

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

STATE OF DELAWARE,	)	
	)	
Employer-Below	)	
Appellant,	)	
	)	
v.	)	C. A. No. 03A-01-004 JEB
	)	
ANTHONY HARRIS,	)	
	)	
Claimant-Below	)	
Appellee.	)	

Submitted: September 12, 2003  
Decided: January 6, 2004

*Appeal from a Decision of the Industrial Accident Board.  
Decision Affirmed.*

**OPINION**

*Appearances:*

Susan A. List, Esquire, Wilmington, Delaware.  
Attorney for Appellant State of Delaware.

Michael D. Bednash, Esquire, Wilmington, Delaware.  
Attorney for Appellee Anthony Harris.

**JOHN E. BABIARZ, JR., JUDGE**

This is the Court's decision on the Employer State of Delaware's appeal of a decision of the Industrial Accident Board granting additional workers' compensation to Claimant Anthony Harris. For the reasons explained below, the Board's decision is affirmed.

## **FACTS**

In August 2000, Claimant hurt his neck and shoulders while lifting stereo equipment during his work at the Delaware Psychiatric Center. Claimant and Employer entered into an Agreement as to Compensation, which consisted primarily of compensation for a limited period of total disability because of "bilateral shoulder strain."

In July 2002, Claimant filed a Petition to Determine Additional Compensation Due for injuries to his cervical spine. The Board conducted a hearing and took evidence presented by deposition from two physicians, both of whom had reviewed Claimant's records and examined Claimant in preparation for the hearing. John Hocutt, Jr., M.D., testified on Claimant's behalf. Andrew Gelman, M.D., testified on Employer's behalf. Claimant did not appear at the hearing.

Both doctors noted that Claimant had lumbar (lower) spine surgery in 1985 and that he had degenerative arthritic spinal changes, also known as spondylosis. The doctors agreed that Claimant currently has an 18-percent permanent impairment to

his cervical (upper) spine, but they offered different opinions as to causation.

In his report and in his testimony, Dr. Gelman stated that Claimant's injury is attributable to degenerative arthritis and nerve irritation, which were prior conditions due to aging and exacerbated by the work accident.<sup>1</sup> He also stated that "[al]though there may have been some exacerbation following whatever occurred in August of 2000, it does not appear, from my review, to have affected his permanency rating." He testified that if Claimant's cervical spine had been assessed for an impairment rating in the mid 1990's, it probably would have been assigned an 18 percent. The gist of Dr. Gelman's testimony was that the work accident somehow exacerbated Claimant's degenerative condition impacting his permanency rating.

Dr. Hocutt diagnosed Claimant with cervical disc syndrome and assigned an 18-percent permanency rating to the cervical spine. He stated that Claimant's functional capacity evaluation showed a significant reduction in function and range of motion in his neck. He noted that Claimant had degenerative spine changes but that his neck had been asymptomatic for several years prior to the work accident. He also noted that an MRI performed after the work accident showed a herniated disc at C2-3 (in the cervical spine) that was not present prior to the accident. He believed that the condition was latent between 1997 and 2001 because Claimant had consulted

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<sup>1</sup>Gelman Deposition at 10.

physicians on other issues but not about his neck. Dr. Hocutt concluded that Claimant's 18-percent impairment was due to the work accident.

Based on this evidence, the Board found that Claimant had carried his burden of proof. The Board noted that Claimant did not seek any medical attention for his neck between January 1997 and August 2000, when he hurt himself at work. The Board observed that Claimant sought medical help for other conditions during this period, which further indicates that he was not experiencing neck problems. The Board found that the work accident caused an asymptomatic condition in the cervical spine to become symptomatic.

For this reason, the Board awarded Claimant an 18-percent permanent partial impairment rating for the cervical spine, as well as attorneys' and medical witness fees. Employer filed a timely appeal to this Court.

### **STANDARD OF REVIEW**

This Court's scope of review of a decision from the Board is limited. The Court determines whether the agency's decision is supported by substantial evidence and is free from legal error.<sup>2</sup> Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion.<sup>3</sup> This Court does

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<sup>2</sup>*General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

<sup>3</sup>*Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

not act as the trier of fact nor does it have authority to weigh the evidence, decide issues of credibility, or make factual conclusions.<sup>4</sup> The Court's review of conclusions of law is *de novo*.<sup>5</sup>

## **DISCUSSION**

On appeal, Employer argues first that the Board erred in awarding Claimant an 18-percent permanent partial impairment rating as a result of the work injury. Employer also argues that the Board wrongly determined that Claimant's neck condition was latent prior to the work accident. Finally, Employer argues that at the very least Claimant's impairment should be apportioned. Claimant argues that the Board correctly found that the work accident triggered the symptoms of Claimant's pre-existing degenerative condition.

The issues boil down to causation and apportionment. As to causation, where there has been an identifiable work accident, compensability is determined by the "but for" standard of causation.<sup>6</sup> If a worker had a preexisting disposition to a certain physical or emotional injury, an injury attributable to the work accident is compensable if the injury would not have occurred but for the accident. If the

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<sup>4</sup>*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>5</sup>*Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002).

<sup>6</sup>*Reese v. Home Budget Center*, 619 A.2d 907 (Del. 1992).

accident provides the “setting” or “trigger,” causation is satisfied for purposes of compensability.<sup>7</sup> The Board found that Claimant’s injury was compensable because his neck condition had been latent for several years prior to the accident and also because the latent condition was degenerative. The Court concludes that the Board’s finding as to causation is based on substantial evidence.

As to apportionment, the Board found that because Claimant’s prior back condition resolved itself in 1997, it had not been a permanent impairment. The symptoms had disappeared, and the degenerative condition itself had returned to a latent condition. The 2001 work accident caused the latency to become a permanent impairment, which is compensable under DEL. CODE ANN. tit. 19 sec. 2326.

Liability for a permanent impairment may be apportioned between employers under certain limited circumstances. Section 2327 of the Workmen’s Compensation Act provides as follows:

Whenever a subsequent permanent injury occurs to an employee who has previously sustained a permanent injury, from any cause, whether in the line of employment or otherwise, the employer for whom such injured employee was working at the time of such subsequent injury shall be required to pay only that amount of compensation as would be due for such subsequent injury without regard to the effect of the prior injury.

Under this statute, the period of disability is to be paid out of a fund known as the

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<sup>7</sup>*Id.* at 910.

Industrial Accident Board Second Injury and Contingency Fund so that a subsequent employer is not responsible for the cost of an injury that arose during previous employment. The purpose of this statute is to ensure coverage for injured workers and also to protect subsequent employers. It is not to eliminate or reduce coverage to an injured worker who had a latent, pre-existing injury when he started his employment. For these reasons, Delaware courts have ruled that a “previously sustained permanent injury” under sec. 2327 does not include naturally degenerative changes to the body as a result of the aging process.<sup>8</sup> In the case at bar, the record shows that Claimant suffered from spondylosis, a degenerative arthritic condition that is a natural part of aging. In upholding the General Assembly’s intention to afford injured workers complete relief from work-related accidents, this Court in *Sewell v. Delaware River and Bay Authority* stated that “a prior nondisabling defect or disease. . . is not apportionable.”<sup>9</sup>

In this case, as in *Sewell*, there was evidence before the Board that Claimant had no recent manifestation of his latent condition prior to the work accident. There

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<sup>8</sup>*Sewell* at 663-64. See also *Nastasi-White v. Fuddy*, 509 A.2d 1102 (Del. 1986) (affirming the Board’s compensation award to an employee whose cracked vertebra was caused partly by lifting a heavy box and partly by his pre-existing osteoporosis).

<sup>9</sup>796 A.2d 655 (Del. Super. 2000). Employer argues that this Court’s decision in *Mangle v. Grotto Pizza, Inc.*, WL 358671 (Del. Super. 1997), is dispositive of the apportionment issue. However, as this Court has previously noted, “[i]n *Mangle*, the Court did not rule on, nor did it address, the legal question of the appropriateness of apportionment.”

was also evidence that Claimant was fully functional before the accident and that his impairment occurred as a direct result of the accident. The only factual distinction between this case and *Sewell* is that Mr. Sewell's condition had never manifested itself until his work accident, whereas Mr. Harris' condition had been latent for approximately three years. The point is that Mr. Harris was not impaired prior to the work injury but that he has been since the injury. The Court concludes that the Board relied on substantial record evidence to find that the accident caused Claimant to suffer a compensable injury and that apportionment is not appropriate.

### **CONCLUSION**

For the above-stated reasons, the Board's decision is *Affirmed*.

*It Is So ORDERED.*

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Judge John E. Babiarz, Jr.

JEB,jr/rmp/bjw  
Original to Prothonotary



