IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

JOHN R. SIMON,)	
)	
Claimant-Below/Appellant,)	
)	
v.)	C.A. No. N13A-07-001 DCS
)	
CRODA, INC.,)	
)	
Employer-Below/Appellee.)	

Submitted: January 24, 2014 Decided: May 5, 2014 Corrected*: May 19, 2014

On Appeal from a Decision of the Industrial Accident Board of the State of Delaware – **AFFIRMED.**

OPINION

Kenneth F. Carmine, Esquire, Potter, Carmine & Associates, P.A., Wilmington, DE, Attorney for Claimant-Below/Appellant John R. Simon

Maris Paris Newill, Esquire, Heckler & Frabizzio, Wilmington, DE, Attorney for Employer-Below/Appellee Croda, Inc.

STREETT, J.

^{*} Footnote 153 has been corrected to complete the citation.

Introduction

On December 18, 2008, Appellant John R. Simon (the "Appellant") sustained injuries to his right wrist, right shoulder, cervical spine, left thigh, and head when he slipped and fell from a 5 ½-foot metal platform while working for Appellee Croda, Inc. (the "Employer"). Appellant received a period of total disability compensation for his injuries and compensation for a 33% impairment of his cervical spine.¹

On April 2, 2012, Appellant filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board (the "Board"). He sought a determination as to the "[r]elationship of *left* shoulder injury to work accident." On October 10, 2012, Appellant filed a second Petition to Determine Additional Compensation Due seeking compensation for medical expenses related to left shoulder surgery.³

On June 7, 2013, the Board found that Appellant did not meet his burden of proving, by a preponderance of evidence, that his left shoulder injuries

¹ Simon v. Croda, Inc., Hearing No. 1331392, 2 (Indus. Accident Bd. June 7, 2013) (hereinafter "Bd. Dec. at

It is uncontroverted that the Employer entered into an agreement to compensate Appellant for certain injuries that it acknowledged and that the agreement did not include Appellant's left shoulder. *See* Opening Br., 1 (Oct. 7, 2013); Answering Br., 1 (Nov. 5, 2013). The date of the agreement and the acknowledged injuries are not specified. The agreement is not included in the record.

² Pet. to Determine Additional Compen. Due (Apr. 2, 2012) (emphasis supplied).

³ Included in the record is a claim form and report for a March 14, 2012 procedure to treat cervical facet joint disease, performed by Ginger Chiang, M.D. The claim form and report are not relevant to Appellant's left shoulder injuries or the Board's causation determination.

(impingement and cartilage damage⁴) were caused by the 2008 work accident. The Board also denied the Petition that sought "payment of medical expenses related to left shoulder surgery."⁵

For the reasons set forth below, the Board's decision is hereby affirmed.

Factual and Procedural Background

On March 26, 2013, a hearing before the Board was held.

There was testimony that Appellant was seen by eight medical providers from 2001 through the date of the hearing before the Board; Dr. Jeffrey West, P. Michael Glowacki, M.D. ("Dr. Glowacki") (of Total Care Physicians), Dr. Noyes (of First State Orthopedics), Dr. Sardo⁶ (of Concentra), Michael John Pushkarewicz, M.D., F.A.C.S. ("Dr. Pushkarewicz") (of First State Orthopedics), Dr. Rastogi (of Delaware Neurosurgical Group), Dr. Glassman, and John Barratt Townsend, III, M.D. ("Dr. Townsend").

⁴ The Board decision references "cartilage damage" and "labral tear where the labrum attaches to the glenoid" interchangeably. It also notes that the medical experts use different terms to describe the injury (i.e., cartilage damage and chondral lesion). *See* Bd. Dec. at n. 5. The Court will refer to the injury as cartilage damage.

⁵ Bd. Dec. at 2.

⁶ Appellant notes that "Dr. Sardo" is the correct spelling of the physician who treated him at Concentra. *See* Appellant's Opening Br., n. 1 (Oct. 7, 2013). Dr. Sardo is identified as "Dr. Certo" in the Board hearing transcript and "Dr. Surdo" in Dr. Pushkarewicz' deposition transcript.

At the hearing, Appellant testified that he was 64 years old and that he had worked for the Employer as a security officer for approximately eight years before he was injured in the 2008 work accident.⁷

Appellant initially denied any injury to his shoulder or treatment for his left shoulder prior to the work accident.⁸ However, when confronted with a 2001 chiropractor's report concerning left shoulder pain and a neck twinge in 2001, Appellant admitted that he lost "his balance, caught a wall and felt a twinge in his left shoulder and neck" while wallpapering in October 2001.⁹

The 2001 report, from the chiropractor (Dr. West) to Appellant's family physician (Dr. Glowacki) noted that Appellant had pain in the glenohumeral joint of his left shoulder, numbness throughout his left arm, difficulty moving his left arm, and Appellant's symptoms worsened at night. Appellant treated his left arm symptoms with ice and heat, a ventilator, sleeping pills, and Xanex, none of which provided him with relief. 11

⁷ Tr. of Bd. Hrg. Tr., 27 – 28 (Mar. 26, 2013) (hereinafter "Hrg. Tr. at _____").

⁸ Hrg. Tr. at 28 – 29.

Appellant did not specify whether he was referencing his left or right arm and shoulder.

 $^{^{9}}$ Hrg. Tr. at 29 - 30.

¹⁰ Hrg. Tr. at 42-43, 44.

¹¹ Hrg. Tr. at 42 - 43.

Appellant testified that he did not recall Dr. West's report until his attorney presented him with a copy at the hearing.¹²

Appellant further testified that he did not follow up with any physicians or receive treatment for his left shoulder after his visit to Dr. West. However, Appellant conceded that his medical records show that he was treated by Dr. Noyes of First State Orthopedics in November 2001 for left shoulder pain, decreased range of motion, and neck pain that started shortly after the wallpapering accident in October 2011.

Dr. Noyes' report characterized Appellant's left shoulder pain "as a classic impingement arch from 100 to 140 . . . when it actually gets better when [Appellant's] arm is up over his head" and that an x-ray of Appellant's left shoulder showed "narrow humeral acromial distant type three acromion, unremarkable." Dr. Noyes' report also said that Appellant had received a cortisone shot to treat his left shoulder on November 13, 2001. Appellant said that he did not return to Dr. Noyes for further treatment because "whatever the problem was [Dr. Noyes] had taken care of it." 15

¹² Hrg. Tr. at 29.

¹³ Hrg. Tr. at 31.

 $^{^{14}}$ Hrg. Tr. at 44 - 45.

¹⁵ Hrg. Tr. at 55.

On the date of the work accident (December 18, 2008), Appellant testified that he worked a 12-hour shift from 6:00 p.m. to 6:00 a.m. ¹⁶ Appellant's duties included changing the safety message on a large marquee in front of a 5 ½-foot metal platform located at the entrance to his work site. ¹⁷

Appellant testified that he climbed five wooden steps that led to a platform, removed the plastic 5-inch letters from the existing message, "stoop[ed] down," and his left leg "shot out from under [him]" as he stood up because he did not notice the frost that had formed on the top step. Appellant said that he "went up in the air" and "fell onto the platform" on his side or back. Because his mid-back hung over the platform and he felt his body slipping over the side of the platform, he "turned with [his] right hand and tried to grab the marquee sign. Appellant "barely went off the board on [his] left side," but he was unable to testify with certainty whether he struck his left shoulder. Appellant jammed his right thumb, "hit the ground" head first, and ended up flat on his back. After one minute, Appellant sat up, discovered that he had broken his glasses and the clip on his

¹⁶ Hrg. Tr. at 31.

 $^{^{17}}$ Hrg. Tr. at 31 - 32, 34.

¹⁸ *Id.* at 32.

¹⁹ *Id*.

²⁰ *Id*.

²¹ Hrg. Tr. at 32, 49.

²² Hrg. Tr. at 33.

handset, and went to the guard shack to report the fall to his supervisor by radio.²³ Appellant testified that he fell at 12:25 a.m.²⁴

Appellant thought that he had broken his neck because he "felt bones crack all the way down [his] back."²⁵ Appellant's right hand was swollen, he sustained a 4-inch abrasion to his left thigh, and he had "aches and pains all over" his neck, arms, and legs.²⁶ Appellant treated his left leg injury with a first aid kit, put an ice pack on his right hand, and took "some Excedrins."²⁷

Appellant further testified that his supervisor wrote a slip for him to go to Concentra or Christiana Hospital. However, because Appellant did not have anyone to relieve him and he knew Concentra did not open until 7:00 a.m., he stayed in the office until his shift ended at 6:00 a.m.²⁸

Appellant then went to Concentra on the morning of the work accident.²⁹ On the patient questionnaire that Appellant completed and signed, Appellant reported that he "slipped, fell on head first, injured right hand, right temple, . . .

²³ Hrg. Tr. at 34.

²⁴ Hrg. Tr. at 34.

²⁵ Id.

²⁶ Hrg. Tr. at 32, 34, 35.

²⁷ Hrg. Tr. at 34, 36.

²⁸ Hrg. Tr. at 35.

²⁹ Hrg. Tr. at 46.

neck, and left upper thigh."³⁰ Appellant asserted that he reported a problem with his shoulders and that "they didn't write it down."³¹ Appellant also testified that Dr. Sardo (at Concentra) physically examined him and requested an ambulance to take him to Christiana Hospital because she thought that he might have broken his neck.³² However, Appellant drove himself to the emergency room (located across the street from Concentra).³³

The following day (December 19, 2008), Appellant went to First State Orthopedics and saw Dr. Pushkarewicz (a specialist in orthopedic surgery) for treatment of his right wrist.³⁴

Appellant testified that he "was still having problems with the neck, the hands, [and] the shoulders" at the end of December 2008.³⁵ He said that it was difficult to sleep on his left side because the "shoulder pain would just feel like someone was stabbing [him]" and that he would get "needles and pins" down his hands.³⁶ Appellant said that he told Dr. Pushkarewicz that he was unable to sleep

³⁰ *Id*.

³¹ Hrg. Tr. at 51.

³² Hrg. Tr. at 36.

³³ Hrg. Tr. at 36, 47.

 $^{^{34}}$ Hrg. Tr. at 47 - 48.

³⁵ Hrg. Tr. at 37.

³⁶ *Id*.

on his left side, but Dr. Pushkarewicz "would constantly tell [him]" that he thought that Appellant's "left shoulder problems" were coming from Appellant's neck.³⁷

Appellant testified that his family physician (Dr. Glowacki) referred him to Dr. Rastogi to treat his neck injury.³⁸ Dr. Rastogi operated on Appellant's neck over a year after the work accident.³⁹ According to Appellant, the neck surgery "somewhat" improved Appellant's neck pain, but "not to the point where it's better."⁴⁰ Appellant also testified that the surgery did not relieve Appellant's left shoulder and arm symptoms.⁴¹

On November 30, 2011, Dr. Pushkarewicz performed surgery on Appellant's left shoulder. Following the left shoulder surgery, Appellant said that he continued to "feel the pain," but it was "not as severe," and that he "still can't sleep on [his left] side."

Appellant denied any injuries to his left shoulder between the 2008 work accident and the date of his left shoulder surgery at the end of 2011.⁴³

The date that Dr. Glowacki referred Appellant to Dr. Rastogi is not included in the record.

The date that Dr. Rastogi operated on Appellant's neck is not included in the record.

³⁷ Hrg. Tr. at 38.

³⁸ *Id*.

³⁹ *Id*.

⁴⁰ Hrg. Tr. at 39, 41.

⁴¹ Hrg. Tr. at 39.

⁴² Hrg. Tr. at 40.

⁴³ *Id*.

In addition, Appellant presented expert deposition testimony from Dr. Pushkarewicz. However, Dr. Pushkarewicz did not review Appellant's pre- and post-work accident medical records but "just reviewed what was in [his] chart on [Appellant]" and the report of Dr. Townsend (the Employer's expert) in preparation for his deposition.⁴⁴

Dr. Pushkarewicz testified that he does not treat the spine and that Appellant was referred to him for the treatment of Appellant's right hand and wrist.⁴⁵

During the initial visit on December 19, 2008 (the day after the work accident), Appellant "did not relate anything of significance" other than the history of the work accident." Appellant reported to Dr. Pushkarewicz that he slipped at work, "struck his head rather forcefully," broke his glasses, and later realized that he hurt his right hand. Appellant also reported that he had a CT scan of his neck at Concentra, an x-ray of his hand and thumb at Christiana Hospital, his hand was "splinted," and he was given Percocet. Dr. Pushkarewicz physically examined Appellant, whose main complaints were "his right hand and wrist and about his neck," and ordered an MRI of Appellant's right wrist.

⁴⁴ *Id*. at 10.

⁴⁵ *Id.* at 8.

⁴⁶ *Id.* at 6, 8, 37.

⁴⁷ *Id.* at 7.

⁴⁸ *Id*.

⁴⁹ *Id.* at 7, 9.

Dr. Pushkarewicz next saw Appellant eleven days later, on December 30, 2008. At that time, Dr. Pushkarewicz focused on treating Appellant's right wrist. ⁵⁰ Although there is no indication that Appellant complained to Dr. Pushkarewicz of any left shoulder symptoms on December 30, 2008, Dr. Pushkarewicz testified that a note from Concentra, dated that same day (December 30, 2008), stated that Appellant's "[n]eck, back and shoulders [were] giving him pain as well in the morning." ⁵¹

Dr. Pushkarewicz testified that Dr. Sardo (from Concentra) called him in January 2009 and asked that he "look at [Appellant's] shoulders." On January 23, 2009 (the next office visit), Appellant told Dr. Pushkarewicz that "he felt that there was something wrong with his neck and his shoulders." He did not relate any pre-work accident history of shoulder problems to Dr. Pushkarewicz. Dr. Pushkarewicz examined Appellant's shoulders and did not detect "any significant tenderness about the [left] shoulder." He testified that he was able to flex Appellant's left shoulder 160 degrees (which is "a little shy of perfect") and abduct it 90 degrees (which is normal), but this caused Appellant to have pain in his

⁵⁰ *Id.* at 12.

