IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TAO YANG,	)	
	)	
Employee-Apellant,	)	
	)	
v.	)	C.A. No. 04A-01-008 MMJ
	)	
E. I. DU PONT DE NEMOURS & CO.,	)	
	)	
Employer-Appellee.	)	

Submitted: September 16, 2004
Decided: December 3, 2004

UPON APPEAL FROM A DECISION OF THE INDUSTRIAL ACCIDENT BOARD

AFFIRMED

MEMORANDUM OPINION

Joseph M. Jachetti, Esquire, Kenneth R. Schuster & Associates, P.C., *Attorney for Claimant-Appellant*

John J. Klusman, Jr., Esquire, & Susan A. List, Esquire, Tybout, Redfearn & Pell, *Attorneys for Employer-Appellee*.

JOHNSTON, J.

Tao Yang ("Claimant") has appealed the Industrial Accident Board ("Board")'s December 31, 2003 decision denying Claimant's Petition to Determine Compensation Due.

Claimant asserts that despite finding that Claimant's problems have a psychological dimension, the Board held that Claimant's bronchiolitis is not related to the March 6, 2001 exposure. Thus, the Board's decision that Claimant has not sustained a compensable injury is not supported by substantial evidence and is an error of law. Claimant requests that the Board's decision be reversed. E. I. du Pont de Nemours & Co. ("DuPont" or "Employer") contends that Board's decision denying Claimant's Petition is free of legal error and supported by substantial evidence. Thus, Employer claims that the Order denying the Petition to Determine Compensation Due must be affirmed.

FACTS AND PROCEDURAL CONTEXT

Claimant holds a doctorate in biochemistry and a master's degree in biology. Claimant was hired by DuPont in 2000 as a research chemist in the experimental cancer drug research division. In March 2001, Claimant was working on a project involving cancer treatment pre-clinical studies. Claimant worked with chemicals that were experimental and whose toxicity was unknown.

On March 6, 2001, Claimant was working with a "hot" batch of approximately 350 compounds developed by DuPont's California branch. Claimant was the only

scientist working in the laboratory that day. The laboratory contained a vent hood to remove fumes.

Claimant testified that he had analyzed some of the compounds on the preceding Friday. Claimant had replaced the plastic covering and returned the compounds to the refrigerator. On March 6, 2001, Claimant removed the container from the refrigerator and was exposed to fumes emanating from the container. Claimant immediately realized that the plastic covering the containers had been eaten through by the chemicals. Claimant carried the container across the room to the ventilation hood.

Claimant continued to sneeze for approximately a half hour after he inhaled the fumes. Claimant immediately reported the incident to his supervisor and a report was made. Later that evening while at home, Claimant began to experience intense chest pains. The following day Claimant reported this pain to his supervisor who thereafter prepared a report. However, because there were so many compounds, it was not possible to determine the exact exposure.

On March 7, 2001, Claimant was still experiencing intense chest pain, fatigue and breathing difficulty. Claimant's supervisor advised him to go home. When Claimant awoke on March 8, 2001, the symptoms had became worse and he went to the emergency room. On March 9, 2001, Claimant went to his family physician and

remained out of work. Claimant's problems remained over the following weekend.

On March 12, 2001, Claimant returned to work with continued complaints. On April 2, 2001, Claimant returned to his primary care physician for follow-up, stating that his symptoms were getting worse. In early April, Claimant began to experience night sweats and muscle weakness. Around April 5, 2001, DuPont contacted Claimant and instructed him not to return to work. In June 2001, Claimant attempted to return to work and was able to do so sporadically until October 19, 2001. On October 19, 2001, DuPont's doctor agreed that Claimant was no longer able to work. Claimant has not returned to work as of this date.

On January 16, 2003, Claimant filed a Petition to Determine Compensation Due, alleging that he was injured as a result of the inhalation of chemical fumes on March 6, 2001. Claimant sought compensation for total disability and payment of medical expenses. DuPont disputed causation.

The parties stipulated that the case could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with title 19, section 2301B(a) of the Delaware Code. A hearing was held on Claimant's Petition on December 4, 2003 ("Hearing"). When considering a case by stipulation, the Hearing Officer stands in the position of the Industrial Accident Board ("Board").[1]

[1]*See* 19 *Del. C.* § 2301B.

THE BOARD'S FINDINGS

Acting as the Board, the Hearing Officer denied Claimant's Petition. Some of the findings of the December 31, 2003 decision are as follows.[2]

The Board observed that to succeed on his Petition, Claimant must establish by a preponderance of the evidence that his various difficulties are causally related to the March 6, 2001 exposure to chemical fumes of unknown toxicity. The Board held that Claimant had not met his burden of proving that it was more likely than not that the March 2001 exposure to fumes caused his symptoms.

The Board held that Claimant failed to "prove both the existence of stressful working conditions and the connection between those conditions and Claimant's mental disorder" in accordance with *State v. Cephas*.[3]

The Board determined that Claimant failed to show the existence of an objectively stressful work condition. Claimant admitted that, originally, he thought nothing of the exposure to fumes because it is a common occurrence in that line of work. After the exposure, he continued his work on a new batch of the same chemicals. It was not a stressful event. It was only after Claimant began to have chest pain that he became anxious about his health and focused on the work event as

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[2] *Yang v. E.I. du Pont de Nemours & Co.*, I.A.B. No. 1199345 (Dec. 31, 2003).

[3] 637 A.2d 20, 28 (Del. 1994).

a cause. The work event itself was not objectively stressful. Rather, as Dr. Neil Kaye ("Dr. Kaye") observed, Claimant chose to focus on that event as the cause of all his problems. As such, Claimant does not meet the required *Cephas* standard of causation for workers' compensation benefits.[4]

In arriving at its conclusion, the Board considered the testimony of many physicians by way of multiple dispositions taken over an extended period of time. The Board observed that this case involves both physical/biological and psychological questions. The Board considered these questions separately.

The first issue was whether Claimant has any physical problem at all. If he does, the second issue was whether that physical problem is causally related to the fume exposure of March 2001. Based upon the testimony of Dr. Glen Greenberg ("Dr.Greenberg"), a psychologist, Dr. Kaye, a psychiatrist, and Dr. Richard Ivins ("Dr. Ivins"), a neuropsychologist, the testing reflects a psychological problem related to anxiety and depression, not a physical or anatomical injury. As Dr. Greenberg observed, Claimant has more cognitive difficulty in things that are of no interest to him. The Board did not find the testimony of Dr. Grace Ziem ("Dr. Ziem") to be credible that Claimant suffered from the presence of a peripheral neuropathy.

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[4]*See Saleh v. Wilmington Trust Co.*, Del. Super., C.A. No. 97A-06-004, Toliver, J., 1998 WL 733195, at *5. (compensation not paid for disability proximately caused by conditions found stressful only in claimant's mind).

Based on the testimony of Dr. Talmadge King ("Dr. King"), the Board stated that more likely than not, Claimant has bronchiolitis. However, Claimant failed to meet his burden of proof of establishing the causal connection between bronchiolitis and the March 2001 exposure to the chemical fumes. Because there is no way to discern what precise chemical vapors Claimant inhaled, there is no scientific evidence as to what dosage is necessary to cause a physical problem. Dr. Kane Schaphorst ("Dr. Schaphorst") agreed that the chemical agent would be more strongly implicated if other people had been affected.

Chest pain, the most persistent of Claimant's claimed symptoms, appears to be unrelated to any physical problem from the inhalation exposure. Dr. Schaphorst noted that he could not explain chest pain based on an inhalation theory. Medical experts were in agreement that the pulmonary tests in April 2001 were completely normal. Dr. King suggested that a person could remain asymptomatic for hours, days or weeks, but the April testing was a full month after the exposure and was completely normal. This is highly suggestive that no injury was caused at the time of the exposure. If the chemical exposure was sufficient to be toxic, it seems likely that some sign of the damage would have been evident after a month.

Claimant's case uses a bootstrap argument: the fumes must have been toxic because he has bronchiolitis, and the bronchiolitis must have been caused by the

exposure to the fumes because they were toxic. The medical experts all agreed that bronchiolitis can be caused in a multitude of ways. According to Dr. Schaphorst, as of October 2001, Claimant's testing was still normal. This raises the suggestion that another cause developed in 2002 which resulted in the bronchiolitis. Employer, however, does not have to establish another cause for Claimant's condition. To defend against Claimant's petition, it is sufficient that Employer merely present evidence rebutting Claimant's claim that the injury was work related.[5] Claimant has failed to show that, more likely than not, his bronchiolitis is the result of the minimal exposure in March of 2001 to chemicals of unknown toxic properties.

Medical professionals agreed that at least some of Claimant's problems are psychologically based. None of the medical witnesses believed that Claimant was malingering (i.e., deliberately faking). Rather, Claimant is being affected by psychological factors. The issue is whether the psychological problems are causally related to the March 2001 exposure. The Board found that under the applicable legal standard for mental injury claims, causation had not been established.

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[5] *See Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985); *Alfree v. Johnson Controls, Inc.*, Del. Super., C.A. No. 97A-04-005, Goldstein, J., 1997 WL 718669, at *7.

STANDARD OF REVIEW

In reviewing the decisions of the Board, this Court must determine whether the findings and conclusions of the Board are free from legal error and supported by substantial evidence in the record.[6] The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[7] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[8] The appellate Court determines if the evidence is legally adequate to support the agency's factual findings.[9] The Court also determines if the Board made any errors of law.

On appeal "[t]he Superior Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[10] The Superior Court may not overturn a factual finding of the Industrial Accident Board unless there is "no satisfactory proof" supporting the

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[6] *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985); *Talmo v. New Castle County*, 444 A.2d 298, 299 (Del. Super. 1982), aff'd, 454 A.2d 758 (Del. 1982).

[7] *Johnson v. Chrysler Corporation*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

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

[9] 29 *Del. C.* § 10142(d).

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

Board's finding.[11] It is also well established that "[t]he credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine."[12]

ANALYSIS

Claimant asserts that the Board should have found a physical/biological and/or psychological injury resulting from the March 6, 2001 exposure, after concluding that Claimant suffered injury. Claimant claims that the Board's finding that no compensable injury exists is not supported by substantial evidence and is an error of law.

Employer asserts that Board's decision denying Claimant's Petition to Determine Compensation Due must be affirmed since it is free of legal error and supported by substantial evidence. The Board did not err when it accepted Claimant's expert opinions as to the nature of the injury and rejected those opinions as to causation. The Board accepted the testimony of Dr. King that more likely than not, Claimant had bronchiolitis. However, for causation determination, the Board relied on the testimony of Employer's expert, Dr. Greenberg, who testified that there

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[11] *Id.* at 67.

[12] *Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. 1972).

was no information as to what dosage is necessary to cause a physical problem since there was no way to discern what precise chemical vapors were involved.

The Board also took into account the fact that there were no other reports of inhalation injuries even though other researchers have come into contact with these chemicals. Thus, the Board determined, based upon substantial evidence, that Claimant had failed to meet his burden of proof to establish causation.

To determine whether Claimant's injury could be physically based, the Board recognized three possible diagnoses asserted by Claimant. The first diagnosis of peripheral neuropathy, suggested by Dr. Ziem, was not supported by traditional diagnostic testing. The second diagnosis of physical brain damage, also suggested by Dr. Ziem, was not corroborated by MRI scans of the brain, or a PET scan. The Board opined that, consistent with Dr. Greenberg's opinion, the cognitive difficulties are more of a psychological nature than physical. The third diagnosis of bronchiolitis, suggested by Dr. King, was accepted by the Board.

The Board noted that the delayed onset of symptoms illustrated another difficulty in establishing a causal connection. The chest pains, the most persistent symptom over the years, did not occur till eight hours after the exposure. The chest pain appears to be unrelated to any physical problem from the inhalation exposure. Dr. Ziem opined that the inhalation of these "corrosive" chemicals would have

irritated the entire respiratory tract. The fact that the first pulmonary tests were normal rebutted Dr. Ziem's opinion as to causation.

Dr. Schaphorst opined that if the March 2001 exposure caused the problem, the findings would have been acute nearer to the date of exposure. Dr. Schaphorst also testified that the causal link was "not beyond the realm of possibility." Nevertheless, the Board noted that Dr. Schaphorst's statement expressed a standard far below the finding of "more likely than not," which is required for causation. Therefore, Claimant did not meet the burden of proving that the bronchiolitis was caused by the March 2001 exposure because bronchiolitis can be caused in a multitude of ways.

The Board's decision is supported by substantial evidence, but the Board clearly stated the reasons why it chose to believe Dr. King's testimony that Claimant had bronchiolitis, and Dr. Greenberg's testimony negating causation. Further, the Board explained why it did not accept Dr.Ziem's testimony on causation.

In *Downes*,[13] the Supreme Court held that the Board was free to adopt the opinion of one expert over the opinion of another. In *Cephas*,[14] the Supreme Court reaffirmed deference to Board decisions, holding that as long as substantial evidence

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[13]623 A.2d 1142 (Del. 1993).

[14]*State v. Cephas*, 637 A.2d 20, 28 (Del. 1994).

existed to support the Board's findings, it was within the Board's authority to adopt the testimony of one doctor over the testimony of another.

Claimant contends that the error of law with regard to the psychological injury is dispositive. Claimant posits that the proper standard to be applied in the case at bar is that set forth in *Rice's Bakery v. Adkins,*[15] rather than the *State v.Cephas* standard.[16] The basis of Claimant's argument is that the instant case arises out of one single traumatic exposure on March 6, 2001, rather than a mental injury that was the result of, "gradual stimuli rather than sudden shock."[17] In *Rice's Bakery*, a psychological or neurotic disorder was deemed compensable, provided a sufficient causal connection is provided by competent evidence between an industrial accident and a resulting disability.[18]

A psychological illness is compensable under the Workers' Compensation Act, even when, as here, there has been no compensable physical trauma.[19] However, for a stress-related mental claim to be compensable, "a claimant must offer evidence demonstrating objectively that his or her work conditions were actually stressful and

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[15]269 A.2d 215, 216-17 (Del. 1970).

[16]637 A.2d 20, 28 (Del. 1994).

[17]*Id*. at 21.

[18]*Id*.

[19]*Id.* at 27.

that such conditions were a substantial cause of claimant's mental disorder."[20] The Board noted that Claimant failed to show the existence of an objectively stressful condition. Originally, Claimant thought nothing of the exposure. In fact, he continued to work with the chemicals till he had chest pain and became anxious and focused on the work event as the cause. The Board accepted Dr. Kaye's opinion that Claimant subjectively concluded at that time that the work incident is the source of his problems.

The Board assessed the evidence and concluded that Claimant merely imagined or subjectively concluded that the work incident is the source of his problems.[21] Claimant argues that even DuPont's medical experts relate Claimant's anxiety and depressive symptoms to the work event. However, the Court recently has noted that what a doctor considers to be a medical cause does not necessarily translate into a substantial legal cause of an injury for purposes of worker's compensation benefits.[22]

Claimant chose to make the fume incident the focus of his anxiety. While, in that sense, the anxiety problems "relate" to the work event, that does not make that event the legal cause of the problems. "[T]he employer cannot be held responsible

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[20] *Id*.

[21] *Cephas,* 637 A.2d at 28.

[22] *State v. Stewart*, Del. Super., C.A. No. 02A-05-010, Carpenter, J. (Nov. 26, 2003).

if the claimant imagines or subjectively concludes that work conditions have caused a mental injury."[23] The Board considered Claimant's history, reflecting that he has been overly anxious concerning his health before. The emergency room records indicate that Claimant maintained that he had stomach cancer. The Board found that a similar over-anxiety appeared to be present in the current situation.

CONCLUSION

Claimant's psychological injury is not compensable. Claimant has failed to establish causation under the applicable legal standard for mental injury claims for workers compensation benefits.[24]

THEREFORE, having determined that the findings and conclusions of the Industrial Accident Board are free from legal error and supported by substantial evidence in the record, the decision of the Industrial Accident Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston

[23] *Saleh*, 1998 WL 733195, at *4.

[24] *State v. Cephas*, 637 A.2d 20, 24-28 (Del. 1994).