

**SUPERIOR COURT
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0669

MBNA AMERICA BANK, N.A.,)
)
 Employer - Appellant,)
)
 v.)
)
ALAN BROOKS,)
)
 Employee - Appellee)

C.A. No. 04A-12-005 FSS

Submitted: May 11, 2005
Decided: August 25, 2005

ORDER

Upon Appeal from Industrial Accident Board – *AFFIRMED*

Colin M. Shalk, Esquire, Casarino Christman & Shalk, P.O. Box 1276, Wilmington, Delaware, 19899. Attorney for Employer-Appellant.

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

SILVERMAN, J.

1. This is MBNA's appeal from the Industrial Accident Board's November 15, 2004 decision granting Brooks's Petition to Determine Additional Compensation Due.

2. Brooks's claim arose out of a hard fall he took as he left work on February 10, 2003. Brooks hurt his neck, shoulder and low back when he slipped and fell.

3. Brooks initially sought medical treatment for his low back. After undergoing lumbar surgery Brooks filed a claim for benefits, which the Board granted. MBNA did not take an appeal from that decision.

4. Brooks also sought treatment and filed a claim for his neck. The Board heard that claim on October 29, 2004 and, as mentioned, it granted additional benefits on November 15, 2004. It is that decision, concerning the neck injury, from which MBNA took this appeal.

5. The Board rested its decision primarily on the testimony of Brooks and his neurosurgeon. The latter's opinion relied on Brooks's subjective complaints, his treating physician's reports, objective studies and the neurosurgeon's clinical findings. The neurosurgeon firmly and consistently opined that the fall in February 2003 aggravated a preexisting condition, making neck surgery necessary.

6. MBNA contends that the neurosurgeon's opinion was not based on

the evidence and, at best, the opinion was mere “musing” or “hypothesizing.”

7. MBNA does not question Brooks’s need for the neck surgery. Instead, MBNA denies that the surgery was attributable to the fall in February 2003. Backed by a potentially persuasive expert opinion, MBNA attributed the neck surgery to Brooks’s pre-existing condition.

8. Everyone, including Brooks and his medical expert, agrees that the neck problem started no later than in early childhood. Everyone further agrees that by November 1996, Brooks was a candidate for the same neck surgery that he underwent on June 24, 2004, and for which the Board granted the challenged benefits. Moreover, it is agreed that all the objective findings were not changed by the slip and fall. With that being true, which it is, MBNA cannot fathom how the neurosurgeon and the Board, in turn, could conclude that the neck surgery was attributable to the February 2003 slip and fall. Finally, and most vexing to MBNA, is the undisputed fact that Brooks did not seek his neurosurgeon’s treatment for the neck until April 2004, fourteen months after the slip and fall.

9. MBNA’s consternation clearly is intensified by the strength of the evidence supporting its position. MBNA had Brooks seen by a neurosurgeon of its choosing. Not only did MBNA’s neurosurgeon claim that Brooks had “changed his story completely” between the two examinations he performed, MBNA’s

neurosurgeon saw nothing to justify attributing the neck surgery in June 2004 to the 2003 slip and fall.

10. All of the above notwithstanding, Brooks's medical expert – his treating neurosurgeon – opined that the neck surgery was causally related to the February 2003 slip and fall. According to the neurosurgeon, it was the slip and fall, a traumatic event, that caused the longstanding, degenerative, neck condition to become symptomatic.

11. Despite MBNA's arguments to the contrary, the neurosurgeon saw evidence in the medical records concerning the neck injury appearing almost immediately after the slip and fall. Brooks initially reported problems with his neck and problems with his shoulder, which the neurosurgeon associated with the neck. As the neurosurgeon put it, “[Brooks] had neck complaints right from day one.” That testimony is supported by Brooks's treating physician's records, which show that shortly after the slip and fall Brooks was complaining about aches and pains, including some pain around the base of the muscles of his neck. In fact, the original diagnosis included cervical sprain and a question about Brooks's cervical disc.

12. Furthermore, Brooks testified that immediately after the slip and fall, he mentioned having pain specifically in the neck area, although it was his back “that hurt like hell.” While MBNA offered cross-examination and argument that

potentially undermined Brooks's testimony, the Board specifically found Brooks credible, which means the Board believed Brooks's claim that his neck started giving him trouble when he slipped and fell. MBNA dismisses the Board's credibility finding. But Brooks's testimony, if believed, helped tie the slip and fall to the neck surgery.

13. Furthermore, Brooks's neurosurgeon discounted the fact that Brooks did not complain about neck pain on several occasions when Brooks had the opportunity. The neurosurgeon concluded "the lower back was overpowering his other complaints." Moreover, the neurosurgeon's opinion was based on the fact that Brooks's neck, despite the degenerative changes, had been asymptomatic until the slip and fall.

14. The court appreciates that MBNA's position is supported by a competent medical expert's opinion. And, moreover, MBNA offered potentially compelling evidence and logical arguments supporting its medical expert's opinion. Even so, if the evidence supporting Brooks's neurosurgeon's opinions is thin, it is more than diaphanous. It has substance and the court cannot rule, as a matter of law, that the Board could not rely on it.

15. In summary, this is another appeal from an agency determination where the appellant presented a powerful case, which the agency nonetheless rejected.

The court appreciates how MBNA sees the evidence and why that probably precipitated this appeal. In light of the entire record, however, the court is unwilling to substitute its views for the Board's.

16. Based on the above, the Industrial Accident Board's November 15, 2004 decision granting additional compensation is *AFFIRMED*.

IT IS SO ORDERED

Judge

cc: Prothonotary (Appeals Division)