⁵¹ *Id.* at 13.

⁵² *Id*.

⁵³ *Id.* at 12.

⁵⁴ *Id.* at 15.

⁵⁵ *Id.* at 14.

neck.⁵⁶ Although Appellant was able to lift his left arm away from his back, he reported pain radiating down his left hand. Appellant's Sulcus test (to determine instability in Appellant's left shoulder) was negative.⁵⁷

Dr. Pushkarewicz also testified that "[p]atients often think they have a shoulder problem when actually they have a neck problem. And probably the most common objective thing we see is that patients tend to splint their shoulders because they're having pain referred from their neck even when there's absolutely nothing wrong with their shoulder." Consequently, Dr. Pushkarewicz "thought that most of his symptoms in the left shoulder were actually being referred from his neck more than directly from the shoulder itself." Dr. Pushkarewicz ordered an MRI of Appellant's cervical spine. On the shoulder itself.

On January 30, 2009, Appellant underwent an MRI of his cervical spine. The MRI of the spine revealed that he "had degenerative disease, worst at C6-7, where the disc osteophyte complex caused a severe neuroforaminal narrowing and moderate spinal stenosis." Dr. Pushkarewicz explained that "severe neuroforaminal narrowing means the space where the nerve leaves the neck to go

⁵⁶ *Id*.

⁵⁷ Id.

⁵⁸ *Id.* at 19.

⁵⁹ *Id.* at 15.

 $^{^{60}}$ *Id.* at 15 - 16.

⁶¹ *Id.* at 16.

down his arm is severely narrowed, puts pressure on the nerve and is going to give . . . various, neurologic-type symptoms – numbness, tingling, burning, pain, etc. down to his hand, which he was talking about."⁶²

Thereafter, Appellant saw Dr. Rastogi for treatment of his neck and cervical spine and Dr. Pushkarewicz focused his treatment on Appellant's right wrist. 63

Then, on April 5, 2010, more than fifteen months after the work accident, Appellant complained to Dr. Pushkarewicz that "his left shoulder was still bothering him." Dr. Pushkarewicz re-examined the left shoulder and found that "there was nothing obvious." However, because Appellant "had some slight tenderness over the anterior glenohumeral articulation," Dr. Pushkarewicz "thought he may have a small anterior labral tear where the cartilage attaches to the front of the glenoid." Dr. Pushkarewicz ordered an MR arthrogram of Appellant's left shoulder to determine whether there was damage to the glenoid, labrum, or rotator cuff. Dr. Pushkarewicz testified that tenderness on the anterior aspect of the shoulder suggests some damage to the cartilage or labrum at the front of the shoulder.

⁶² *Id.* at 16.

⁶³ *Id.* at 17, 18.

⁶⁴ *Id.* at 18.

⁶⁵ *Id*.

⁶⁶ *Id*.

⁶⁷ *Id.* at 40.

On April 20, 2010, Dr. Pushkarewicz reviewed the MR arthrogram which "was interpreted by the radiologist as being normal." The MR arthrogram of Appellant's left shoulder did not show any cartilage damage. Dr. Pushkarewicz testified that "there did not appear to be any pathology directly related to the shoulder" and that he thought Appellant's "symptoms of shoulder pain were still mostly coming from his neck." He was unable to state "specifically" whether he had an opportunity to look at the films. The many pathology directly related to the shoulder.

Following the April 20, 2010 visit, Dr. Pushkarewicz did not examine or treat Appellant's left shoulder again until July 5, 2011. Dr. Pushkarewicz instead focused on Appellant's right wrist and left elbow based on Appellant's complaints of soreness during his visits between May 27, 2010 and July 5, 2011.⁷² On October 6, 2010, Dr. Pushkarewicz performed a left elbow release, which he testified was unrelated to Appellant's left shoulder symptoms.⁷³

On July 5, 2011, over thirty months after the work accident, Dr. Pushkarewicz diagnosed Appellant with left shoulder impingement and a partial

⁶⁸ *Id.* at 20.

⁶⁹ *Id.* at 29.

⁷⁰ *Id.* at 21.

⁷¹ *Id.* at 20.

⁷² *Id.* at 21.

⁷³ *Id*.

rotator cuff tear with acromioclavicular degenerative joint disease. Dr. Pushkarewicz testified that impingement "develops from having rotator cuff weakness" and that Appellant "probably developed some impingement just from weakness favoring his left arm . . . [s]ince his original injury." He further testified that an MRI of Appellant's left shoulder (which had been ordered by Dr. Rastogi) did not show any cartilage damage but showed "a very small partial [rotator cuff] tear that did not show up on the [MR arthrogram]." Dr. Pushkarewicz did not testify as to the date or basis for the MRI of Appellant's left shoulder which was ordered by Dr. Rastogi.

On July 5, 2011, Dr. Pushkarewicz and Appellant discussed treatment options for Appellant's left shoulder, including no treatment, physical therapy, a cortisone injection, and surgery to remove "part of the acromion that was impinging on the rotator cuff." Dr. Pushkarewicz ordered physical therapy to strengthen Appellant's rotator cuff.⁷⁸

On August 4, 2011, Appellant returned to Dr. Pushkarewicz and "was still complaining about the left shoulder." Appellant told Dr. Pushkarewicz that "he

⁷⁴ *Id.* at 23.

⁷⁵ *Id.* at 20, 24

⁷⁶ *Id.* at 23, 29.

⁷⁷ *Id.* at 24.

⁷⁸ *Id.* at 25.

⁷⁹ *Id*.

had not gotten physical therapy" and Dr. Pushkarewicz again ordered physical therapy. 80

On September 8, 2011, Appellant told Dr. Pushkarewicz that he started to feel improvement in his left arm after physical therapy. ⁸¹ Appellant reported that his "sharp . . . moderate to severe and intermittent" left shoulder pain was relieved by rest and stretching but was exacerbated by bending, climbing, lifting, movement, pushing, sitting, and walking. ⁸² He also reported crepitus, decreased mobility, difficulty sleeping, night pain, nighttime awakening, numbness, and tingling in the arms. ⁸³ Dr. Pushkarewicz diagnosed Appellant with left shoulder impingement and a partial left supraspinatus (i.e., the main tendon on top of the rotator cuff) tear. ⁸⁴

On October 10, 2011, Appellant told Dr. Pushkarewicz that physical therapy for his shoulder caused pain in his neck and made him feel ill. Appellant informed Dr. Pushkarewicz that a Dr. Glassman had prescribed Vicodin and

⁸⁰ *Id*.

⁸¹ *Id.* at 26 - 27.

⁸² *Id.* at 26.

⁸³ *Id*.

⁸⁴ *Id.* at 27.

⁸⁵ *Id.* at 28.

⁸⁶ There is no additional information in the record concerning Dr. Glassman, his medical specialization, or the date(s) of treatment.

Tramadol and that Appellant was taking the prescribed medications.⁸⁷ (Dr. Pushkarewicz did not testify as to when Dr. Glassman began treating Appellant or whether such treatment was related to the work accident.)

During the October 2011 visit, Dr. Pushkarewicz physically examined Appellant and noted "that he appeared to have impingement when you bring the arm up and it catches as you're lifting the arm up in the air" and "tenderness on the anterior aspect of his shoulder, which usually suggests some damage to the cartilage or labrum at the front of the shoulder." Dr. Pushkarewicz testified that all non-surgical measures to treat Appellant's left shoulder impingement syndrome "did not appear to be working" and that surgery was the only remaining option. ⁸⁹

On November 30, 2011, Dr. Pushkarewicz performed arthroscopic acromioplasty to treat Appellant's left shoulder impingement and to assess his rotator cuff to determine whether a tear was present. (Earlier in his testimony, Dr. Pushkarewicz stated that the MRI of Appellant's left shoulder detected a very small partial rotator cuff tear.) He debrided "a very small partial thickness rotator cuff tear" which he said "could be degenerative." Additionally, Dr.

⁸⁷ *Id.* at 28.

⁸⁸ *Id.* at 40.

⁸⁹ *Id.* at 41.

⁹⁰ *Id.* at 40.

⁹¹ *Id.* at 28, 34.

Pushkarewicz performed a diagnostic arthroscopy to detect any damage to Appellant's labrum, glenoid cartilage, "any loose bodies," or arthritis. 92

Dr. Pushkarewicz found that Appellant had damaged the cartilage where the labrum attaches to the glenoid, which was where he previously detected tenderness on physical examination. He diagnosed Appellant with a "focal lesion" which "was clearly the result of an injury" (i.e., some type of "direct blow" or "trauma"). Dr. Pushkarewicz stated that he was "not really surprised" that neither the MR arthrogram nor the MRI of Appellant's left shoulder showed the cartilage damage because "it was not a dramatic lesion," only "a small piece of cartilage was sitting up," and the entire labrum was not torn away.

Dr. Pushkarewicz opined that Appellant's left shoulder cartilage damage and impingement were related to the 2008 work accident. When asked whether the cartilage damage was caused by the work accident, Dr. Pushkarewicz replied, "Sure. In the course of falling, you don't know exactly where you take your tumbles, what gets jammed. But something caused that lesion that I saw." Dr. Pushkarewicz further stated, "I don't know exactly how he fell, but I know that he

⁹² *Id.* at 41.

⁹³ *Id.* at 28, 30.

⁹⁴ *Id.* at 36.

⁹⁵ *Id.* at 30.

⁹⁶ *Id.* at 32.

⁹⁷ *Id.* at 35.

developed pain. It turns out that he had this cartilage [damage] that we had been missing for a while." Dr. Pushkarewicz opined that if the cartilage damage existed prior to the work accident, he "expect[ed]" that Appellant would have had "some mild symptoms from it." However, he did not specify what those symptoms would be.

Dr. Pushkarewicz also testified that Appellant's left shoulder impingement "probably developed as a result of his disuse weakness" that was brought on either by direct injury to Appellant's shoulder or by Appellant's neck pain which caused Appellant not to use his left arm. However, he also explained that "[t]he little bit of minor fraying of the rotator cuff could be degenerative" and impingement can develop without trauma. Dr. Pushkarewicz was unable to "say one way or the other" whether the impingement was degenerative or was caused by disuse and weakness because of "that little bit of damage to the cuff" or Appellant's neck. 102

Between November 30, 2011 and March 18, 2012, Appellant was totally disabled from working. On March 18, 2012, Appellant was released to work light duty with no overhead use of his left arm. 104

⁹⁸ *Id*.

⁹⁹ *Id.* at 39.

 $^{^{100}}$ *Id.* at 32 - 33.

¹⁰¹ *Id.* at 34, 38.

¹⁰² *Id.* at 36.

 $^{^{103}}$ *Id.* at 30 - 31.

Dr. Pushkarewicz testified that Appellant "still has complaints" following the left shoulder surgery. He also stated that Appellant's cervical spine problems and cervical radiculopathy "symptoms have [not] ever completely gone away." 106

The Employer presented expert deposition testimony from Dr. Townsend who is board certified in neurology. 107

Dr. Townsend testified that he reviewed Appellant's medical records from First State Health & Wellness, Concentra, Christiana Care Health Services, First State Orthopedics, Dr. Rastogi, miscellaneous diagnostic testing, Dr. Weisberg, Delaware Foot and Ankle Associates, Barley Mill Rehabilitation, Handling Physical Therapy, MX Physical Therapy, Delaware Back Pain & Sports Rehabilitation Center, Glasgow Surgery Center, the utilization review decision, Dr. Raskin, and Dr. Glowacki. 108

Dr. Townsend testified that Appellant's medical records showed that he had sustained a trauma to his left shoulder prior to the work accident (i.e., a twinge in the left shoulder and neck after Appellant lost his balance while wallpapering) and

¹⁰⁴ *Id.* at 31.

¹⁰⁵ *Id.* at 38.

¹⁰⁶ *Id*.

¹⁰⁷ Depo. Tr. of Dr. Townsend, 4 (November 6, 2012).

 $^{^{108}}$ *Id.* at 5, 10 – 11.

Appellant was treated for "ongoing left shoulder and neck pain" at First State Health & Wellness on October 29, 2001. However, Dr. Glowacki's (Appellant's family physician) records from October 2001 through October 2008 do not reference any complaints of shoulder pain. 110

Dr. Townsend's review of First State Orthopedics' records (which was Dr. Pushkarewicz' medical group) showed that Appellant was seen for left shoulder pain with decreased range of motion on November 13, 2001, shortly after the wallpapering fall. 111 Dr. Townsend testified that an x-ray on that date showed "a Type III acromion with narrowed humeral acromial distance which can sometimes lead to a patient having impingement."¹¹²

Dr. Townsend also testified that Appellant sought treatment at Christiana Care for dizziness, nausea, and weakness in his legs in October 2008 (approximately six or seven weeks prior to the work accident). 113 Although those records do not reference the left shoulder, the records do reference Appellant's neck. 114

 109 *Id.* at 7 - 8.

 $^{^{110}}$ *Id.* at 55 - 56.

¹¹¹ *Id.* at 12.

¹¹² *Id*. at 14.

¹¹³ *Id*. at 56.

¹¹⁴ *Id.* at 57.

Dr. Townsend's review of Concentra's records show that Concentra diagnosed Appellant with a cervical strain, face and scalp contusion, right hand injury, possible avulsion fracture, and an abrasion on the date of the work accident (December 18, 2008). Appellant continued to treat at Concentra through December 30, 2008. Concentra's December 30, 2008 records showed that Appellant reported that his neck, back, and shoulder gave him pain, especially in the morning and that Concentra physically examined his right upper extremity. There is no indication that Appellant had any left shoulder problems and Concentra did not diagnose Appellant with a left shoulder injury.

Dr. Townsend noted that records showed that Appellant was seen by Dr. Pushkarewicz twenty-four times between December 19, 2008 and December 14, 2010, but there are only three references to Appellant's left shoulder in Dr. Pushkarewicz' records during that time. On January 23, 2009, Appellant reported something wrong with his neck and shoulders, the physical examination showed that Appellant had "normal internal and external rotation," and Dr. Pushkarewicz diagnosed Appellant with radiculopathy that affected the left upper

¹¹⁵ *Id*. at 9.

¹¹⁶ *Id.* at 10.

¹¹⁷ *Id.* at 10, 15.

¹¹⁸ *Id.* at 17, 23.

extremity (not with impingement). Dr. Townsend explained that "people with impingement don't like to do [internal and external rotation] maneuvers" because they produce pain. 120

Dr. Townsend also testified that there is no evidence of a cartilaginous injury or guarding or weakness of Appellant's left shoulder in Dr. Pushkarewicz' records for April 5, 2010 and April 20, 2010, despite Appellant's subjective complaints of left shoulder pain and tenderness on April 5, 2010. Moreover, although Dr. Pushkarewicz prescribed physical therapy in 2010, his December 14, 2010 office note indicates that the physical therapist was doing shoulder strengthening to address Appellant's left elbow complaints after his unrelated left elbow release surgery in October 2010. 122

Additionally, Dr. Townsend reviewed the records of Dr. Rastogi who treated Appellant's cervical spine. Dr. Rastogi's records did not reference a left shoulder injury until May 31, 2011 when he "wonder[ed] whether there [was] a left shoulder component to [Appellant's] pain." Dr. Rastogi ordered an MRI of the left

¹¹⁹ *Id.* at 15.

 $^{^{120}}$ *Id.* at 16 - 17.

¹²¹ *Id.* at 18, 20.

¹²² *Id.* at 23.

¹²³ *Id.* at 11.

The date that Dr. Rastogi first started treating Appellant is not in the record.

shoulder on July 5, 2011.¹²⁴ Appellant underwent the MRI and it showed a supraspinatus partial rotator cuff tear with AC degenerative joint disease and subacromial impingement on the left.¹²⁵ In Dr. Townsend's opinion, the April 2010 MR arthrogram that Dr. Pushkarewicz had ordered did not detect left shoulder impingement because Appellant had "preexisting degenerative changes at the acromioclavicular joint," such changes "progress over time," and "a small degenerative change" may have just been missed.¹²⁶

Dr. Townsend also noted that Dr. Pushkarewicz' records show that, on August 4, 2011 (more than three months before Appellant's left shoulder surgery), Appellant "had no tenderness anywhere in the left shoulder," he was able to flex without pain, and rotation and strength were normal. Also, there was no finding of impingement syndrome or evidence of the cartilage damage as the source of Appellant's left shoulder pain complaints.

Records also showed that Appellant visited Delaware Back Pain & Sports Rehabilitation Center nineteen times between February 26, 2009 and October 19, 2011 for physical therapy. On February 26, 2009 (approximately two months

¹²⁴ *Id.* at 25.

¹²⁵ *Id.* at 26.

¹²⁶ *Id*.

¹²⁷ *Id.* at 27.

¹²⁸ *Id.* at 28.

¹²⁹ *Id.* at 30.

after the work accident), Appellant provided Delaware Back Pain & Sports Rehabilitation Center with a history of the work accident, indicated that he struck the ground with his right forehead, and complained of right wrist, right hand, and neck pain. The records of Delaware Back Pain & Sports Rehabilitation Center do not show that Appellant told them of any history of a direct impact to the left shoulder. The findings from Appellant's initial visit show that "he had full range of motion of both shoulders and no frank signs of impingement." ¹³⁰

Moreover, although Delaware Back Pain & Sports Rehabilitation Center's reports contain a checklist where a diagnosis affecting the upper extremity can be indicated, no physical examination findings or diagnoses involving Appellant's left shoulder are documented in Delaware Back Pain & Sports Rehabilitation Center's records until October 19, 2011 (several years after the work accident). On that date, Appellant was diagnosed with left shoulder pain and they note that Dr. Pushkarewicz had no plans for shoulder surgery at the time. ¹³¹

Records also show that on January 24, 2012 (approximately two months after the left shoulder surgery), Appellant reported to Dr. Rastogi that "he was pulling something and felt sudden numbness down his arm, and he was

¹³⁰ *Id.* at 31.

¹³¹ *Id.* at 33.

complaining of significant neck pain radiating into the left shoulder and down the left arm with numbness and tingling." ¹³²

Dr. Pushkarewicz' records show that he diagnosed Appellant with cervical radiculopathy on April 16, 2012 (approximately five months after the left shoulder surgery). 133

In addition to reviewing Appellant's relevant past medical history, Dr. Townsend examined Appellant on seven occasions between March 25, 2009 and October 18, 2012.¹³⁴

Dr. Townsend testified that he first examined Appellant on March 25, 2009 (approximately three months after the work accident) and obtained Appellant's medical history from him. Appellant had not missed any work and continued to work for the Employer as a security guard "doing a computer job." ¹³⁵

Appellant did not tell Dr. Townsend that his left shoulder was injured during the 2008 work accident. Moreover, Appellant had normal strength when Dr. Townsend examined him and there was no evidence of guarding or weakness that would lead to impingement syndrome. Thus, although Appellant complained of

¹³³ *Id.* at 28.

¹³² *Id.* at 11.

 $^{^{134}}$ *Id.* at 4-5.

¹³⁵ *Id.* at 34.

¹³⁶ *Id.* at 43.

¹³⁷ *Id.* at 36.

pain at the tips of his shoulders and that his shoulders were popping, it was Dr. Townsend's opinion that Appellant's subjective complaints could be attributed to Appellant's neck pain, a muscular issue, or degenerative conditions related to Appellant's age. 138

When Dr. Townsend next saw Appellant (on October 7, 2009), Appellant was working, physically able to mow the lawn, and did not complain of his left shoulder. As a result, Dr. Townsend did not physically examine Appellant's left shoulder.

Similarly, on August 10, 2010, almost one year after his October 2009 visit with Dr. Townsend, Appellant did not report any left shoulder complaints to Dr. Townsend and Dr. Townsend made no findings consistent with cartilage damage or impingement.¹⁴¹

Appellant also did not complain of his left shoulder on June 2, 2011 (approximately five months prior to the left shoulder surgery). On that date, Dr. Townsend found that Appellant had normal strength in his left shoulder, there was no evidence of weakness or guarding that would lead to impingement, and

 $^{^{138}}$ *Id.* at 35 - 36.

¹³⁹ *Id*.

