SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947

October 25, 2005

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RE: ***Stratton v. Bayhealth Medical Center***
C.A. No.: 05A-03-003 ESB

Date Submitted: July 26, 2005

Dear Counsel:

This is my decision on Brenda Stratton's ("Stratton") appeal of the Industrial Accident Board's ("Board") approval of Bayhealth Medical Center's ("Bayhealth") Petition to Terminate Benefits and denial of Stratton's Petition to Determine Additional Compensation Due. I have affirmed the Board's decision for the reasons set forth herein.

STATEMENT OF THE CASE

Stratton, a 32 year-old housekeeper for Bayhealth, injured her right shoulder when she picked up a bucket of water at work on March 9, 2001. Bayhealth acknowledged that Stratton's injury was compensable, allowing her to receive temporary total disability benefits. Andrew P. Robinson, M.D., a board certified orthopedic surgeon, treated Stratton. He performed three surgeries in three years on her right shoulder. The first surgery was an arthroscopic procedure to correct Stratton's shoulder strain. The second surgery was to remove a bone spur from Stratton's clavicle, which was

a complication caused by the first surgery. Stratton got better after each of these surgeries. The third surgery involved a tendon transfer to correct Stratton's torn rotator cuff. This surgery was unsuccessful. Stratton, who has not worked since the accident, has pain in her right shoulder and is unable to raise her arm to shoulder level.

Bayhealth filed a Petition to Terminate Benefits on July 28, 2004, alleging that Stratton was no longer totally disabled. Stratton filed a Petition to Determine Additional Compensation Due on August 30, 2004, seeking $15,937.80 to pay medical bills for the third surgery. The Board held a hearing to consider both petitions on February 7, 2005. The Board heard testimony from Stratton, Steven L. Friedman, M.D., a board certified orthopedic surgeon, Dr. Robinson, and H. Robert Stackhouse, a vocational expert.

Drs. Friedman and Robinson both testified that Stratton's pain in her right shoulder and her inability to raise her arm to shoulder level were caused by her torn rotator cuff. Dr. Friedman testified that Stratton's torn rotator cuff was caused by an intervening trauma to her shoulder, not her accident. Dr. Robinson testified that Stratton's torn rotator cuff was indirectly related to her accident. Stackhouse testified about a number of jobs that Stratton could perform.

The Board approved Bayhealth's Petition to Terminate, and denied Stratton's Petition to Determine Additional Compensation Due, concluding that Stratton's torn rotator cuff was not caused by her accident. The Board also concluded that even if Stratton's torn rotator cuff was caused by her accident, that Stratton was not totally disabled because Bayhealth had identified a number of jobs that Stratton could perform.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Board is to determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[5]

Stratton has raised three arguments in support of her appeal. One, Stratton argues that the Board erred when it found that her torn rotator cuff was not caused by her accident. Two, Stratton argues that the Board erred when it questioned her credibility. Three, Stratton argues that the Board erred when it found that there were jobs that she could do.

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[1] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

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

[3] *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66 (Del. 1965).

[4] 29 *Del.C.* § 10142(d).

[5] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. Ct. 1958).

DISCUSSION

I. The Board's finding that Stratton's torn rotator cuff was not caused by her accident is supported by substantial evidence in the record.

The employer must, in a total disability termination case, prove that the employee is not completely incapacitated.[6] If the employer is able to do this, then the employee must prove that she is either a *prima facie* displaced worker or that she performed a reasonable job search and was not able to get a job because of her injury.[7] If the employee is able to do this, then the employer must prove the availability of jobs within the employee's physical capabilities.[8]

Since both Drs. Robinson and Friedman testified that Stratton's current shoulder problem was caused by her torn rotator cuff, the Board concluded that the first issue for consideration was whether or not Stratton's torn rotator cuff was caused by her accident. The rule on causation where an employee's work-related injury is aggravated by a subsequent, non-work related accident is set forth in a line of cases beginning with *Hudson v. E. I. DuPont de Nemours & Co., Inc.*.[9] In this case the Superior Court held that "a subsequent injury is compensable only if it follows as a direct and natural result of the primary compensable injury."[10] If the subsequent injury is caused by the employee's own negligence or fault, then the chain of causation is broken and the subsequent injury

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[6] *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975).

[7] *Id.*

[8] *Id.*

[9] 245 A.2d 805 (Del. Super. 1968).

[10] *Id*. at 810, *citing* 1 Larson, Worker's Compensation Law, § 13.12; *Hartford Fire Insurance Company Group v. Beeler*, 244 F.Supp. 188 (E.D.Tenn. 1965); *See Fiorucci v. C.F. Braun & Co.*, 4 Storey 79, 173 A.2d 635 (Del. Super. 1961).

is not compensable.[11] Similarly, in *DuPont Hospital for Children v. Haskins*, the Superior Court stated that "an intervening independent cause of incapacity will not remove the employer's liability for benefits as long as the prior injury remains a 'cause' of the accident's ongoing conditions..."[12]

The most recent case to address causation in this area is *Barkley v. Johnson Controls*.[13] In this case the Superior Court discussed the concept of "direct and natural results" as to compensable injuries, and how the chain of causation may be broken by an employee's own negligent behavior.[14] It went on to state that, "[u]nder this rule, absent such negligence, a weakened condition stemming from a compensable injury may be deemed the cause of an aggravation of the injury which occurs in a subsequent non-work related accident."[15] It is clear from this line of cases that an employer is not relieved of responsibility for an employee's work-related injuries that are aggravated by a subsequent non-work related event that was not caused by the employee.

Drs. Robinson and Friedman offered conflicting theories about the cause of Stratton's torn rotator cuff. Dr. Robinson testified that Stratton was predisposed to sustaining a torn rotator cuff because of her accident and the two surgeries to correct it. Dr. Friedman testified that Stratton's torn rotator cuff was caused by violent trauma. The Board accepted Dr. Friedman's theory and concluded that Stratton's torn rotator cuff was not caused by her accident.

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[11] *Id*. at 810. *Amoco Chemical Corp. v. Hill*, 318 A.2d 614 (Del. Super. Ct. 1974).

[12] 2001 WL 1198938 (Del. Super. Ct. 2001).

[13] 2003 WL 187278 (Del. Super. Ct. 2003).

[14] *Id*., 2003 WL at *3.

[15] *Id*., 2003 WL at *4; *See also DuPont Hospital for Children v. Haskins*, 2001 WL 1198938 (Del. Super. Ct. 2001).

The Board's conclusion is supported by substantial evidence in the record. Dr. Friedman's theory is supported both by the fact that a torn rotator cuff is typically caused by violent trauma and the medical findings from the three surgeries. Dr. Robinson's theory is supported by nothing more than anecdotal evidence.

Dr. Robinson testified that Stratton's torn rotator cuff was "indirectly" related to her accident. His theory was based on a conversation that he had with two colleagues who told him that there was "a very, very low but known incidence of massive rotator cuff tears without trauma" in patients that had previously had arthroscopic surgery. Dr. Robinson testified further that this was so rare that it had not yet been reported in the medical literature and that it was merely anecdotal. Dr. Robinson acknowledged that he had never seen such a massive rotator cuff tear in a person of Stratton's age that was not associated with "high-velocity trauma." Dr. Robinson offered no rationale for why a person who previously had arthroscopic surgery on her shoulder would be predisposed to sustaining a massive torn rotator cuff without violent trauma.

Dr. Friedman testified that Stratton's torn rotator cuff was caused by some violent trauma that happened after her accident. Both Drs. Friedman and Robinson agreed that a torn rotator cuff is almost always caused by violent trauma. Dr. Robinson, when he performed the first and second surgeries on Stratton, did not find any evidence of a torn rotator cuff. He inspected the subscapularis tendon, biceps tendon and rotator cuff and found no damage. The rotator cuff was "unremarkable," as was the biceps tendon and its attachment. Indeed, these areas were described as "pristine" in the medical records. Dr. Robinson performed an MR arthrogram before he did the third surgery. This showed a tear in the supraspinatus tendon with some retraction of the tendon. However, there was no evidence of atrophy in the supraspinatus muscle. The MR arthrogram also showed abnormalities

in the anterior inferior glenoid labrum. Dr. Friedman testified that this is usually an indication of a traumatic tear to the labrum. Dr. Friedman also testified that these findings were significant in diagnosing the cause of Stratton's torn rotator cuff. He testified that where there is a combination of retraction of the tendon and no atrophy, it usually means that there has been an injury that caused the tendon to tear off violently.

The Board's decision to accept Dr. Friedman's theory instead of Dr. Robinson's theory was appropriate. When the parties provide expert testimony, the Board is free to choose between conflicting medical opinions, and either opinion will constitute substantial evidence for purposes of an appeal.[16] In that same light, it is within the Board's discretion to accept the testimony of one expert over another when their opinions are conflicting and supported by substantial evidence.[17] Moreover, the Delaware Supreme Court has consistently held that it is the Board's function to resolve conflicts in medical testimony.[18] Dr. Friedman's theory was consistent with both the typical mechanism of injury for a torn rotator cuff and the medical evidence. Dr. Robinson's theory was based on nothing more than anecdotal evidence. Moreover, Dr. Robinson's testimony was both uncertain and contradictory. When asked if Stratton's torn rotator cuff was related to her accident, Dr. Robinson said, "Yeah, I guess, indirectly."[19] When asked if Stratton had a predisposition to

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

[17] *Romine v. Conectiv Communications, Inc.*, 2003 WL 21001030, at *5 (Del. Super.).

[18] *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).

[19] Q. Okay. So it was your opinion that this would have been related?
A. Yeah, I guess, indirectly. (Robinson Dep. at 18.)

sustaining a torn rotator cuff because of her accident and two surgeries, Dr. Robinson said "no."[20] He then went on to testify that Stratton's situation was a "freak thing," describing it as related to the "water pressure" and "exposure to anesthetics, and you know, who knows."[21] I have no idea at all what Dr. Robinson was trying to say here. His testimony on this critical issue is incomprehensible and the Board cannot be faulted for disregarding it.

II. The Board did not improperly question Stratton's credibility.

Stratton argues that it was wrong for the Board to question her credibility when both Drs. Robinson and Freidman agreed that she cannot use her right arm. Stratton's agrument misses both the point and context of the Board's comments in this regard. The Board accepted it as a fact that Stratton cannot effectively use her right arm to work. The extent of Stratton's shoulder problem clearly was not an issue that the parties disputed. The important issue, as the Board saw it, was not the extent of Stratton's injury, but whether or not it was caused by her accident or some subsequent violent trauma. The Board concluded, based on Dr. Freedman's testimony, that her injury was caused by some subsequent violent trauma. This, of course, raised the obvious question of what kind of violent trauma it was because Stratton did not testify about any event that would have caused her

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[20]Q. Dr. Freedman's DME that you referred to just a couple minutes ago, of June 9, 2004, indicates that Ms. Stratton would have had a predisposition to develop a rotator cuff tear because of the prior surgical procedures and the prior shoulder injury; would you agree with that assessment?

A. No. (Robinson Dep. at 18.)

[21]Q. So you don't think that she would have a predisposition?

A. As I said, the incidents of sustaining, you know, a cuff-tendon failure, in essence, after arthroscopy is extremely, extremely low. So, you know, if .1 percent of all patients have this condition that Mrs. Stratton has, I can't – I don't think you can say that arthroscopy predisposes you to it. It's just, you know, a freak thing. You know, it is related to - - is it related to the water pressure, is it related to the exposure to anesthetics, you know, who knows. (Robinson Dep. at 26.)

to sustain a torn rotator cuff. It was in this context that the Board raised questions about Stratton's credibility. The Board correctly noted that Stratton had a history of not raising matters with her doctors that might be of importance in her treatment. For example, Stratton did not tell Dr. Robinson that she waw in a car accident in 2004. She also did not tell the doctor that had treated her for the injuries from the car accident that she had previously sustained an injury to her shoulder. The Board also noted that it felt that Stratton had exaggerated her shoulder problem. This was based on the Board's observation that Stratton, after being unable to move her right arm while taking the oath before testifying, was able to move it freely while sitting at counsel's table. It is clear to me that the Board's comments reflect its belief that Stratton was being less then forthcoming about what had happened to her and was willing to exaggerate her injuries in order to advance her claim. This, according to the Board, might well explain why Stratton did not testify about an event that might have caused her to sustain a massive torn rotator cuff. The Board was, in this regard, merely commenting on Stratton's credibility to explain a part of the case. It was in no way substituting its judgment for the undisputed medical testimony.

III. Other Employment Opportunities

Since I have concluded that the Board's decision regarding the cause of Stratton's torn rotator cuff was supported by substantial evidence in the record, there is no need to address whether or not the Board's decision about Stratton's ability to perform the jobs testified to by Stackhouse was correct.

CONCLUSION

The Board's decision is affirmed for the foregoing reasons.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley