

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. 01A-01-018
)
WILLIAM H. BLAKE,)
)
Claimant-Below,)
Appellee.)

Submitted: May 15, 2001
Decided: September 20, 2001

UPON APPEAL FROM THE INDUSTRIAL ACCIDENT BOARD:
REVERSED.

OPINION

David G. Culley, Esquire, Wilmington, Delaware for the State.

Edward B. Carter, Esquire, Wilmington, Delaware for the Appellee.

ABLEMAN, JUDGE

This is an appeal by Appellant Employer, the State of Delaware (Employer or State), from a decision of the Industrial Accident Board, dated January 5, 2001 granting Appellee Employee, William H. Blake's (Claimant) Petition to Determine Additional Compensation Due. On August 18, 2000, Claimant filed his petition seeking medical and disability benefits associated with surgery he underwent on July 26, 2000, and the resulting period of disability. He claimed that the surgery was compensable because the work accident accelerated or aggravated an existing degenerative condition and that he should therefore be compensated for the additional expense of surgery. The State asserts in this appeal that the work accident or the injuries sustained in the accident did not alter the need for, or extent of, required surgery, and that there was no compensable change in the employee's pre-existing condition.

Statement of Facts

William Blake (Claimant) was injured on April 30, 1997 while responding to a call as a volunteer fireman with the Christiana Fire Company. Mr. Blake was called to a fire at an apartment complex, apparently in the manager's office. In attempting to gain entry to the office respondent kicked the steel door with his right foot and felt a "sharp

twinging pain in his right knee at the time.” The pain immediately subsided but the following morning Claimant’s knee was swollen and he was unable to bend it. He sought medical attention from Dr. William Newcomb, a board certified orthopedic surgeon, with whom he had previously treated for right knee problems.

In fact, this recent work-related knee injury was not the first time Mr. Blake had experienced this type of problem. Mr. Blake began treating with Dr. Newcomb back in December 1983 when he complained of pain that dated back to 1976 when he began experiencing occasional locking during competitive swimming. In 1984, Dr. Newcomb performed arthroscopic surgery on Mr. Blake’s right knee, to repair a bucket handle tear in his meniscus.

Dr. Newcomb did not see Mr. Blake again until 1991 when he returned to his office complaining of pain on the lateral side of his knee. X-rays of both knees were taken at the time. These constitute the only baseline films for studying the progression of any future deterioration. Those x-rays showed no significant narrowing or wear of the joint space.

Following the Industrial Accident, Claimant again saw Dr. Newcomb on May 13, 1997, complaining of pain and swelling. He reported that he was unable to squat and the lateral (or outside) of the knee tended to give way. Dr. Newcomb ordered an x-ray which showed narrowing of the lateral compartment of the right knee. There was “just about four millimeters of joint space” on that side, as opposed to five and a half to six millimeters of lateral compartment space in the left or opposite knee. The joint space on the medial sides of both knees was the same at five millimeters.

Since Claimant continued to experience pain on the lateral side of the right knee, on August 13, 1997, Dr. Newcomb performed arthroscopic surgery. During the procedure, Dr. Newcomb identified chondromalacia or arthritis in the lateral compartment of the right knee in addition to evidence of a previous partial meniscectomy, which he had performed on the knee in 1984. Dr. Newcomb identified and removed some loose cartilage, which he described as “not a huge amount” with undermining edges from the area of the medial femoral condyle. He testified that the degenerative arthritis was “moderately severe,” in the form of grade III and some grade IV chondromalacia. There was also a small amount of exposed bone on the femoral side of the knee.

Since the surgery was successful in eliminating the painful catching and swelling, Claimant was permitted to return to his supervisory position within two weeks. He eventually returned to his duties as a volunteer fireman. On September 23, 1997, Claimant told Dr. Newcomb that his knee was doing well except for some continued discomfort. On November 18, 1997, Dr. Newcomb noted that Claimant's knee was doing well and that he was not having any problems, with the exception of an occasional catch on the lateral side.

Dr. Newcomb continued to follow the degenerative condition in Claimant's right knee because he knew that it would eventually require osteotomy surgery. On May 18, 1998, he ordered a new set of x-rays of the right knee, which demonstrated further wear of the lateral compartment of that knee. At that time there was only two and a half millimeters of lateral compartment joint space, a reduction of a millimeter and a half from the May 19, 1997 x-rays. When Claimant returned to see Dr. Newcomb on December 3, 1998, he was "not having a great deal of trouble," only some mild tenderness on the lateral side of the knee. By May of 1999, x-rays demonstrated that the joint space remained at two millimeters. In April 2000, a series of x-rays showed that the joint space had reduced to one

millimeter. At this time, Dr. Newcomb recommended that Claimant undergo an osteotomy procedure on the right knee. This procedure is designed to realign the weight bearing bone so as to take some of the weight from the lateral side, where the degeneration is occurring, and switch it to the medial or inside of the knee, where a cushion of cartilage still exists. The procedure was successfully performed on July 26, 2000.

On August 18, 2000, Claimant filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board. He alleged a recurrence of temporary total disability beginning on July 26, 2000 (the date of the osteotomy surgery) and ongoing, and sought payment for his medical bills connected with the surgery. A hearing on the petition was held before the Board on December 27, 2000 at which both parties offered expert testimony. Dr. Newcomb testified on behalf of the Claimant by deposition. Dr. Newcomb outlined his treatment and history with Claimant and testified, "I feel that the work injury that summer did injure his knee and it significantly accelerated the wear process." Dr. Newcomb was unable to provide any anatomical explanation for why the acceleration occurred, stating that he did not know whether the acceleration resulted from the removal of the loose pieces of cartilage or "some other thing that happened

to his knee.” In the absence of any event or explanation other than the work injury, Dr. Newcomb concluded that it was the latter that caused the acceleration.

Significantly, Dr. Newcomb conceded that Claimant would have required the osteotomy surgery in any case, even in the absence of the April 19, 1997 accident, and he was unable to state to a reasonable degree of medical probability when the surgery would have been required. Since the only measurements he had were those taken in 1991, and ones obtained later in 1997, Dr. Newcomb was unable to state with any certainty whether the progression was a steady line during those six years or whether it may have started in January 1997 and rapidly continued from that date onward.

Dr. Richard Zamarin, a board certified orthopedic surgeon, who is licensed to practice in Delaware and Pennsylvania, provided testimony in support of the employer’s position. Dr. Zamarin testified that he examined the employee on June 1, 2000, approximately seven weeks prior to the osteotomy surgery. He also reviewed the medical records and various x-ray studies previously discussed. Based upon the fact that Dr. Newcomb had removed a large portion of the lateral meniscus of the knee in 1983, Dr.

Zamarin concluded that this surgery created a contact point between the two bones, thereby increasing the compressive forces and contact stresses between them.

According to Dr. Zamarin, this change in the weight-bearing forces inside the joint led to the early and premature degenerative joint disease, which became evident during the 1997 arthroscopic surgery. He also pointed to the x-rays of the knee taken on May 13, 1997, which indicated a loss of joint space in the lateral compartment. According to Dr. Zamarin, this was all part of the same degenerative process.

Dr. Zamarin's review of the progression of the x-ray studies beginning in May of 1997 and ending in April of 2000 was also explored. It was his impression following his examination and review of the records that Claimant was suffering the effects of osteoarthritis in the lateral compartment of his right knee. It was further his opinion that it was not the April 30, 1997 accident and subsequent arthroscopic surgery that created the need for the osteotomy surgery. He testified that the problem leading to the osteotomy surgery began in 1976 when Claimant sustained a meniscal injury to his knee. The removal of the lateral meniscus in 1984 changed the

weight-bearing forces inside the joint, leading to early and premature degenerative joint disease. He opined that the work injury did not have any bearing on the subsequent need for the osteotomy. Dr. Zamarin testified that, in his opinion, the joint would have continued to erode regardless of the 1997 injury and Claimant would have required the surgery eventually anyway.

Following the hearing, the Board issued an award, finding that the July 2000 osteotomy surgery was compensable. The Board awarded total disability benefits for the post-operative recovery period. In finding that Claimant had met the burden of establishing that the accident accelerated the need for the osteotomy, the Board relied upon Dr. Newcomb's periodic monitoring of Claimant's knee following the accident, which showed rapid acceleration of the degeneration of the right knee. Specifically, the Board based its conclusion on 1) the periodic x-rays showing degeneration of the joint space following the accident; 2) Claimant's testimony that his knee began to "lock up" after the accident rather than the occasional catching that occurred before; and 3) medical records showing an increase in symptoms.

Standard of Review

On appeal, the Superior Court's review is limited by 29 Del.C. §§10142 and 10161(a)(8). This Court does not re-examine evidence nor does it make its own factual findings. The function and scope of this Court's review is to determine whether the Board's conclusions are supported by substantial competent evidence in the record and are free from legal error. General Motors v. Freeman, Del. Supr., 164 A.2d 686, 689 (1960); Johnson v. Chrysler Corp., Del. Supr., 213 A.2d 64, 66-67 (1965). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Olney v. Cooch, Del. Supr., 425 A.2d 610, 614 (1981). It is the role of the Board, rather than that of the Court, to resolve conflicts in testimony and to decide which witnesses are credible. Johnson v. Chrysler Corp., Del. Supr., 213 A.2d 64, 66 (1965).

The State's appeal focuses primarily on its contention that there was insufficient evidence presented to establish causation. That is, the State submits that the Board's factual conclusion that the osteotomy surgery, for which Claimant seeks compensation, was accelerated by the industrial accident, is not supported by substantial competent evidence in the record. Even accepting the testimony of Mr. Blake's expert, Dr. Newcomb, and

discounting the opinion of Dr. Zamarin, it is the State's position that Dr. Newcomb's testimony concerning causation is inadequate as a matter of law, and the Board's conclusion therefore constitutes legal error.

The Claimant, on the other hand, maintains that substantial evidence in the record supports the Board's finding that the osteotomy surgery was caused by the April 20, 1997 industrial accident. Mr. Blake argues that the evidence establishes that the degeneration of the joint space in his right knee was accelerated by the work accident, and that the acceleration of this degeneration created a need for the July 26, 2000 osteotomy surgery. Further, Claimant submits that the Board accurately noted that there was insufficient evidence to find that the degenerative condition, on its own, would have degenerated as quickly as it did, absent any initiating factor, such as the work accident*.

In support of its argument, Employer relies heavily upon the Delaware Supreme Court's decision in Reese v. Home Budget Center, Del. Supr., 619 A.2d 907 (1992) which defines the applicable standard for determining when

*Claimant's argument that there is insufficient evidence in the record to find that the degenerative condition on its own, would degenerate so quickly as it did, absent any factor such as the work accident is flawed. It attempts to shift the burden of proving causation away from the Claimant where it rests, McGlinchey v. Phoenix Steel Corp., Del. Super., 293 A.2d 585, 587 (1972), and onto the employer.

a pre-existing disease or infirmity can form the basis for a compensable workers compensation claim. In Reese, the Supreme Court stated that “[a] pre-existing disease or infirmity, whether overt or latent, does not disqualify a claim for workers’ compensation if the employment aggravated, accelerated or in combination with the infirmity produced the disability.”

619 A.2d at 980. The Court observed:

If the injury serves to produce a further injurious result by precipitating or accelerating a previous dormant condition, a causal connection can be said to have been established.

Id.

The State emphasizes, however, that the Reese Court did not in any way eliminate the general tort law definition of proximate cause. In fact, the Supreme Court made it clear in that case that the “but for” definition remained the effective standard of causation in workers’ compensation cases:

The ‘but for’ definition of proximate cause in the substantive law of torts finds equal application in fixing the relationship between the acknowledged industrial accident and its aftermath. If the worker had a pre-existing disposition to a certain physical or emotional injury which had not manifested itself prior to the time of the accident, an injury attributable to the accident is compensable if the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the ‘setting’ or ‘trigger,’ causation is satisfied for purposes of compensability.

619 A.2d at 911 (emphasis added). Accord, State v. Steen, 719 A.2d 930, 932 (1998) (...when there is an identifiable industrial accident, the compensability of any resultant injury must be determined exclusively by an application of the ‘but for’ standard of proximate cause.”) The substantial cause or substantial factor standard of causation was specifically rejected by the Reese Court in determining whether the work injury accelerated the degenerative process.

In concluding as it did, that Mr. Blake’s osteotomy surgery was compensable, the Board relied upon Dr. Newcomb’s testimony that the accident caused a “rapid acceleration” in the underlying degenerative condition, resulting in an accelerated need for the osteotomy. The defect in this analysis, however, is that the Board failed to apply the Reese ‘but for’ standard properly, basing its decision instead upon the testimony that the accident was a substantial cause in the acceleration of the degenerative process. As will be discussed more fully hereafter, the absence of any medical testimony from either expert that the osteotomy procedure would not have been necessary, or would not have been performed when it was, “but for” the April 1997 work accident represents error on the part of the Board and requires reversal of its decision.

The parties agree that the Board is free to accept one expert witnesses' opinion over that of the other. They also do not dispute that the weight to accord such testimony and assessment of the credibility of the witnesses is the exclusive function of the Board. Nor do they dispute that this Court cannot substitute its own findings of fact for that of the Board on these matters, if substantial evidence exists to support them.

In this case, however, the fact that the Board accepted Dr. Newcomb's opinion and rejected that of Dr. Zamarin is not in issue. The Board was free to do so. Rather, the State submits that, even accepting the testimony of Dr. Newcomb and rejecting that of Dr. Zamarin, the medical evidence is inadequate as a matter of law to support a "but for" link between the need for osteotomy surgery and the accident. The Court agrees.

In the first place, Dr. Newcomb conceded that Mr. Blake would have required the osteotomy surgery regardless of the accident, at some unknown time in the future. Dr. Zamarin concurred with his opinion. The fact that Dr. Newcomb testified that the work accident was a "substantial cause" in the acceleration of the degenerative process does not equate with an opinion

that the surgery would never have been required but for the accident – the legal standard that should have applied in this instance.

Secondly, the evidence is undisputed that Mr. Blake’s condition was both symptomatic and objectively worsening prior to, and leading up to, the industrial accident. It was not dormant or asymptomatic as emphasized in Reese. This circumstance is significant because, in the absence of any precise way to measure the extent of aggravation or acceleration of a medical condition, the Reese analysis did not intend it to be compensable. Dr. Newcomb could not state with any certainty when the surgery would have been necessary. The work injury did not change the need for the surgery, nor can it be said with any precision that the surgery would not have been required to be performed when it was. In essence, there is nothing about the work accident, or the injuries sustained in the accident, which changed the need for, or extent of, the surgery. Accord, Lindbloom v. Teton International, Wyo. Supr., 684 P.2d 1388 (1984). For that reason, the Board abused its discretion in finding a compensable change in Mr. Blake’s pre-existing condition.

Third, the Board erred in its award of compensation because the expert testimony was simply inadequate to support a finding of causation. The record in this case simply does not support the finding that the accident made a “but for” difference in the outcome. Both doctors agree that Mr. Blake would have required the surgery regardless of the accident. Yet, neither could predict within any reasonable medical probability when the surgery might have been necessary had the accident not occurred. Dr. Newcomb could not state to a reasonable degree of medical probability when Mr. Blake would have required the procedure but he was unequivocal in his opinion that he would have needed it at “sometime within his normal life span.” The inability of either of the medical doctors to determine the extent, if any, to which the work accident may have caused a worsening or acceleration of the degenerative condition in Mr. Blake’s knee leads to the conclusion that the Board’s finding is not based on substantial causation evidence. Dr. Newcomb’s opinion that the accident accelerated the degenerative condition does not support the conclusion that the outcome was in any way affected by the accident. See, Damm v. Washington County School District No. 7, Ore. App., 846 P.2d 425 (1993).

Finally, the Board's causation finding is not based upon substantial competent evidence in the record because Dr. Newcomb's opinion testimony lacks any substantial factual basis. The reason that Dr. Newcomb concluded as he did was because he described the loss of approximately two millimeters of lateral joint space in the eighteen months following the work accident--from May 1997 to December 1998--to constitute a "rapid" or "marked" change. His conclusion was based upon his comparison of this change to the loss of 1 ½ to 2 millimeters of joint space between 1991 and May of 1997, a period of about six years. The problem with this analysis, however, is that from the evidence there is no way of determining whether the changes observed in May of 1997 occurred on a straight line basis over the entire six-year period after 1991, or more recently in time, perhaps just prior to the industrial accident. Dr. Newcomb acknowledged this difficulty in his testimony. Thus, Dr. Newcomb's opinion that Mr. Blake's degenerative condition was "accelerated" by the accident is essentially a conclusory one, which cannot support an award in a worker's compensation proceeding.

Conclusion

For the foregoing reasons, the judgment of the Industrial Accident Board is hereby **REVERSED**.

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

cc: Prothonotary
David G. Culley, Esquire
Edward B. Carter, Esquire