IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRUCE DRAINER,	§	
	§	No. 393, 2013
Appellant Below,	§	
Appellant,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
HEATING OIL PARTNERS,	§	
	§	C.A. No. N12A-06-004 RRC
Appellee Below,	§	
Appellee.	§	

Submitted: November 13, 2013
Decided: February 4, 2014

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices.

O R D E R

This 4th day of February 2014, on consideration of the briefs of the parties, it appears to the Court that:

1) Bruce Drainer appeals from a Superior Court decision affirming an Industrial Accident Board decision that denied Drainer's petition to determine additional compensation. Drainer challenges the Board's conclusion that his original spine injury had healed, and that his current condition was not caused by the work-related accident. He also argues that the Board should have granted relief based on his motion for reargument. Finally, Drainer contends that Heating Oil Partners, L.P., his employer, impliedly admitted that his current injury is compensable because

Partners paid his medical bills without protest. Drainer says that he fairly presented this argument to the Board. Alternatively, Drainer asks this Court to consider his implied- admission argument in the interests of justice. We find no merit to Drainer's arguments, and affirm.

2) Drainer suffered a work-related back injury in April 2005. He received total disability benefits from the date of the accident until October 26, 2005, when Drainer returned to work. Partners also compensated Drainer for a 10% permanent impairment of his cervical and lumbar spine.

3) Drainer continued to suffer back pain, and was diagnosed with degenerative disc disease in February 2006. His doctors treated Drainer conservatively, with pain relievers and therapy. In 2008, Dr. Hagop DerKrikorian, a neurosurgeon, recommended that Drainer undergo back surgery. Drainer saw Derkrikorian numerous times during the following year, but did not agree to the surgery. In February 2011, after a one year hiatus, Drainer returned to see Derkrikorian, and the doctor again recommended surgery. In March 2011, Drainer filed a petition to determine additional compensation, seeking payment for the back surgery.

4) At the Board hearing in September 2011, Derkirkorian and Partners' expert, Dr. Ali Kalamchi, testified by deposition. They disagreed on all the relevant medical issues: 1) the nature of Drainer's 2005 injury; 2) whether that injury had healed;

3) whether that injury was causing Drainer's current symptoms; and 4) whether the proposed back surgery was reasonable and necessary. The Board credited Kalamachi's testimony and found that Drainer had a history of lumbar spine degeneration and that, although the work-related injury may have aggravated his pre-existing condition, Drainer's condition returned to baseline before the current flare-up. As a result, the Board concluded that the work-related injury did not cause Drainer's present back condition, and that the surgery is not compensable.

5) The Board denied Drainer's motion for reargument, on both procedural and substantive grounds. Drainer appealed to the Superior Court, arguing, among other things, that Partners had implicitly acknowledged the validity of his claim because Partners has been paying Drainer's medical bills. The Superior Court held that Drainer waived the implied-admission claim, and affirmed the Board.

6) This Court, like the Superior Court, reviews a Board decision to determine whether it is free of legal error and supported by substantial evidence.[1] To qualify as "substantial," a reasonable person must consider the evidence adequate to support a finding of fact.[2] Both medical experts agreed that Drainer had a pre-existing back ailment, which was aggravated by his work-related injury. Kalamachi opined that the

---

[1] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133 (Del. 2006).

[2] *Standard Distrib. Inc. v. Hall*, 897 A.2d 155 (Del. 2006).

work-related injury did not cause Drainer's current back condition because his back returned to "baseline" before the current symptoms arose. Kalamachi's testimony is substantial evidence in support of the Board's decision.

7) Drainer's motion for reargument, although timely filed, was properly denied. The Board acknowledged the factual error Drainer pointed out, but explained that it was a typographical error, which had no bearing on the Board's conclusion.

8) Finally, Drainer argues that the Board, and the Superior Court, should have considered the fact that Partners paid his medical bills through July 2011. Those payments, he says, constitute an admission by Partners that his current condition arises from the work-related injury. The Superior Court concluded that Drainer did not fairly present this issue to the Board. We agree, for the reasons stated in the trial court's June 27, 2013 decision.[3]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

---

[3] *Bruce Drainer v. Heating Oil Partners*, C.A. No. N12A-06-004RRC (Del. Super., June 27, 2013).