

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE )  
 ) No. 117, 2004  
 Appellant Below, )  
 Appellant, ) Court Below: Superior Court  
 v. ) of the State of Delaware in  
 ) and for New Castle County  
 )  
 ANTHONY HARRIS, ) C.A. No. 03A-01-004  
 )  
 Appellee Below, )  
 Appellee. )

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

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices

***ORDER***

This 8<sup>th</sup> day of October 2004, on consideration of the briefs of the parties, it appears to the Court that:

1. In this Worker’s Compensation case the employer, the State of Delaware, appeals an award of eighteen percent permanent partial impairment to the claimant, Anthony Harris. The State contends, on appeal, that a portion of the award should have been apportioned to reflect previously treated “neck problems” sustained by Harris and that the Industrial Accident Board (IAB) erred by concluding that apportionment was unnecessary. After reviewing the record, we hold that the Superior Court correctly found that the IAB’s conclusion was supported by substantial evidence. Accordingly, we **AFFIRM**.

2. Harris suffered an injury to his neck on August 3, 2000, while lifting a speaker in the course of his duties at the Delaware Psychiatric Center. Neither party disputes that the injury sustained was compensable. Because Harris' symptoms and impaired function did not resolve, he filed a petition with the IAB for additional compensation due. Specifically, Harris sought an award for an eighteen percent permanent partial impairment of his cervical spine. After a hearing, the IAB awarded Harris the full eighteen percent permanent partial impairment plus attorney's fees and medical witness fees. The State appealed the IAB award to the Superior Court where a judge affirmed the Board's findings. The State now appeals to this Court contending that the Superior Court judge erred when he concluded that the record supported the IAB's conclusion rejecting apportioning a percentage of the award to Harris' preexisting neck condition.

3. The record fully documents the medical history of Harris' neck condition. In late 1994 or early 1995, Harris sought treatment in the emergency room for left arm and neck pain.<sup>1</sup> At that time, an MRI showed significant age-related degenerative changes, but there was no evidence of any disc disease.<sup>2</sup> Harris' neurologist recommended anterior discectomy and fusion at C5-6 and C6-7

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<sup>1</sup> Hocutt Dep. Tr. at 12-13. Dr. Hocutt testified on behalf of the claimant and his testimony is the only record reference of a prior accident.

<sup>2</sup> Gelman Dep. Tr. at 18-19. Dr. Gelman testified on behalf of the state.

in March of 1995 if the symptoms recurred.<sup>3</sup> Harris declined treatment at that time because he had full range of motion in his neck.<sup>4</sup> At the IAB hearing, Harris' medical expert, Dr. Hocutt, testified that the symptoms Harris exhibited in 1995 had resolved within a year.<sup>5</sup> In January of 1997, however, Harris experienced arm numbness. An EMG revealed a right C7 radiculopathy, which appeared to be consistent with the earlier neck symptoms, but inconsistent with the claim that Harris' neck problems had resolved a year earlier.<sup>6</sup>

4. Between 1997 and his work injury in 2000, Harris did not seek any medical treatment for his neck. Harris did not attend the hearing, was not deposed, and, therefore the record contains no direct testimony from him. Dr. Hocutt, testified that Harris told him that he had been free of neck problems for "several years" before his work related injury.<sup>7</sup>

5. In May of 2001, after conservative treatment for his work-related injury failed,<sup>8</sup> an MRI showed a herniated disc at C2-3. In September of 2001, an EMG revealed bilateral radiculopathy at C6 and right carpal tunnel syndrome.

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<sup>3</sup> *Id.* at 12.

<sup>4</sup> *Id.* at 13.

<sup>5</sup> Hocutt Dep. at 15.

<sup>6</sup> Hocutt Dep. at 17. When Dr. Hocutt was pressed on this point he conceded that he would need more evidence to determine whether the problem had proceeded "steadily" since 1994 until 1997 and if it had then, in his opinion, a portion of Mr. Harris' eighteen percent permanent impairment could be attributed to a preexisting problem.

<sup>7</sup> *Id.* at 5-6.

<sup>8</sup> *Id.* at 3. Harris took ten days off from work, after seeing his work physician, and then commenced treatment with a chiropractor. Harris, however, discontinued treatment because "he wasn't sure it was helping."

Based on those factors and because Harris had full range of motion in 1995, Dr. Hocutt opined that Harris' entire eighteen percent partial permanent disability was attributable to Harris' work-related injuries stemming from the accident of August 2000. Dr. Hocutt further opined that since Harris "was asymptomatic for several years before [the] accident,"<sup>9</sup> no portion of the disability should be attributed to Harris' earlier neck problems.

6. Dr. Gelman, the State's expert, testified that Harris' disability should be attributed to his preexisting neck condition. Dr. Gelman testified that if Harris had been medically evaluated before the accident, he more likely than not would have had the same limited range of motion then that he has now. Therefore, the State contends that none of the eighteen percent permanent partial disability is attributable to the August 2000 accident.

7. The IAB chose to accept Dr. Hocutt's testimony and found that Harris did not seek medical treatment for any cervical problems from 1997 until the work-related accident in 2000. The IAB found that the absence of a reference to any neck condition "suggests that the cervical problems had become asymptomatic."<sup>10</sup> The Board determined that Harris' pre-existing degenerative condition was latent and that he was entitled to the full eighteen percent award without apportionment.

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<sup>9</sup> Hocutt Dep. at 11-12.

<sup>10</sup> IAB Decision, Dec. 16, 2002, at 7-8.

The State appeals on the grounds that the award should have been apportioned to reflect Harris' earlier "neck problems," and that the record did not contain sufficient evidence from which the IAB could conclude that Harris' earlier condition was latent and therefore inappropriate for apportionment.

8. The Court reviews a Superior Court judge's affirmation of an IAB decision on appeal to determine if the record contains substantial evidence supporting the IAB findings. Substantial evidence is relevant evidence that a reasonable mind would accept as adequate to support a conclusion.<sup>11</sup> This Court has the duty to review the evidence on record, but the scope of the review is narrow.<sup>12</sup> Because the IAB, is the trier of fact weighing the credibility of the evidence, this Court will not reverse a holding the Superior Court concludes to be supported by substantial evidence unless it is premised on an error of law.<sup>13</sup> Conclusions of law are reviewed *de novo*.<sup>14</sup>

9. Harris relies on *Sewell v. Delaware River and Bay Authority*<sup>15</sup> to support his position that the IAB should not apportion an award for an injury that is partially related to an asymptomatic, pre-existing condition. In *Sewell*, the

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<sup>11</sup> *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

<sup>12</sup> *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *see also Chicago Bridge & Iron Co. v. Walker*, 372 A.2d 185, 188 (Del. 1997) *overruled by Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989).

<sup>13</sup> *Freeman*, 164 A.2d at 688.

<sup>14</sup> *In re Doughty*, 832 A.2d 724 (Del. 2003).

<sup>15</sup> 796 A.2d 655 (Del. Super. Ct. 2003), *appeal dismissed in Delaware River & Bay Auth. V. Sewell*, 755 A.2d 387 (Del. 2000).

claimant suffered an injury to his knee, which would not have resulted in a permanency rating absent Sewell's pre-existing condition of osteoarthritis.<sup>16</sup> The court emphasized that the employer takes its employees "as they are,"<sup>17</sup> and reaffirmed the "but for" test, which is that the employee would not have suffered the infirmity "but for" the industrial accident.<sup>18</sup>

10. The State claims that the appropriate standard to be applied in this case is the standard set forth in *State v. Neff*.<sup>19</sup> There, a Superior Court judge held, and this Court affirmed, that apportionment was required despite her complete recovery because she had "previously sustained a permanent injury."<sup>20</sup> In *Neff*, the claimant suffered from a severe previous injury that required surgery and substantially altered her anatomy. Although she returned to work after the surgery without further symptoms for four years, the trial judge distinguished that type of permanent injury from a "naturally occurring degenerative change."<sup>21</sup> Additionally, the State relies on *Mangle v. Grotto Pizza*,<sup>22</sup> where scar tissue in the claimant's

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<sup>16</sup> *Sewell*, 796 A.2d at 664.

<sup>17</sup> *Id.* at 663.

<sup>18</sup> *Id.* at 661.

<sup>19</sup> No. 02A-12-006SCD 2003 WL 22064099 (Del. Super. Ct. Sept. 3, 2003), *aff'd Neff v. State*, 842 A.2d 1244 (Del. 2004).

<sup>20</sup> *Neff*, 2003 WL 22064099 at \*11-\*13 (quoting DEL. CODE ANN. tit. 19, §2327(a) (2001)).

<sup>21</sup> *Id.* at \*3.

<sup>22</sup> 1997 Del. Super. LEXIS 195 (Del. Super. Ct. May, 13, 1997).

knee from an earlier surgery contributed to his disability and a part of the award for the claimant's second injury was apportioned to the pre-existing injury.<sup>23</sup>

11. The State's argument is unpersuasive. Unlike the plaintiff in *Neff*, there is no evidence that Harris' injury was symptomatic before the work-related injury sustained in August 2000. The IAB found that Harris was suffering from a degenerative condition of his neck that had become latent or *asymptomatic* and was non-disabling at the time of his injury. Therefore, the Superior Court judge properly recognized that the IAB correctly applied *Sewell* when it refused to apportion Harris' award.

12. There is sufficient evidence in the record to support the IAB finding that Harris' condition had become latent. Dr. Hocutt testified that Harris had told him that he was asymptomatic for several years before the work-related accident. While the State accurately emphasizes that Dr. Hocutt admitted wanting more information regarding Harris' course of illness, the record supports a conclusion that Harris was fully functional before the accident. Any preexisting condition Harris had resulted from an undetected naturally occurring degenerative change and not from surgical anatomy alteration or a preexisting permanent injury. This fact combined with Dr. Hocutt's testimony that Harris was asymptomatic is

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<sup>23</sup> *Id.*

sufficient evidence to support the Board's finding of latency and the Superior Court judge's affirmance of that finding.

13. The State did not meet its burden of proof because it failed to demonstrate that Harris' "neck problem" was symptomatic during the three year time period before the accident. Furthermore, Harris himself informed his physician that those problems had become asymptomatic or latent. Based on this evidence, the Superior Court judge did not legally err when he affirmed the IAB's application of Sewell and refusal to apportion Harris' award. We conclude that the IAB's decision was supported by substantial evidence, therefore, the Superior Court judge's affirmance of that decision is free from legal error.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice