

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JOHN HINCKLE,)	
)	
Appellant,)	
)	
v.)	C. A. No. 03A-07-010 JEB
)	
SHORTS ENTERPRISES, INC.,)	
)	
Appellee.)	

Submitted: April 8, 2004
Decided: July 28, 2004

*Appeal from a Decision of the Industrial Accident Board.
Reversed and Remanded.*

OPINION

Appearances:

Gary S. Nitsche, Esquire, and W. Christopher Componovo, Esquire,
Wilmington, Delaware. Attorneys for John Hinckle.

David G. Culley, Esquire, and Susan A. List, Esquire, Wilmington,
Delaware. Attorneys for Shorts Enterprises, Inc.

JOHN E. BABIARZ, JR., JUDGE

Claimant John Hinckle was injured in a compensable work accident during the scope of his employment for Shorts Enterprises, and the parties entered into a compensation agreement. Claimant subsequently filed a petition for additional compensation due, which was denied by a hearing officer acting on behalf of the Industrial Accident Board. For the reasons explained below, the Court reverses the hearing officer's decision and remands the case back to the Industrial Accident Board to enter an order granting Claimant's petition for additional compensation due.

FACTS

In March 2000, Claimant injured his left shoulder while working as a concrete finisher for Short Enterprises. His duties included heavy shoveling, digging and lifting. In September 2000, after conservative treatment failed to resolve Claimant's shoulder pain and weakness, Robert Steele, M.D., a board-certified orthopedic surgeon, performed arthroscopic surgery on Claimant's left shoulder.

Dr. Steele shaved the collar bone to relieve pressure on the rotator cuff. He also excised some of the outer collar bone so that it would not grate upon the shoulder bone. He performed a bursectomy, which is a cleaning out of the ball and socket joint of the shoulder. The shoulder socket, which is shallow, is surrounded by cartilage called the labrum. Claimant's labrum was frayed at approximately the 12 o'clock position, but Dr. Steele was confident that there was no tearing of the labrum. He

performed minor debriding, or smoothing, of this area but did not make any repairs, and did not consider the smoothing of the labrum to be an actual part of the surgery. Dr. Steele also noted a sublabral hole at approximately the 3 or 4 o'clock position. He described this type of hole, or separation of the labrum from the socket, as a normal condition which required no corrective action. The parties reached an agreement as to compensation in regard to this operation and its aftermath.

Following the operation, Claimant resumed his normal activities but saw Dr. Steele in May 2001 because of residual shoulder pain, especially after work. Claimant again presented to Dr. Steele in November 2002, this time with severe left shoulder pain which was making work difficult for him. Based on his belief that Claimant had a mechanical problem which therapy and other conservative treatments would not correct, Dr. Steele performed a second arthroscopic left shoulder procedure in December 2002.

The second surgery revealed a labral tear in the same location where the fraying had been observed in the first operation, that is, between the 11:00 and the 1:00 o'clock position. Dr. Steele inserted stitches through the arthroscope and sewed the detached labrum back onto the bone. This is the area which had been debrided during the first operation. Dr. Steele also performed another subacromial bursectomy, primarily as a preventive measure to ensure that there were no other problems with

the ball and socket joint. Following the December 2002 surgery, Dr. Steele gave Claimant a total disability note through February 2003.

In June 2002, Claimant filed a petition to determine additional compensation due, including medical expenses for the second surgery and temporary and total disability benefits. A departmental hearing officer conducted a hearing in June 2003 and subsequently issued a decision finding that the second surgery was not related to the work accident. Claimant's petition was denied, and he filed a timely appeal to this Court.

STANDARD OF REVIEW

In reviewing a decision of an administrative board or hearing officer, the Court's role is to determine whether the factual findings are supported by substantial evidence and are free from legal error.¹ Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion.² When parties present testimony from expert witnesses, the agency is free to choose between conflicting opinions, and either opinion will constitute substantial evidence for purposes of appeal.³ The Court does not weigh the evidence, determine questions of

¹*Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del.Super. 1979). *See also* DEL. CODE ANN. tit. 19, § 3323f(a).

²*Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del.1998).

³*Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

credibility or make factual findings.⁴ It merely determines if the evidence is legally adequate to support the agency's findings.⁵

DISCUSSION

Claimant argues that the hearing officer's decision that the second surgery was unrelated to the work accident should be reversed because it is not supported by substantial evidence. Employer argues that the hearing officer's decision is supported by substantial evidence and is free from legal error.

The Court notes first that the medical testimony pertains to three types of labral conditions. The labrum is a ring of cartilage found around the edge of a joint or bone, in this case, the shoulder bone. Labral fraying, or raveling, was found in the 12 o'clock position in the first operation performed by Dr. Steele. A labral hole occurs when the labral cartilage pulls away from the bone. This is a common occurrence which does not typically require repair. A labral hole was observed in the three o'clock position during Claimant's first operation but is not part of the dispute. A labral tear, where the cartilage literally shreds away from the bone, was found at the 12 o'clock position during the second operation. The focus of this appeal is the labral tear, referred to as a superior labral tear because of its position at the top of the

⁴*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1960).

⁵DEL. CODE ANN. tit. 29, § 10142(d).

rim of cartilage surrounding the shoulder bone.

The hearing officer based his decision primarily on the testimony of Andrew Gelman, M.D., a board-certified orthopedic surgeon who examined Claimant in September 2002. Dr. Gelman prepared a report in March 2003 in preparation for the hearing. Dr. Gelman's report stated that the labral tear repaired in the second operation was a separate condition from any of the problems addressed in the first surgery. He hypothesized that the tear was due to simple attrition and/or a separate accident. In his deposition, Dr. Gelman indicated that Claimant's "everyday activities slowly beg[a]n to work away and affect that area of the shoulder,"⁶ as opposed to the impact of Claimant's heavy job duties.⁷ The Court finds that this conclusion defies common sense. If ordinary movement of the shoulder could have caused Claimant's labral cartilage to tear, it must also be true that his heavy lifting, digging and shoveling at work contributed to the torn cartilage, especially in light of the fact that this area was frayed in September 2000 following the work accident. While the Board, or its appointed hearing officer, has broad discretion to accept testimony from either party's expert witness, the factfinder may not accept an expert opinion that fails to account for relevant, reliable medical evidence.

⁶Gelman Deposition at 8.

⁷*Id.* at 6.

Dr. Gelman also theorized that another accident could have caused the tear, although he conceded that no evidence exists of such an accident. Dr. Steele testified that he questioned Claimant at length about any intervening event, and that Claimant was certain that no such event had occurred. Claimant himself testified at the hearing that he had not experienced any additional accidents affecting the shoulder, and the hearing officer found him to be a credible witness. The unknown-accident theory was nothing more than good old-fashioned speculation, which has never been an adequate basis for a judicial or quasi-judicial finding. Nor does such speculation constitute substantial evidence for purposes of appellate review.

Dr. Gelman also asserted that the surgical records showed that the operations addressed “two separate structural abnormalities.”⁸ Dr. Gelman underscored this interpretation of the records by emphasizing Claimant’s “excellent surgical outcome” following the first surgery, suggesting that a potential labral tear would have complicated the recuperation.⁹ However, Dr. Gelman’s opinion that the operations involved completely different pathologies ignores Dr. Steele’s visual observation of superior labral fraying in the first operation, which he documented in his surgical notes and testified to in his deposition on both direct and cross-examination. Dr.

⁸*Id.* at 5.

⁹*Id.* at 6.

Gelman's opinion also ignores Dr. Steele's surgical observation that the tear repaired in the second operation was in the same 12 o'clock location as the fraying found in the first operation. Although Dr. Gelman was correct that other shoulder problems were addressed in the two operations, he glossed over the fact that the frayed superior labrum observed in the first operation was actually found to be torn in the second operation. Dr. Steele's deposition testimony and his surgical records about the superior labral fraying are reliable, relevant evidence. Although Dr. Gelman did not take this evidence into account, the Court finds that the factfinder cannot ignore it. The Court concludes that the hearing officer abused his discretion in relying on Dr. Gelman's representation that the two operations addressed distinct pathologies in light of the surgeon's observations of labral fraying in the same spot which subsequently tore away from the bone.

The hearing officer also misstated the crucial part of Dr. Steele's testimony as to causation. The hearing officer's decision states that "[u]nfortunately, Dr. Steele could not pinpoint that the labral tear resulted from the industrial accident or from the surgery which repaired the initial injury."¹⁰ However, the record shows that Dr. Steele was not asked that particular question. He was asked on cross-examination whether he could testify within a reasonable degree of medical probability that

¹⁰Board Decision at 6.

Claimant's daily activities "did not either contribute or cause the fraying that you observed in the first surgery to develop into the labral hole that you repaired on the second surgery."¹¹ Dr. Steele replied as follows: "Yes. I think it would be unlikely for normal daily activities to produce that. I just have not seen that in my experience before."¹² In other words, he was asked the question in the negative -- can you say that Claimant's normal activities did not cause the fraying to develop into the tear? And he answered in the way he was asked, in the negative, that normal activities would not have caused the fraying to become a tear.

The hearing officer also ignored Dr. Steele's testimony on direct examination. He was asked to give his expert opinion on the relation between the work accident and the second operation. He answered as follows:

My feeling is that Mr. Hinckle would not have sustained this injury if, for instance, he was a computer programmer. His job is an extraordinarily heavy, physical job. . . . [H]e does a lot of shoveling, lot of digging, a lot of lifting, and the only conclusion that I can come to in the absence of any acute traumatic episode was that this was one -- that the labral tear occurred as a result of attrition from his heavy work. I just do not see that normal activities of daily living would cause this to happen. I have not seen that in my experience.¹³

Based on Dr. Steele's answers during both direct and cross examination, the Court

¹¹Steele Deposition at 16.

¹²*Id.*

¹³*Id.* at 10.

finds that the hearing officer misstated Dr. Steele's expert opinion as to the causal connection between the work accident and the second shoulder surgery.

For all these reasons, the Court concludes that the hearing officer's finding that Claimant did not prove that his second shoulder surgery was related to his work accident must be reversed. In addition, Dr. Steele's testimony that Claimant was totally disabled from December 9, 2002, through February 19, 2003, was uncontradicted by any other evidence. The Court hereby orders the Industrial Accident Board to award Claimant total disability benefits for that time period. Finally, Employer presented no evidence to rebut the reasonableness of Dr. Steele's medical expenses, and the Board is hereby ordered to enter an award for Dr. Steele's reasonable and necessary expenses related to the second surgery, as set forth in Claimant's petition.

CONCLUSION

For the above-stated reasons, the hearing officer's decision to deny Claimant Hinckle's petition for additional compensation due is *Reversed* and the cause is *Remanded* to the Board to enter an award consistent with this Opinion.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr/ram/bjw
Original to Prothonotary