¹⁴⁰ *Id.* at 37.

 $^{^{141}}$ Id. at 38 - 40.

Appellant continued to have ongoing subjective complaints of neck pain despite having neck surgery. 142

However, on February 7, 2012, after Appellant underwent left shoulder surgery by Dr. Pushkarewicz, Appellant complained to Dr. Townsend of tenderness over the left acromioclavicular region. A physical examination showed that he had diminished range of motion and tenderness over the deltoid muscle (which is the muscle most likely to produce pain if there an issue with the shoulder). 143

When Appellant next saw Dr. Townsend on October 18, 2012, he reported that the left shoulder surgery "made him feel no better." Dr. Townsend noted that although Appellant subjectively complained of pain upon internal and external rotation of his left arm and had a decreased range of motion, Appellant had normal strength and no evidence of guarding or weakness in his left shoulder. 145

In Dr. Townsend's opinion, the cartilage damage was not caused by the 2008 work accident because, unlike Appellant's fall in 2001, "[t]here was no direct impact to the left shoulder at the time of the injury" and "[t]here did not appear to be any way for the left glenohumeral joint to have been impacted, which you

¹⁴² *Id.* at 40.

 $^{^{143}}$ *Id.* at 40 - 41.

¹⁴⁴ *Id.* at 42.

¹⁴⁵ *Id*.

would generally need to have to produce [the cartilage damage]."¹⁴⁶ Dr. Townsend testified that if the cartilage damage caused Appellant's left shoulder pain, then he expected Appellant's symptoms would have improved after the surgery. He said that Appellant's symptoms had not improved. 148

Dr. Townsend further offered his opinion that Appellant's left shoulder impingement was not caused by the 2008 work accident. Dr. Townsend testified that Appellant's left shoulder complaints in April 2010 were "more likely just related to normal wear and tear of the shoulder" rather than the 2008 work accident. Dr. Townsend also noted that Appellant complained of his left shoulder around the time that he had left elbow complaints, which would cause some guarding and could have contributed to preexisting degenerative changes in Appellant's left shoulder. 150

On June 7, 2013, the Board issued its decision denying the Petitions. ¹⁵¹

The Board found that the Appellant's evidence did not establish that it was more likely than not that the cartilage damage in Appellant's left shoulder was sustained in the work accident. It reasoned that if Appellant had sustained the

¹⁴⁶ *Id.* at 29.

¹⁴⁷ *Id.* at 45.

¹⁴⁸ *Id*.

¹⁴⁹ *Id*. at 41.

¹⁵⁰ *Id.* at 47.

¹⁵¹ Bd. Dec. at 14.

cartilage damage as a result of the December 2008 work accident, then such injury would have been present at the time of the accident.

The Board considered Dr. Pushkarewicz' testimony that cartilage damage is caused by direct trauma and that Appellant was unable (and not expected) to remember "every precise point of impact in his head-first fall." The Board also noted that Dr. Pushkarewicz initially focused on Appellant's right upper extremity, that Dr. Pushkarewicz did not find tenderness or other clinical evidence of cartilage damage when he examined Appellant's left shoulder one month after the work accident, and that clinical evidence of cartilage damage was not documented in Appellant's medical records until more than fifteen months after the work accident.

In addition, the Board found that Appellant's left shoulder impingement was not causally related to the 2008 work accident and credited Dr. Townsend's testimony that Dr. Pushkarewicz' clinical findings did not establish a period of weakness or disuse of the left shoulder such that it would cause impingement. The Board also credited Dr. Townsend's "reasonable explanation" that the natural aging process could result in impingement "completely independent of the acknowledged injuries from the December 2008 work accident." ¹⁵³

On July 1, 2013, Appellant filed a Notice of Appeal of the Board's decision.

¹⁵² *Id.* at n. 6.

¹⁵³ *Id.* at 13.

Appellant filed an Opening Brief on October 7, 2013. The Employer filed an Answering Brief on November 5, 2013. Appellant did not file a Reply Brief.¹⁵⁴

Parties' Contentions

Appellant contends that the Board erred in finding that Appellant did not meet his burden of proving causation as to both left shoulder injuries (cartilage damage and impingement). Appellant alleges that the Board failed to fully consider that he had no symptoms of cartilage damage, was fully functional, had completed a major home improvement, and was working full-time prior to the work accident when he "sustained a severe fall thirteen days after which he began complaining of left shoulder pain." Appellant further alleges that the Board misstated and mischaracterized Dr. Pushkarewicz' testimony that disuse weakness caused Appellant's left shoulder impingement and, thus, erred in finding that such testimony raised "a mere possibility of causation." ¹⁵⁶

The Employer contends that the Board did not err in finding that Appellant failed to meet his burden of proving causation by a preponderance of the evidence.

The Employer asserts that Appellant offered only two sources of evidence (his own testimony and that of his medical expert) and that neither source of evidence

¹⁵⁴ On December 9, 2013, the Prothonotary's Office sent Appellant a Final Delinquent Brief Notice pursuant to Superior Court Civil Rule 107(f). No further action was taken, and on January 9, 2014, the Court ordered that the issues on appeal would be determined based on the papers that had been filed.

¹⁵⁵ Opening Br. at 14.

¹⁵⁶ *Id.* at 11.

establishes a causal relationship between Appellant's left shoulder injuries and the 2008 work accident.

The Employer argues that there was no credible basis for Dr. Pushkarewicz to opine, to a reasonable degree of medical probability, that Appellant's left shoulder cartilage damage was causally related to the work accident.

The Employer also contends that Dr. Pushkarewicz' opinion that Appellant's left shoulder impingement developed as the result of disuse weakness is unsupported by Appellant's medical records. The Employer further asserts that the Board applied the appropriate standard to find that Appellant failed to establish that the impingement was not caused by the work accident because it was within the Board's purview to reject Dr. Pushkarewicz' opinion and accept Dr. Townsend's opinion.

Standard of Review

In reviewing an appeal of an Industrial Accident Board decision, the role of the Court is to determine whether the Board's findings of fact are supported by substantial evidence and whether its decision is free from legal error. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The Court does not weigh evidence,

¹⁵⁷ Spellman v. Christiana Care Health Servs., 74 A.3d 619, 622 (Del. 2013).

¹⁵⁸ Histed v. E.I. Du Pont de Nemours & Co., 621 A.2d 340, 342 (Del. 1993) (citing Olney v. Cooch, 425 A.2d 610, 614 (Del. 1998)).

determine questions of credibility, or make findings of fact.¹⁵⁹ The record is viewed "in the light most favorable to the prevailing party below."¹⁶⁰

Where satisfactory proof supports the Board's factual findings, its decision will stand. 161

Discussion

Under Delaware law, a claimant may recover compensation for a personal injury caused by an accident "arising out of and in the course of employment." The claimant is required to prove causation by a preponderance of the evidence. ¹⁶³

Where there is a "specific and identifiable industrial accident," the claimant must demonstrate that the claimant's injury would not have occurred "but for" that accident. The work accident "need not be the sole cause or even a substantial

¹⁵⁹ Arrants v. Home Depot, 65 A.3d 601, 605 (Del. 2013).

¹⁶⁰ Wyatt v. Rescare Home Care, 81 A.3d 1253, 1258 – 59 (Del. 2013).

¹⁶¹ Noel-Liszkiewicz v. La-Z-Boy, 68 A.3d 188, 191 (Del. 2013) ("Only when there is no satisfactory proof to support a factual finding of the Board may the Superior Court . . . overturn that finding").

¹⁶² 19 *Del. C.* § 2304. *See also Spellman v. Christiana Care Health Servs.*, 74 A.3d 619, 623 (Del. 2013) ("To be eligible for worker's compensation benefits for personal injury or death, the claimant must prove that the injury sustained was 'by accident arising out of and in the course of employment'"); *Harasika v. State*, 2013 WL 1411233, *4 (Del. Super. Feb. 28, 2013) ("Under Delaware law, an injury must both arise out of and occur in the course of one's employment in order to be compensable").

¹⁶³ *Goicuria v. Kauffman's Furniture*, 1997 WL 817889, *2 (Del. Super. Oct. 30, 1997), *aff'd*, 1998 WL 67720 (Del. Feb. 5, 1998); 29 *Del. C.* § 10125(c). *See also White v. Masley Enters.*, 2013 WL 1087577, * 7 (Del. Super. Mar. 8, 2013) (affirming a Board decision that rested solely on the fact that the appellant was unable to meet his burden in establishing causation).

¹⁶⁴ Reese v. Home Budget Center, 619 A.2d 907, 910 (Del. 1992). See also World Airways, Inc. v. Golson, 2014 WL 703820, *6 (Del. Super. Feb. 5, 2014).

cause of [the claimant's] injury." The element of causation is satisfied if the work accident provides the "setting" or "trigger" of the claimant's injury. 166

In the instant case, the only issue before the Board was to determine causation with respect to Appellant's left shoulder injuries (cartilage damage and impingement) and the Board applied the appropriate "but for" standard of causation.

The Board concluded that Appellant did not meet his burden of proving, by a preponderance of the evidence, that his left shoulder injuries were causally related to the 2008 work accident. Furthermore, substantial evidence supports the Board's decision that neither the cartilage damage nor the impingement was caused by the 2008 work accident.

While a medical expert's testimony "is necessary to establish the injury and the causal connection" between that injury and the work accident 167, an award of workers' compensation benefits "cannot stand on medical testimony alone, if the

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¹⁶⁵ *Reese*, 619 A.2d at 910.

¹⁶⁶ Id.; Hoffecker v. Lexus of Wilmington, 2012 WL 341714, *2 (Del. Feb. 1, 2012).

¹⁶⁷ Knowles v. A Greener Solution, LLC, 2011 WL 5554906, *2 (Del. Super. Oct. 20, 2011); See also Wilkinson v. General Motors Corp., 2012 WL 2367603, * (Del. June 22, 2012) (holding the Industrial Accident Board correctly concluded the appellant did not meet her required burden of proof where the only medical evidence accepted was the employer's expert's testimony).

medical testimony shows nothing more than a mere possibility that the injury is related to the accident." ¹⁶⁸

Moreover, the Board, as the trier of fact, determines the credibility of witnesses, the appropriate weight to accord witness testimony, and the reasonable inferences to be drawn therefrom. This function is reserved exclusively for the Board. The Board also has the flexibility to make credibility determinations as to expert witnesses. It is free to accept or reject the testimony, in whole or in part.

As to the cartilage damage, the Board credited Appellant's medical expert's (Dr. Pushkarewicz') testimony that cartilage damage is caused by a trauma. However, the Board rejected the part of Dr. Pushkarewicz' opinion that the 2008 work accident was the trauma that caused Appellant's left shoulder cartilage damage. The Board found that the cartilage damage occurred at "some later point" after the work accident and, as a result, Appellant failed to establish that the cartilage damage was caused by the 2008 work accident. (The Board did not

¹⁶⁸ Wyatt v. Rescare Home Care, 81 A.3d at 1259 (internal quotation marks omitted) (quoting General Motors Corp. v. Freeman, 164 A.2d 686, 688 (Del. 1960)).

¹⁶⁹ Saunders v. DaimlerChrysler, Corp., 2006 WL 390098, *4 (Del. Feb. 17, 2006); Christiana Care Health Sys., VNA v. Taggart, 2004 WL 692640, *12 (Del. Super. Mar. 18, 2004) (citing Clements v. Diamond State Port Co., 831 A.2d 870, 878 (Del. 2000).

¹⁷⁰ Opportunity Ctr., Inc. v. Jamison, 2007 WL 3262211, *3 (Del. May 24, 2007) (citing Johnson, 213 A.2d at 66).

¹⁷¹ Clements v. Diamond State Port Corp., 831 A.2d 870, 877-78 (Del. 2003).

¹⁷² Johnson Controls v. Evans, 2009 WL 1964941, *2 (Del. Super. May 13, 2009).

¹⁷³ Bd. Dec. at 12.

consider Dr. Townsend's opinion testimony as to the cause of the cartilage damage.)

The Board's decision is supported by Dr. Pushkarewicz' testimony that "something" caused the cartilage damage but Appellant's expert did not definitively state that the 2008 work accident caused Appellant's cartilage damage. Furthermore, Dr. Pushkarewicz was unsure of how Appellant fell and he was unable to state with certainty that Appellant's left shoulder was impacted during the fall. Dr. Pushkarewicz was also unaware that Appellant had sustained a trauma to his left shoulder in 2001 and had not reviewed Appellant's pre-accident medical history. Dr. Pushkarewicz only reviewed his own records in forming his opinion that the cartilage damage was caused by the work accident, and Appellant did not relate any previous history to him.

Moreover, Appellant's medical records contemporaneous to the work accident do not support a finding of trauma to his left shoulder or that he reported any left shoulder injury. On the date of the work accident, Appellant filled out Concentra's patient questionnaire but did not mention any left shoulder injury.

Contrary to Appellant's assertion that he complained of bilateral shoulder pain to Concentra on December 30, 2008 (twelve days after the work accident), the Board found that his medical records show that he complained of his shoulder (singular) and that only his right upper extremity was examined. Furthermore, one

day after the work accident, Appellant did not complain to Dr. Pushkarewicz of his left shoulder. Appellant also did not complain to Dr. Pushkarewicz of a left shoulder injury on his the follow-up visit twelve days later.

Indeed, there is no clinical evidence of cartilage damage documented in Dr. Pushkarewicz' medical records until April 2010 (more than fifteen months after the work accident). However, although Dr. Pushkarewicz detected "slight tenderness" in Appellant's anterior glenohumeral articulation during a physical examination in April 2010, Dr. Pushkarewicz continued to believe that Appellant's left shoulder pain radiated from his neck. Furthermore, an MR arthrogram in April 2010 was normal, did not show any cartilage damage, and did not change Dr. Pushkarewicz' belief that Appellant's left shoulder symptoms were attributable to his neck pain. In fact, eventual left shoulder surgery performed by Dr. Pushkarewicz did not relieve Appellant's left shoulder pain. So too, an MRI in 2011 (ordered by Dr. Rastogi – the physician treating Appellant's cervical spine) did not show cartilage damage either.

Also, although Dr. Pushkarewicz explained that he was "not surprised" that the cartilage damage did not appear on either diagnostic study because "it was not a dramatic lesion," Dr. Pushkarewicz did not clarify whether Appellant's subjective complaints were related to cartilage damage (or whether the complaints were attributable to another injury, such as impingement).

In addition, the Board's determination that the Employer was not required to present evidence of another cause of Appellant's cartilage damage was appropriate. An employer can merely present "medical evidence to contradict and refute [Appellant's] assertion that his injury was work-related." The law is clear that an employer defending against a petition for disability benefits "need not raise and prove alternative theories of causation in order to prevail."

Thus, substantial evidence supports the Board's decision that Appellant failed to establish that his left shoulder cartilage damage was caused by the 2008 work accident.

As to the cause of Appellant's left shoulder impingement, the Board weighed the testimony of Appellant's expert and the Employer's expert. The Board found Dr. Townsend's opinion (that the impingement resulted from normal degenerative changes) to be more persuasive than Dr. Pushkarewicz' opinion (that it resulted from disuse weakness).

In its role as fact-finder, the Board must resolve any conflict in the medical evidence. ¹⁷⁶ If the Board is presented with conflicting medical testimony, "it is

¹⁷⁵ Strawbridge & Clothier v. Campbell, 492 A.2d at 853. See also Alfree v. Johnson Controls, Inc., 1997 WL 718669, *7 (Del. Super. Sept. 12, 1997) (holding the employer did not have to prove nonwork-related causes of the claimant's injury because the claimant filed a petition for benefits and had the burden of proving his injury was work-related).

¹⁷⁴ Strawbridge & Clothier v. Campbell, 492 A.2d 853, 854 (Del. 1985).

¹⁷⁶ *Miller v. Broadmeadow Health Care*, 2012 WL 1405698, *5 (Del. Super. Feb. 1, 2012) (citing *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006)).

well established under Delaware law that the Board may rely on the opinion of either expert and such evidence constitutes substantial evidence for the purpose of the Board's decision."¹⁷⁷

In the instant case, although the Board credited Dr. Pushkarewicz' testimony that impingement can develop absent a trauma, the Board rejected Dr. Pushkarewicz' opinion that Appellant "probably" developed some left shoulder impingement from favoring his left arm following the work accident.

Dr. Pushkarewicz' opinion that Appellant's left shoulder impingement developed from disuse weakness was contradicted by Dr. Townsend's testimony. Dr. Pushkarewicz' records from twenty-four office visits do not establish any findings of weakness in Appellant's left shoulder.

In fact, the records show that Appellant had normal strength and that Dr. Pushkarewicz diagnosed Appellant with radiculopathy in the left upper extremity (rather than impingement) one month after the work accident. Indeed, Dr. Pushkarewicz did not prescribe physical therapy for the left shoulder until July 2011 (four months prior to the unavailing left shoulder surgery). 178

¹⁷⁸ Moreover, Dr. Pushkarewicz's 2010 physical therapy prescription for Appellant was for the treatment of Appellant's left elbow.

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¹⁷⁷ Arrants v. Home Depot, 65 A.3d at 606. See also Doherty v. Valitas, 2013 WL 3959221, *4 (Del. Super. July 31, 2013) ("Where the Board adopts the opinion of one medical expert over another, the opinion adopted by the Board constitutes substantial evidence for appellate review").

Similarly, Dr. Townsend did not find any evidence of weakness in Appellant's left shoulder upon examination of Appellant on five occasions after the work accident and five months prior to the left shoulder surgery. Moreover, Dr. Townsend found that Appellant had normal strength and no evidence of guarding or weakness after the left shoulder surgery.

So too, there are no findings of left shoulder impingement documented during Appellant's nineteen visits to Delaware Back Pain & Sports Rehabilitation Center. However, approximately one and a half months after Delaware Back Pain & Sports Rehabilitation Center first diagnosed Appellant with left shoulder pain and noted that Dr. Pushkarewicz had no plans for shoulder surgery at that time, Dr. Pushkarewicz proceeded with Appellant's left shoulder surgery on November 30, 2011.

Furthermore, Dr. Pushkarewicz was unaware of Appellant's preexisting history of left shoulder injury. Dr. Pushkarewicz did not conduct a complete review of Appellant's medical records, including the November 2001 records of his own medical practice. Appellant's records, however, showed that he was diagnosed as having a classic left shoulder impingement in November 2001 shortly after a wallpapering accident. Additionally, a November 2001 x-ray showed a degenerative condition (a Type III acromion with narrowed humeral acromial distance) which (Dr. Townsend explained) can lead to impingement.

Dr. Townsend, contrastingly, did review Appellant's records and explained that preexisting degenerative changes at the acromioclavicular joint progress over time. Dr. Townsend also noted that Appellant's left elbow complaints would cause some guarding and could have contributed to preexisting degenerative changes in his left shoulder. The Board credited Dr. Townsend's opinion that Appellant's left shoulder impingement was caused by normal degenerative changes since 2001.

The Board summarized the experts' opinions and articulated specific, relevant reasons for its acceptance of Dr. Townsend's opinion over the opinion of Dr. Pushkarewicz. Where, as here, "the Board indicates that it found the approach and testimony of one expert more persuasive than that of the other, no further clarification of why the Board rejected the testimony of the appellant's expert is needed." 180

Conclusion

The Board did not err in determining that Appellant failed to meet his burden of proof as to the cause of his left shoulder injuries. The Board's finding that the left shoulder cartilage damage was not sustained in the 2008 work accident is supported by substantial evidence in the record and its decision that the Employer was not required to present an alternative theory of causation is consistent with case law and free from legal error. As to the cause of Appellant's

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¹⁷⁹ Noel-Liszkiewicz v. La-Z-Boy, 68 A.3d at 192; Johnson Controls v. Evans, 2009 WL 1964941 at *2.

¹⁸⁰ Breeding v. Advanced Auto Parts, 2014 WL 607323, *3 (Del. Super. Jan. 27, 2014).

left shoulder impingement, the Board did not err in accepting Dr. Townsend's

opinion that the impingement resulted from normal degenerative changes, which

constitutes substantial evidence for the purpose of appellate review. When

viewing the record in the light most favorable to the Employer, as the prevailing

party below, the Court finds that the Board's decision is supported by substantial

evidence and is free from legal error.

For the foregoing reasons, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

Diane Clarke Streett Judge

Original to Prothonotary

cc: Kenneth F. Carmine, Esquire

Maria Paris Newill, Esquire

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