and April of 2001, Dr. Pahnke observed that when he examined the claimant in July 2001, Taggart had some minor swelling in her upper neck but no swelling in her arm. The employer's expert also noted that Dr. Rodgers did not examine the claimant until November 2001, which was subsequent to the claimant's September 2001 motor vehicle accident. Dr. Pahnke concluded that Taggart's lymphedema symptoms in September 2001 were possibly "secondary to the motor vehicle accident," and that Dr. Rodgers had no way of knowing what amount of swelling

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[14] Dr. Pahnke also explained that the lymphatic system transports water and proteins throughout the body. Pahnke Dep. at 40.

[15] *See* Pahnke Dep. at 19; *see also* Tr. 133-34.

was due to the car accident as opposed to being a pre-existing condition.[16] (Tr. 167-168) Dr. Pahnke opined that Dr. Rodgers, Dr. Guarino, and Dr. Dickson-Witmer did not have a complete picture of the claimant's medical history because there were no records providing a history of the traumas Taggart sustained either in previous automobile accidents or during her employment at the Rockford Center. (Tr. 169) As noted above, the claimant had previously injured her neck and lower back when some shelves fell on her at work on July 20, 1999. Dr. Pahnke expressed his opinion that if the shelves were considered a severe trauma and hit the claimant's upper neck, then that trauma could have caused the onset of the Taggart's lymphedema. (Tr. 147) On August 15, 1999, the claimant also strained both her back and neck when trying to lift a patient. (Tr. 141)

Dr. Pahnke's review of Taggart's medical records confirmed that there was no identifiable industrial accident, the claimant "just woke up with" accentuated pain on March 12, 2001. (Tr. 130-31) Physical therapy notes from March 16, 2001 indicate that the claimant suffered from cervical, lumbar, and left shoulder strain for two weeks with no obvious injuries. (Tr. 129) On April 5, 2001, Taggart complained of left upper neck pain and Dr. Guarino suspected lymphedema. (Tr. 130, 155) Physical therapy records dated April 19, 2001 indicate that the claimant presented with lymphedema secondary to breast cancer, and at this time Taggart told the physical therapist that carrying a heavy shoulder bag "irritated" her condition. (Tr. 130-31) Dr. Dickson-Witmer's records from April 2001 reveal that she suspected lymphedema and believed there was a possibility

[16] Later in his deposition, Dr. Pahnke responded during his direct examination:

> Q: And we have no way of telling in the future what is due to the underlying condition and alleged exacerbation by work duties or even the subsequent motor vehicle accident?
>
> A: Correct, from when she swells the first time. . . .

Pahnke Dep. at 75-76.

that the claimant's condition was exacerbated by her carrying of a heavy bag as a VNA employee.[17]

However, Dr. Pahnke pointed out that on April 16, 2001, the claimant told her surgeon that for six months she had tingling in her left hand and some swelling in her left arm, left anterior chest wall and left supraclavicular fossa. (Tr. 131) Dr. Pahnke also noted that, although Dr. Guarino recorded a lack of swelling in Taggart's left arm on several occasions, his records also indicate that the claimant suffered some occasional numbness, tingling, or throbbing in her left arm prior to her employment with VNA. (Tr. 140-41) In addition, a physical therapy record from April 2001 notes some atrophy in Taggart's left upper extremity and forearm as compared to her right side. Dr. Pahnke testified that he believed that this atrophy had to be a condition that predated March 2001 because four weeks would be too fast for such muscle weakness to develop (Tr. 142), and the records indicated no atrophy in 1999.[18]

On cross-examination, Dr. Pahnke conceded that, in reviewing Dr. Guarino's records from the 1994 surgery up until April 5, 2001, Dr. Guarino specifically noted on numerous occasions that there was no swelling in the claimant's left arm. (Tr. 152-54) Dr. Pahnke also agreed that, during these regular check-ups, Dr. Guarino would have specifically examined the claimant for swelling because swelling could be an indication of something serious. (Tr. 154) Dr. Pahnke concurred with Dr. Guarino's diagnosis that Taggart had lymphedema in April 2001. (Tr. 155) He also agreed that Taggart had been

[17] Pahnke Dep. at 12-13; *see also* Tr. 131.
[18] *See* Pahnke Dep. at 38.

working and performing her daily activities of life without a problem until March 2001.[19]

Dr. Pahnke's Opinion on Causation

Dr. Pahnke opined that Taggart's history of carrying a twenty-pound bag on her left shoulder did not accelerate, aggravate, cause or contribute to her condition. (Tr. 145-46) In fact, Dr. Pahnke stated that "normally, carrying a 20-pound bag . . . a file or hand bag" would not be a restricted activity and "would not normally cause" lymphedema. (Tr. 147)[20] Nevertheless, Dr. Pahnke told Taggart not to lift anything over 20-pounds because at that time the claimant felt immediate pain when she lifted anything. (Tr. 149)[21]

Dr. Pahnke acknowledged that if Taggart had lymphedema it would be reasonable for her not to work during the periods of time alleged in her petition. (Pahnke Dep. at 25.) But Dr. Pahnke opined that the claimant's lymphedema was secondary to her previous cancer surgery and that he could not come up with another cause.[22] In his view, the original cancer surgery caused the lymphedema and not any particular lifting event.[23] (Tr. 138-39) Dr. Pahnke further testified that the claimant's lymphedema was "insidious"[24] and occurred without the history of trauma or specific injury. (Tr. 136)

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[19] Specifically, Dr. Pahnke's cross-examination includes the following exchange:

Q: Now, it's fair that this initiates sometime in approximately March of 2001, and that's approximately seven years post-surgery?

A: Correct.

Q: And during that course of time, she has been working and performing her daily activities of life?

A: Correct.

Q: And would it be fair to say that none of those activities apparently caused her to have ongoing problems during that time or caused the lymphedema?

A: Up to that time there was no problem.

Pahnke Dep. at 53-54; *see also* Tr. 156.

[20] *See also* Pahnke Dep. at 45.

[21] *See also* Pahnke Dep. at 28.

[22] Pahnke Dep. at 28; *see also* Tr. 138.

[23] Dr. Pahnke testified that within a reasonable degree of medical probability the cause of Taggart's lymphedema was her primary surgery. *See* Tr. 145.

[24] Insidious means "coming on in a stealthy manner, of gradual and subtle development." Dorland's Illustrated Medical Dictionary (27th ed. 1988).

Dr. Pahnke clearly based his causation opinion on the fact that Taggart did not report a specific trauma or injury. On re-direct examination, he clarified his opinion on causation:

> Q: But I'm talking about causing the condition.
> A: If you are asking me if carrying a hand bag over your shoulder or a file cabinet over your shoulder of 20 pounds, say with normal activity of the lifting up and putting it on the arm, will cause swelling in your supraclavicular area, no.
> Q: Or lymphedema?
> A: That where it's initiated in the upper neck. Had it initiated in her hands or arm first, then the likelihood of something else is possible, but you're asking me to comment on the lymphedema in this particular person which started primarily in her neck. In someone who has had repetitive injuries from accidents and known events, I don't think it's due to handling her hand bag or heavy file . . . you are not doing bench presses with it.
> Q: You take it out of your car, you put it in the car. You take it out of the car to the patient's home and back. That type of activity on a daily basis doesn't cause this problem?
> A: That is correct.
> Q: It is the shifting, the strain, the pulling, that causes in the combination with underlying –
> A: A major event.
> Q: It is such a major event that you know that it occurred, correct?
> A: They will **normally** recall the inciting event . . . I did not get that history with her in a point of recurrent cancer.[25]

Dr. Pahnke stated that the claimant denied suffering any trauma to her neck in either her personal or professional life. (Tr. 136) Dr. Pahnke also noted that when he pointedly asked the claimant if she was aware of any direct injury to her left arm that could have exacerbated or caused the condition, the claimant indicated no. (Tr. 151) On cross-examination, Dr. Pahnke indicated that when he examined Taggart he was unaware of the claimant's theory that the work bags caused her lymphedema:

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[25] Pahnke Dep. at 79-81 (emphasis added); *see also* Tr. 177-78.

Q: Would it be fair in reviewing the records, other then lifting the bag at work, there's no other activity that she reports causing the symptoms?
A: To me she didn't even relate that. She related no injury. . . ."[26]

Lifting Restrictions for Masectomy Patients

Dr. Pahnke testified that a masectomy patient is normally advised to avoid needle sticks, the taking of blood pressure, and heavy lifting of more than twenty to thirty pounds with the affected arm.[27] (Tr. 134) When asked, "[i]f someone has the type of surgery that Ms. Taggart had, are they counseled against lifting heavy bags over their shoulder on that side?," Dr. Pahnke responded, "[a]lmost always."[28] Dr. Pahnke also indicated that such patients are advised not to lift any objects that weigh over a general limit of twenty to thirty pounds because one could stretch or pull the scar tissue underneath the arm if the patient reached in an awkward motion. (Tr. 159, 163) But he stated that he could not give an absolute weight limit because there is no study to show what weight would specifically cause lymphedema. (Tr. 159). Dr. Pahnke stated that the weight limit is "just a general recommendation. Our major thing is the infection and the needle sticks and blood pressure."[29]

Dr. Pahnke further testified that it is not repetitive lifting that causes concern. The fear is that the patient could sustain a trauma while engaging in lifting because the weight could shift and the patient could strain or stretch the tissue. (Tr. 169-70) He expressly noted that Taggart never "provided a history to anyone of lifting on a specific

[26] Pahnke Dep. at 68; *see also* Tr. 167.
[27] Tr. 134. Dr. Pahnke also testified that "[n]ormally [masectomy patients] are told at the time of surgery not [to] lift." Tr. 139.
[28] Pahnke Dep. at 55-56; *see also* Tr. 158.
[29] Pahnke Dep. at 56; *see also* Tr. 159.

day and feeling a strain." (Tr. 170) Although Dr. Pahnke testified that lymphedema symptoms are usually caused by trauma or "something definable," he agreed that if a patient lifted a weight beyond the general restriction, such activity could cause the symptoms. (Tr. 163) On cross-examination, Dr. Pahnke was asked "if [Taggart's] bag weighed more than twenty pounds would that have more of a probability of causing problems lifting on a daily basis or repeatedly on a daily basis?" Dr. Pahnke replied, "[i]t could with more weight than twenty-five pounds." (Tr. 149-50)

Nevertheless, he was mainly concerned with a sudden strain caused by reaching for a heavier object, as revealed by the following testimony:

> Q: If you're lifting something that weighs thirty [to] forty pounds repeatedly during the course of a day carrying stuff . . . is it fair that could cause lymphedema?
> A: Probably not, depending on how you're lifting, with a straight [lift] or using your legs, no, it should not.
> Q: Okay.
> A: If you lifted something 30 pounds and lost control of it and made a motion to grab it, that certainly could aggravate something . . . but she didn't indicate any of that to me in my records that she was lifting anything heavier, but I have no prior knowledge of how much weight she was picking up at that time . . . ."
> Q: So how much [bag weight] would impact your opinion?
> A: She would have to get up into the 40 to 60-pound range, repetitive motion and depending on your mode of lifting . . . .[30]
>
> * * *
>
> Q: Would it be fair to say that someone would be counseled with her type of surgery and condition that they should not carry a shoulder bag or a heavy bag on that particular arm?
> A: Shoulder bag depends on the weight. We ask them not to lift anything. We just give a general recommendation. . . . what I'm more worried about is lifting something with that arm and the indirect or direct injury thereof.
> Q: And the worry about lifting something with that arm is that it can lead to the stretching –
> A: Yes, but **normally** it is a known event that causes it. They usually will know and cite the episode that caused it.

[30] Pahnke Dep. at 46-47; Tr. 149-50. Dr. Pahnke also stated that if a patient already had lymphedema, they could "exacerbate it" by lifting over a certain amount of weight, but he noted that lymphedema "can occur without anything." Tr. 159.

> Q: And doing those activities could lead to the development specifically of the lymphedema?
> A: Right, repetitive and if you would injure that arm over and over again.
> Q: And with respect to the developing lymphedema, once you develop it, is it fair that it's then a permanent condition?
> A: It is permanent, correct.[31]

Because lymphedema is a permanent condition, Dr. Pahnke opined that Taggart would face ongoing lifting restrictions, her symptoms would be "permanent with exacerbations and maybe some relief" (Tr. 165), and that "she will always have some degree of swelling."[32]

E. The Employer's Other Witnesses

Two VNA witnesses testified on behalf of the employer: Diana Allen, a human resource specialist and Christine Collins, the director of Christiana Care Employee Health Services. These two witnesses established that VNA was unaware of Taggart's 1994 masectomy and that such a surgery itself would have excluded the claimant from consideration for the VNA position. Ms. Allen explained that the claimant's job as a visiting nurse had a fifty-pound lifting requirement for rotating and repositioning patients and that Taggart was made aware of this requirement before she was hired. These witnesses also explained that Taggart would not have been eligible for this job position had the VNA known of her inability to lift. However, at the time the claimant was hired, there was no pre-employment physical examination requirement.[33] Significantly, there is nothing in the record to suggest that Taggart lied about her medical history or physical condition at the time of hiring or at any point thereafter.

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[31] Pahnke Dep. at 78-79 (emphasis added); *see also* Tr. 176.
[32] Pahnke Dep. at 69.
[33] Tr. 116; *see also* IAB Decision in *Janice Taggart v. Christiana Care Health Services,* Industrial Accident Board Hearing No. 1207783 (decided August 9, 2002) (hereinafter "Bd. Dec.") (Docket No. 3; also attached to Employer's Op. Brief as Exhibit A) at 5.

On cross-examination, Ms. Allen testified that she did not have any knowledge of Taggart being unable to perform any job prior to her employment with VNA. Ms. Allen also confirmed that VNA was not aware of any other problem that prevented Taggart from performing her work duties other than the diagnosis of lymphedema. (Tr. 105-06) Ms. Allen admitted that there may have been occasions when Taggart carried a full file bag. (Tr. 108) She also explained that the supply bag weighs approximately six or seven pounds and the file bag possibly weighs more than twenty (20) or twenty-five (25) pounds, but the exact weight of the file bag depends on the size of the files which varies. (Tr. 108-13)

F. <u>The Board's Decision</u>

It is clear that the Board found Taggart to be a credible witness and found Dr. Rodgers' testimony concerning causation more persuasive and convincing than Dr. Pahnke's. In determining that Dr. Pahnke's opinions were not as persuasive, the Board noted that Dr. Pahnke's paramount concern was checking for a recurrence of cancer, and that he thought the purpose of his examination was to provide a second opinion on the diagnosis of lymphedema. The Board also noted that Dr. Pahnke ruled out trauma as a potential cause because the claimant denied any specific injury or traumatic event, but in the Board's view, Dr. Pahnke's analysis apparently overlooked the claimant's assertion of trauma caused by the ordinary strain of carrying her over-the-shoulder work bags.[34]

The Board concluded that the claimant met her burden of proving that she was totally disabled for two limited periods, March 13-16, 2001 and March 22 through May

[34] *See* Bd. Dec. at 6-7.

1, 2001.[35] The Board based its decision on, *inter alia*, "evidence that (1) Claimant was employed by the VNA at the time of her onset of lymphedema, and (2) that pursuant to that employment, she did carry two bags over her affected shoulder, and (3) that within six months of starting this employment, she had her first diagnosis of lymphedema."[36]

III. ISSUES

There is no dispute that the claimant has lymphedema. The dispute between the employer and the claimant centers on causation of that condition. In support of its appeal, VNA offers the following arguments:

(1) The Board's decision granting the claimant's petition is not supported by substantial evidence.[37]

(2) The Board abused its discretion in accepting Dr. Rodgers' testimony on the issue of causal relation.[38]

(3) The Board erred as a matter of law and abused its discretion by applying the wrong legal standard on causation and the burden of proof.[39]

(4) The Board erred in failing to find that the claimant forfeited her right to benefits by making false representations at the time of hiring.[40]

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[35] Bd. Dec. at 7. The Board noted that while claimant argued at the hearing that she was totally disabled March 13-16 and March 22 through June 4, 2001, the Board adopted the period of time that was listed on claimant's Pre-Trial Memorandum.
[36] Bd. Dec. at 8.
[37] Employer/Appellant's Opening Brief on Appeal (hereinafter "Employer's Op. Brief") (Docket. No. 6) at 19-25; *see also* Employer/Appellant's Supplemental Brief (hereinafter "Employer's Supp. Brief") (Docket No. 19).
[38] Employer's Op. Brief at 11-15.
[39] *Id.* at 16-18.
[40] *Id.* at 14-15.

(5) Dr. Rodgers' methodology is violative of *Daubert v. Merrell Dow Pharmaceuticals*[41] in.[42]

IV. STANDARD OF REVIEW

The Court's limited role when reviewing a decision of the Industrial Accident Board is to determine whether the decision is free from legal error and supported by substantial evidence.[43] Substantial evidence is such relevant evidence that a reasonable person might accept as adequate to support a conclusion.[44] It is not the function of this Court to weigh evidence, determine questions of credibility, or make its own factual findings.[45] When a particular issue revolves around factual determinations, the court will "take due account of the experience and specialized competence of the agency."[46] Consequently, the Court "will not substitute its judgment for that of an administrative body where there is substantial evidence to support the decision and subordinate findings of the agency."[47] Furthermore, a "discretionary ruling of the Board will not be disturbed on appeal unless it is based on clearly unreasonable or capricious grounds."[48] Questions

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[41] *Daubert*, 509 U.S. 579 (1993). *See* Employer's Op. Brief at 12; *see also* Employer's Supp. Brief. After the parties submitted briefs and the Court heard oral argument, the Court asked for supplemental briefing on the *Daubert* issue. *See* the Court's letter to counsel dated October 14, 2003 (Docket No. 17).
[42] Employer's Op. Brief at 12; *see also* Employer's Supp. Brief. After the parties submitted briefs and the Court heard oral argument, the Court asked for supplemental briefing on the *Daubert* issue. *See* the Court's letter to counsel dated October 14, 2003 (Docket No. 17).
[43] *General Motors Corp. v Freeman*, 164 A.2d 686, 688 (Del. 1960).
[44] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).
[45] *Johnson v. Chrysler Corp*., 213 A.2d 64, 66 (Del. 1965).
[46] 29 *Del. C.* § 10142(d).
[47] *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).
[48] *Thomas v. Christiana Excavating Co*., C.A. No. 94A-03-009, 1994 WL 750325 at **4 (Del. Super. Nov. 15, 1994).

of law are reviewed *de novo* by the Court.[49]

V. <u>DISCUSSION</u>

A. <u>Causation Standard – The Usual Exertion Rule</u>

Both parties agree that the causation analysis enunciated in *State v. Steen*[50] is the proper legal standard.[51] In determining that Taggart's lymphedema was causally related to her work activities, the Board's decision specifically cites the substantial factor test articulated in *Steen*. The Board's causation analysis provides in pertinent part:

> "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Reese v. Home Budget Ctr.*, Del. Supr., 619 A.2d 907, 910 (1992). *See also* 1a Arthur Larson, *Workmen's Compensation Law* § 12.21. **"In cases where a claimant is injured by the aggravation of a pre-existing condition *and* there is no identifiable industrial accident, however, causation is governed by <u>the usual exertion rule</u>. The usual exertion rule provides that the injury is compensable, notwithstanding the previous condition, if the ordinary stress and strain of employment is a 'substantial factor' in causing the injury."** *State of Del. v. Steen*, Del. Supr. 719 A.2d 930 (1998) (emphasis in original) (citation omitted). Absent more conclusive evidence to the contrary, the Board concludes that the activities Claimant performed during her employment with the VNA served as the trigger for her lymphedema.[52]

Although VNA in its opening brief repeatedly asserts that the claimant failed to satisfy the "*unusual* exertion rule"[53] for causation, at oral argument the employer

[49] *Department of Correction v. Worsham*, 638 A.2d 1104, 1106 (Del. 1994).
[50] *Steen*, 719 A.2d 930 (Del. 1998).
[51] *See* Employer's Op. Brief at 8-9; Appellee's Answering Brief (hereinafter "Claimant's Ans. Brief") (Docket No. 7) at 22-23.
[52] Bd. Dec. at 8 (emphasis added).
[53] *See, e.g.* Employer's Op. Brief at 17; *see also* Tr. 196 (at oral argument the employer's counsel stated, "[t]here was no unusual exertion, end of story . . . you cannot award benefits in this case.").

conceded[54] that the correct standard is the "*usual* exertion rule" from *State v. Steen*.[55] While the "but for" standard for proximate cause applies exclusively when there is an identifiable industrial accident, the Delaware Supreme Court has explained that the substantial factor standard of proximate cause was incorporated into the usual exertion rule "because of the difficulty of identifying a specific link between regular job-related duties and the aggravation of preexisting ailments."[56] Under this rule, "[a]n injured claimant can recover workers' compensation benefits when there is no specifically identifiable physical industrial accident, as long as the *ordinary stress and strain of employment* is a substantial factor in proximately causing the injury."[57]

Even though the employer's expert testified that Taggart's lymphedema could have developed in the absence of any trauma or ordinary stress or strain, the Board chose to believe Dr. Rodgers' testimony that Taggart's usual work caused her lymphedema. The Board specifically based this conclusion on the fact that Taggart's medical history revealed no signs of swelling in her arm for seven years (1994 – 2001), and it was not until March and April 2001, approximately six months into her employment with VNA,

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[54] *See* Hearing Transcript from the oral argument held on September 26, 2003 (hereinafter "Oral Arg.Tr.") (Docket No. 20) at p. 2, Line 20-22. The employer cited the proper standard in its Reply Brief. *See* Appellant's Reply Brief (Docket No. 11) at 8, 11.

[55] *State v. Steen*, 719 A.2d 930 (Del. 1998). For the quote on the usual exertion rule listed by the Board, *see Steen*, 719 A.2d at 932 (citing *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1136 (Del. 1989)). In *Duvall*, the claimant exacerbated a pre-existing back condition while performing routine duties at work. Workers compensation benefits were denied because he was not engaged in "unusual exertion" at the time of the injury. On appeal, the Delaware Supreme Court abandoned the "unusual exertion" rule for pre-existing conditions and adopted instead the "usual exertion" rule. *Steen*, 719 A.2d at 932, n.2 (citing *Duvall*, 564 A.2d at 1133).

[56] *Steen*, 719 A.2d at 932 (quoting *Reese v. Home Budget Center*, 619 A.2d 907, 911 (Del. 1992)).

[57] *Steen* 719 A.2d at 933 (emphasis added), citing *State v. Cephas,* 637 A.2d 20 (Del. 1994). 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 usual 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. *Steen*, 719 A.2d at 935 (citations omitted).

that Taggart developed swelling in her arm which lead to the ultimate diagnosis of lymphedema. The Court finds that there is substantial evidence in the record to support the Board's decision.

B. Issues of Credibility Are For the Board to Determine

VNA argues that "the Board abused its discretion in accepting the testimony of Dr. Rodger's on the ultimate conclusion of causal relation."[58] The Court cannot agree. This case hinges on issues of credibility, and the IAB clearly found the claimant and Dr. Rodgers to be credible. It is not within the purview of this Court to resolve issues of credibility and assign weight to evidence presented.[59] "As a general rule, the credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine."[60] Only when insufficient facts in the record exist to support a factual finding will the Court overturn the Board's findings.[61] Finding there are sufficient facts in the record to support the Board's analysis, the Court accepts the Board's credibility determinations.

In this case, there were two competing expert opinions. Dr. Rodgers, a specialist in occupational medicine, testified on behalf of the claimant. Dr. Pahnke, a specialist in surgical oncology, testified on behalf of the employer. Although Dr. Pahnke, as an oncologist, may appear to have more experience in dealing with lymphedema, the Board concluded that the opinion of Dr. Rodgers was more persuasive in this particular case. "Under Delaware law, 'an experienced practicing physician is an expert, and it is not required that he be a specialist in the particular malady at issue in order to make his

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[58] Employer's Op. Brief at 11.
[59] *Johnson*, 213 A.2d at 67.
[60] *Clements v. Diamond State Port Corp.,* 831 A.2d 870, 878 (Del. 2003) (citation omitted).
[61] *Johnson*, 213 A.2d at 67.

testimony as an expert admissible.'"[62] Therefore, the Board was entitled to accept Dr. Rodgers' opinion. VNA asserts that Dr. Rodgers' testimony is not as strong as Dr. Pahnke's conclusions, but "[t]he weight to be given to the expert testimony of a treating physician . . . is for the Board to determine, as the trier of fact."[63] Moreover, the Delaware Supreme Court has consistently held that it is the Board's function to resolve conflicts in medical testimony.[64] Accordingly, the Board did not err as a matter of law in concluding that Dr. Rodgers provided more credible testimony about the causation of the claimant's lymphedema.[65]

C. <u>There is Substantial Evidence in Support of the Board's Decision</u>

The Board set forth the factual basis for its conclusion that Taggart's lymphedema was causally related to the ordinary stress and strain of her employment as a home health nurse, and the Court finds that there is substantial evidence in the record to support this conclusion. For example, the evidence shows that while Dr. Guarino consistently checked Taggart for the recurrence of cancer and any swelling (a sign of lymphedema)

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[62] *Clements,* 831 A.2d at 877 (quoting *DiSabatino Bros v. Wortman*, 453 A.2d 102, 106 (Del. 1982)).
[63] *Id.* (citing *Board of Public Ed. in Wilmington v. Rimlinger*, 22 A.2d 98, 100 (Del. 1967)).
[64] *Id.*; *see also Witt v. Georgia-Pacific*, 1994 WL 89027 (Del. Super. Ct. Feb. 26, 1994) (When presented with competing expert testimony, the IAB, as the finder of fact, must make a credibility assessment to determine which expert's opinion to believe); *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1996) (As long as there is substantial evidence to support the testimony of the expert, the IAB may accept the testimony of one expert over another.).
[65] In *Clements*, the Delaware Supreme Court stated that "the Board cannot substitute its judgment to nullify the objective findings of a medical expert that fully support the claimant's objective complaints. Where a medical expert's opinion depends primarily upon the credibility of the claimant' subjective complaints, however, and the Board determines that those subjective complaints are not credible, the Board may reject the medical expert's conclusion." *Clements,* 831 A.2d at 878. In Taggart's case, while several doctors relied upon the claimant's subjective complaints, the Board clearly found the claimant to be credible. Consequently, the Board was free to accept the medical evidence that favored Taggart.

for years after the claimant's 1994 surgery, this oncologist repeatedly noted that the claimant had no swelling in her left arm. During part of this time, Taggart performed her duties as a nurse for several medical institutions without the onset of swelling in her left arm. But within approximately six or seven months of beginning her employment with VNA, where she was required to carry several work bags in addition to her usual duties as a nurse, Taggart suffered significant swelling in her left arm and was positively diagnosed with lymphdema for the first time. The evidence, coupled with Dr. Rodger's testimony, adequately supports a finding that Taggart's work conditions were a substantial cause of her lymphedema.

The Board clearly did not find the testimony of employer's expert, Dr. Pahnke, as convincing. The employer argues that the Board made an erroneous factual finding when it stated, "Apparently when [Dr. Pahnke] ruled out trauma, he was not aware of Claimant's assertion of the trauma caused to her by the carrying of her over-the-shoulder bags. Dr. Rodgers, on the other hand, made this causal connection after the Claimant explained her work activities to him 'in some detail.'"[66] The Court believes that Dr. Pahnke was made aware of Taggart's causation claim at the time of his deposition by the line of questioning he was subjected to on cross-examination. The record supports a conclusion that Dr. Pahnke was unaware of Taggart's specific claim when he examined her in July 2001 because he believed he was seeing her for only a second opinion on the diagnosis of lymphedema. During the physical examination, his major concern was checking for the recurrence of cancer. He was not asked to provide an analysis of the usual stress and strain of the claimant's working conditions. Futhermore, Dr. Pahnke

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[66] Bd. Dec. at 7.

stated that lymphedema patients "will *normally* recall the inciting event" that caused the onset of their condition,[67] and his causation analysis focuses on the lack of "a major event" during Taggart's employment with VNA.[68] Such a focus fails to take into account that under the usual exertion rule, a claimant can recover for an injury caused by the ordinary stress and strain of employment in the absence of an identifiable industrial accident.

Although the employer elicited testimony about Taggart's previous work injuries to her back and neck, Dr. Guarino specifically noted that there was no swelling in the claimant's left arm as a result of these accidents. The minor swelling in Taggart's neck was never previously diagnosed as lymphedema until the spring of 2001. Both experts agreed that the claimant's medical records clearly showed swelling in Taggart's left arm in March and April of 2001. They also both noted that Taggart had been performing her work duties without any major swelling problem up until that time, and that Dr. Guarino specifically noted a lack of swelling in the claimant's left arm from the 1994 surgery until March 2001. The employer also presented evidence that Taggart was involved in a motor vehicle accident in September 2001. However, under the claim filed in this case, Taggart was only awarded compensation for periods of time *before* this car accident, specifically March 13 through 16 and March 22 through May 1, 2001.[69] Therefore, even if the September 2001 motor vehicle accident aggravated the swelling in Taggart's left arm, the record still contains substantial evidence in support of the conclusion that the claimant first developed lymphedema in March 2001, and Dr. Rodgers based much of his opinion

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[67] Pahnke Dep. at 81 (emphasis added); *see also* Tr. 178.
[68] Pahnke Dep. at 80.
[69] Bd. Dec. at 9.

on Taggart's medical history leading up to that time. Dr. Rodgers' testimony supports a finding that Taggart's strain from her ordinary working conditions was a substantial cause of her lymphedema. Therefore, there is sufficient evidence in the record to support the Board's findings. "[T]he evidence was definitely in conflict and, the substantial evidence requirement being satisfied either way, the Board was free to accept the testimony of [Dr. Rodgers] over contrary opinion testimony."[70]

D. <u>The Aggravation of a Pre-Existing Condition</u>

As the Board correctly notes: "[a] preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability."[71] "In work-related claims, as in personal injury claims sounding in tort, the employer takes the employee as he finds him."[72] Consequently, Taggart's cancer surgery and the resultant increased risk that she could develop lymphedema do not preclude her from recovering workers' compensation benefits.

VNA argues on appeal that the Board made a mistake of law and applied the wrong legal standard for causation. Specifically, VNA contends that the "triggering test" set forth in *Reese*:

> "is to be utilized <u>only</u> when there is <u>an identifiable work accident/trauma</u> combined with pre-existing conditions. In this case where there is a pre-existing condition and <u>no identifiable industrial accident</u>, the usual exertion rule applies. [citing *Steen*] The Board applie[d] the 'triggering standard' in stating that the employment with VNA "triggered" the Lymphedema. [IAB Order p. 8]. The appropriate legal standard was the usual exertion rule of *Steen*.[73]

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[70] *See DiSabatino Bros v. Wortman*, 453 A.2d 102, 106 (Del. 1982).
[71] Bd. Dec. at 8 (citing *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. 1992) (citation omitted)).
[72] *Reese*, 619 A.2d at 910, n.1 (noting that the "rule that the defendant takes the plaintiff as he finds him, or the 'thin skull' or 'eggshell skull' rule, is a longstanding principle of Delaware tort law" which also applies in work-related claims).
[73] *See* Appellant's Reply Brief ("Employer's Reply Brief") (Docket No. 11) at 11 (emphasis in original).

This argument ignores the fact that the Board's decision specifically cited *Steen* and the usual exertion rule as the appropriate legal standard for causation. Certainly the Board's written decision would be clearer if it stated that "the activities Claimant performed during her employment with the VNA were a *substantial factor* in causing her lymphedema," as opposed to saying the activities "triggered" her lymphedema. But having laid out the appropriate causation standard in its decision, the Board did not commit reversible error by inadvertently using the word "triggered." The use of the word "triggered" in this context appears to have been merely a drafting oversight. It is clear from the Board decision that the Board applied the *Steen* standard. Considering all the specific facts of this case and the Board's decision as a whole, the Court finds that the record contains substantial evidence to support the conclusion that the ordinary stress and strain from the claimant's work activities were a substantial factor in aggravating her latent predisposition for lymphedema.

E. The Employer's Argument Regarding the Burden of Proof

The employer correctly asserts that as the non-moving party it is not required to raise and prove alternative theories of causation in order to prevail.[74] On appeal, VNA argues that the Board improperly placed the burden of proof upon the employer. VNA makes this assertion based on a sentence in the Board's decision that states, "*[a]bsent more conclusive evidence to the contrary,* the Board concludes that the activities

[74] Employer's Op. Brief at 16 (citing *Strawbridge and Clothier v. Campbell*, 492 A.2d 853 (Del. 1985)). The ultimate burden of proof is on the moving party. *Strawbridge & Clothier*, 492 A.2d at 854. Where the claimant is the party who seeks action from the Board by filing a Petition for disability benefits, it is settled that the claimant bears the burden of proving the injury was work-related. *Id.* It is also well established that the claimant must establish a causal connection between her work activities and her injury by a preponderance of the evidence. *General Motors Corp. v. Freeman*, 157 A.2d 889, 892 (Del. Super. Ct. 1960).

Claimant performed during her employment with the VNA served as the trigger for her lymphedema."[75] VNA's argument on this point is not supported by the record.

The Board decision clearly states: "Claimant had the burden to prove that she was totally disabled for two limited periods. The Board finds that Claimant met this burden."[76] The subsequent use of the phrase "absent more conclusive evidence to the contrary," taken in context with the Board's decision as a whole, does not indicate that the Board required the employer to prove an alternative theory of causation or imposed the burden of proof on the employer. Instead, the Court believes this phrase was offered as a summary of the Board's factual finding that the claimant successfully carried her burden and the employer was unsuccessful in rebutting the claimant's evidence that her injury was work-related. The Board's decision clearly sets forth the causation analysis laid out in *Steen*. A fair reading of the entire Board decision confirms that the Board utilized the usual exertion rule and substantial factor test in determining that the claimant is entitled to benefits. After laying out the proper causation standard and setting forth the facts that support its conclusion, the Board did not commit legal error by using the phrase "absent more conclusive evidence to the contrary." The Board's decision as a whole indicates a finding that the *claimant* established, by a preponderance of the evidence, that her injury was work related.

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[75] Bd. Dec. at 8 (emphasis added).
[76] Bd. Dec. at 7 (internal citation omitted).

F. **The Forfeiture Issue: Pre-Employment Responses**

VNA argues that the claimant forfeited her right to workers' compensation by failing to disclose her predisposition for lymphedema when she was originally hired. In *Air Mod Corp. v. Newton,*[77] the Delaware Supreme Court held:

> [A]n employee forfeits his right to benefits . . . if, in applying for employment, the employee (1) knowingly and willfully made a false representation as to his physical condition; and (2) the employer relied upon the false representation and such reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury.[78]

The Court in *Air Mod* found that the plaintiff had provided the employer with pre-employment answers that "were false and misleading."[79] The Court remanded that case to the Board for an evidentiary hearing on this issue because "the Board barred the defendant from showing that it would not have hired the plaintiff had he correctly reported his condition."[80] In the case *sub judice*, however, the employer's attorney was able to present evidence and argue this forfeiture theory. The Board heard testimony from two employer witnesses, Diana Allen and Christine Collins, who commented on the pre-hiring process at VNA. This issue also hinges upon a credibility determination which is for the Board to decide. Taggart testified that after her 1994 surgery she was only warned about needle sticks and blood pressure cuffs on her left arm. She claims that she was not specifically instructed to avoid any lifting of a certain weight and the Board apparently believed her. Moreover, at the time the claimant was hired, there was no pre-employment physical examination requirement, and the record does not establish that Taggart ever lied to VNA about her medical history or physical condition at the time of

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[77] 215 A.2d 434 (Del. 1965).
[78] *Id.* at 440.
[79] *Id.* at 439.
[80] *Id.*, 215 A.2d at 441.

her hiring. Although VNA provided testimony that *today* all masectomy patients are "almost always" instructed to avoid any heavy lifting in order to prevent the onset of lymphedema, there is no evidence that this particular claimant was specifically given such an instruction until after she was diagnosed with lymphedema in 2001.

Despite the employer's argument that the IAB erred in failing to address the forfeiture argument, the Board's decision specifically states, "Claimant was told by her oncologist and her surgeon to avoid blood pressures and needle sticks in her left arm, but otherwise was told she could resume normal activities."[81] This statement indicates that the Board considered the employer's argument but concluded that the claimant did not knowingly and willfully make a false statement about her medical condition when she applied for the VNA position. Accepting the Board's credibility determination, the Court finds that the employer's forfeiture argument based on *Air Mod* must be denied.

G. The Employer's Attack on the Claimant's Expert: The Daubert Issue

The employer cites *Daubert v. Merrell Dow Pharmaceuticals*[82] in attacking the methodology used by Dr. Rodgers in the formation of his opinion on causation.[83] The claimant contends that the employer's *Daubert* argument is untimely and has been waived because it was not raised before this appeal. The employer responds by arguing that the proceedings before the Board are more relaxed than before the Court and that "anything like a *Daubert* hearing, common in the Superior Court, is unheard of before the Board."[84] The employer also asserts that the grounds for its *Daubert* objection were raised in front of the Board in a timely fashion, and even though the word "*Daubert*" was

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[81] Bd. Dec. at 3.
[82] 509 U.S. 579 (1993).
[83] Employer's Op. Brief at 11-14, Employer's Reply Brief at 1-3.
[84] Employer's Supp. Brief at 7.

never used,[85] the employer believes that the Board conducted a *Daubert* analysis and erroneously chose to accept Dr. Rodgers' opinion.[86]

In *Daubert*, the United States Supreme Court ruled that under Fed. R. Evid. 702 a trial judge has a "gatekeeping responsibility"[87] when an expert witness is presented to testify. Specifically, the Court explained the nature of this duty as follows:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.[88]

Del. R. Evid. 702 is identical to its federal counterpart, Fed. R. Evid. 702, and the Delaware Supreme Court has adopted the admissibility standard enunciated in *Daubert*.[89]

When conducting an analysis under *Daubert* and its progeny, the Court must determine the "reliability" of the expert's proffered testimony, a process which includes a review of both the expert's qualifications to opine on a particular issue, and the

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[85] *See* Oral Arg. Tr. at p.4, Line 19-22 (The employer's attorney states, "[at the Board level] I did not specifically ever say the word Daubert, but if you read the record . . . that was the gist of my argument").
[86] Employer's Supp. Brief at 9.
[87] *Id.* at 590, n.7. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the United States Supreme Court ruled that the *Daubert* standard for evidentiary reliability was not limited to scientific testimony but extended to all types of expert testimony.
[88] *Id.* at 592-593.
[89] *See Crowhorn v. Boyle*, 793 A.2d 422, 428 (Del. Super. Ct. 2002) (citing *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999)). In contrast, the Pennsylvania Supreme Court recently reaffirmed that state's adherence to the "*Frye* test" for the admissibility of expert testimony. *See Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. Dec. 31, 2003) (holding that Pa. R. Evid. 702, which includes the *Frye* rule, requires the proponent of expert evidence to prove that the methodology the expert used is "generally accepted" by other scientists in the relevant field) (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). *Daubert* ruled that the "*Frye* test" had been superseded by the adoption of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 587.

methodology employed by the expert to reach his opinions.[90] The employer argues that the Board abused its discretion in accepting and relying on the testimony of Dr. Rodgers. More specifically, it complains that the Board erred because Dr. Rodgers' testimony did not meet the requisite level of reliability required under *Daubert* and the Delaware Rules of Evidence, and that his testimony did not constitute substantial evidence which would support the Board's decision. Taggart counters that the employer stipulated to Dr. Rodgers' qualifications,[91] and did not make timely objections to his qualifications or the testimony he rendered. As a result, Taggart contends that the employer is precluded from raising this issue on appeal.

The Delaware Superior Court has previously addressed similar arguments in *State v. Stevens*,[92] and the analysis here is the same. The first contention to be addressed is the argument by VNA that the Board's acceptance of Dr. Rodgers' testimony violated the standards for admissibility of scientific evidence articulated by the United States Supreme Court in *Daubert*. Whether a *Daubert* analysis was required before Dr. Rodgers testified need not be addressed for the purposes of this appeal[93] because the employer stipulated to Dr. Rodgers as an expert in occupational medicine and failed to object to the

[90] *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 588-89 (Del. 2000).
[91] The claimant asserts the following: "The Employer stipulated to Dr. Rodger's [sic] being an expert. Whether it was in Occupational Medicine or otherwise, it prevented the employee from establishing Dr. Rodger's [sic] expertise and credential before the Board." Appellee's Supplemental Brief at 10. This is an incorrect conclusion by the claimant. While one party may stipulate that a particular witness is an expert, such a stipulation does not "prevent" the other party from presenting the expert's credentials to the trier-of-fact. If the claimant wished to expound upon Dr. Rodgers' expertise in front of the Board, it was her duty to do so. However, this erroneous argument is irrelevant because the Court finds that the employer failed to submit a timely objection to the admission of Dr. Rodgers' testimony.
[92] *State v. Stevens*, 2001 Del. Super. LEXIS 167 (Del. Super. Ct. May 15, 2001).
[93] *Id.* at *9.

admissibility of his testimony at the time it was offered.[94] "The proper time to make objections to an expert's qualifications or proffered testimony is at trial; not on appeal."[95] Consequently, the Court concludes that there was no legal error or abuse of discretion and that the employer waived the right to pursue this issue on appeal.[96]

The employer argues that (1) its *Daubert* argument was presented at the Board hearing in its opening statement and closing argument, (2) the rules of evidence are relaxed at the administrative level, (3) *Daubert* hearings are "unheard of before the Board," and (4) that in this case, the "gatekeeper" and the trier-of-fact are the same entity such that a formal *Daubert* objection could not properly be made. While it is true that IAB hearings are less formal than Court proceedings and the Board is not forced to follow a "hyper-technical" interpretation of the rules,[97] the parties must still preserve their arguments for appellate review. Even if the Court were to accept the employer's argument that the *Daubert* issue was properly raised before the Board, the Court finds that the Board made a *de facto Daubert* ruling when it chose to accept Dr. Rodgers' testimony. The transcript from oral argument makes it clear that instead of making a

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[94] The employer stipulated to Dr. Rodgers being an expert in occupational medicine. Dr. Rodgers' deposition reveals the following exchange:

Q: Dr. Rodgers, for the record, would you state your medical specialty?
A: Occupational medicine.
Q: And are you licensed and board certified?
A: Yes.

Ms. Welch: Ms. Newill, are you willing to stipulate to Dr. Rodger's [sic] qualifications in that area?

Ms. Newill: In that area, yes.

See Deposition of Dr. Rodgers at 2, Line 12-20 (attached to the IAB Record (Docket No. 3) as Claimant's Ex. #1).

[95] *Stevens* at *9 (citation omitted).

[96] *Id.*

[97] *Yellow Freight Systems, Inc. v. Berns*, 1999 WL 167780 at **4 (Del. Super. Ct. March 5, 1999).

timely *Daubert* challenge to the claimant's expert's testimony before the Board, the employer strategically chose to rely on what it believed to be the superior qualifications of its own expert, who was a specialist in surgical oncology.[98] It is not within the Court's power to weigh evidence or make credibility determinations on appeal.[99] While the employer was under no obligation to let the claimant "get a better expert,"[100] the employer cannot object on *Daubert* grounds *after* the claimant's expert has already testified before the Board. Allowing such a belated motion would defeat the purpose of a *Daubert* challenge, that is to prevent the trier of fact from considering unreliable or irrelevant expert testimony.[101] If the Employer wished to prevent Dr. Rodgers from testifying before the Board, then a specific *Daubert* objection should have been raised before the hearing commenced, or at least before Dr. Rodgers testified.

The employer argues that Dr. Rodgers relied chiefly upon Taggart's oral assertions concerning the cause of her lymphedema. Because Dr. Rodgers did not thoroughly inquire into other possible causes, the employer argues that his diagnosis does not meet the requirements of *Daubert*, and is therefore unreliable. But this identical argument was rejected in *Stevens* when the Superior Court said, "*Daubert* is not the standard to which the substance of the Board's decision must be measured. As stated

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[98] At oral argument on the instant appeal, employer's counsel stated:

> But I have – in my 13 years of practice, I have never even heard [of] Daubert, I'm sorry to say, until after I became in this situation and had to do the research, and that's how I became aware of Daubert. I felt in my – in preparing my case, if I have a good defense to Dr. Rodgers, which is: I don't think he's an expert in [t]his field. Why should I bring that to everybody's attention and let the plaintiff claimant rectify that situation prior to going forward? . . . Why should I give them – before the hearing in the trial, give them the ability to get a better expert to do a better job against me[?] So that was my thought in this case and to my shock his opinion was accepted.

Oral Arg. Tr. at 10, line 2-21.

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

[100] *See* Oral Arg. Tr. at 10, line 17-19 (reprinted above).

[101] *See Daubert*, 509 U.S. 579 (1993); *Crowhorn*, 793 A.2d 422 (Del. Super Ct. 2002).

throughout this opinion, that standard is substantial evidence."[102] Accordingly, the employer's argument based on *Daubert* is misplaced. "An abuse of discretion [with regard to the admission of evidence] occurs when the Board exceeds the bounds of reason in view of the circumstances and has ignored rules of law or practice so as to produce injustice."[103] The Board did not abuse its discretion in choosing to accept Dr. Rodgers as an expert or to consider his testimony.[104]

When the Court requested supplemental briefing on the *Daubert* issue after oral argument, the employer slightly retreated from its earlier position. VNA states in its supplemental brief that, in citing *Daubert*, it "is not arguing that Dr. Rodgers should not have been given the title of 'expert' and should not have been allowed to testify before the Board,"[105] rather, it asserts that there is no legitimate basis for accepting Dr. Rodgers' medical opinions as substantial evidence to support a finding of causal relation. Still relying on *Daubert*, the employer is now challenging the *weight* of Dr. Rodgers' opinion and not its admissibility.[106]

The Court finds that the Board did not abuse its discretion in accepting Dr. Rodgers' testimony as persuasive even though he was "only" an expert in occupational medicine.[107] In the absence of a timely *Daubert* objection, the difference in professional experience between Dr. Rodgers and Dr. Pahnke goes to the weight of their testimony,

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[102] *Stevens* at *10 (internal citations omitted).
[103] *Thomas v. Christiana Excavating Co*., C.A. No. 94A-03-009, 1994 WL 750325 at **5 (Del. Super. Ct. Nov. 15, 1994), citing *McDowell v. State*, C.A. No. 88A-JN-3, Steele, J. (Del. Super. Ct. Mar. 14, 1991) (ORDER), at 3.
[104] The employer stipulated to Dr. Rodgers being an expert in occupational medicine. *See* Rodgers Dep. at 2.
[105] Employer's Supp. Brief at 8 (emphasis in original).
[106] *See id.* at 9.
[107] "Under Delaware law, 'an experienced practicing physician is an expert, and it is not required that he be a specialist in the particular malady at issue in order to make his testimony as an expert admissible.'" *Clements,* 831 A.2d at 877 (quoting *DiSabatino Bros v. Wortman*, 453 A.2d 102, 106 (Del. 1982)).

not its admissibility.[108] It is not the function of this Court to weigh evidence on appeal,[109] and the Court will not substitute its judgment for that of an administrative body where there is a substantial evidence to support the agency's decision.[110] The Board was entitled to accept the opinion of Dr. Rodgers, in whole or in part, and reject the testimony of Dr. Pahnke to the extent it deemed appropriate.[111] The Board articulated its reasons for accepting Dr. Rodgers' diagnosis and causation opinion. Finding that there is substantial evidence in the record to support the Board's conclusion, the Court will not disturb the Board's decision.

VI. CONCLUSION

For the foregoing reasons, the Court concludes that there is sufficient evidence in support of the IAB's decision to grant the claimant her Petition to Determine Compensation Due and that the Board committed no legal error. Accordingly, the decision of the IAB is **AFFIRMED**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

[108] *See id.*
[109] *Johnson*, 213 A.2d at 66.
[110] *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).
[111] *See Stevens* at *10; *see also*, *Clements, DiSabatino.*