IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ROBERT BARKLEY,	)	
	)	C.A. No. 02A-01-003 JTV
Claimant	)	
Below-Appellant,	)	
	)	
v.	)	
	)	
JOHNSON CONTROLS,	)	
	)	
Employer	)	
Below-Appellee.	)	

Submitted: October 23, 2002
Decided: January 27, 2003

Walt F. Schmittinger, Esq., Dover, Delaware. Attorney for Appellant.

John W. Morgan, Esq., Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of Claimant's Appeal From Decision of Industrial Accident Board
REVERSED and REMANDED

VAUGHN, Resident Judge

OPINION

On January 31, 2000, Robert Barkley, the claimant, slipped and fell on ice while walking across a Food Lion parking lot. As a result of the fall, he suffered ongoing back pain which caused total disability. In June 2001 he underwent surgery in an effort to correct the back pain, but the surgery did not help. On September 10, 2001, Mr. Barkley filed a petition with the Industrial Accident Board ("Board") seeking compensation for the cost of the surgery and total disability from January 31, 2000. He contended that his current back problem is a compensable aggravation of a work-related back injury which he sustained on October 22, 1985. The Board denied his petition, finding that his current back problem is a new injury caused by the fall on January 31, 2000. This appeal of that denial requires the Court to consider whether the Board applied the correct rule of causation in deciding Mr. Barkley's case.

FACTS

Only a brief recitation of the facts, taken from the Board's summary of the evidence, is necessary for purposes of this appeal. On October 22, 1985, Mr. Barkley injured the lower part of his back while working at his job for Johnson Controls, Inc. ("employer"). As a result of the injury, he was restricted to light duty. The employer modified his work duties to accommodate his restrictions. He received medical care for his condition from 1985 until 1994, when he stopped his treatment because he was told the insurance carrier would no longer pay for it. The back condition did not improve, however, and Mr. Barkley continued to work with restrictions until his slip

and fall in the Food Lion parking lot. After the fall, Mr. Barkley experienced an increase in back pain. The pain was in the same location as his work injury but it was worse. It rendered him unable to work. As mentioned, back surgery did not relieve the pain. Before the fall in January 2000, no surgery was contemplated. There was medical testimony that the claimant's fall on the ice was the reason that surgery became necessary but that surgery would not have been necessary due to the slip and fall if the claimant had not suffered the pre-existing, 1985 back injury.

STANDARD OF REVIEW

The scope of review for appeal of a Board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.[1] "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[3] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.[4]

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[1] *Robinson v. Metal Masters, Inc.,* 2000 Del. Super. LEXIS 264 (Del. Super. 2000); *See Histed v. E.I. DuPont De Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[2] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *See Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

[3] 213 A.2d at 66.

[4] *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3 (Del. Super. 1999).

DISCUSSION

Under 19 *Del. C.* § 2347, a claimant is entitled to compensation if he suffers an increase in a compensable incapacity. In reaching its decision that the fall in 2000 caused a new injury, rather than an increase in the old one, the Board reasoned as follows:

> Claimant argues that the law in Delaware is that once an employee is injured in an industrial accident, the employer is responsible for all aggravations caused by any factor unless the aggravation is caused by a claimant's own negligence. The Board disagrees. Under Delaware law, an employee who has suffered a work-related injury may seek compensation for a recurrence of that injury if the impairment has returned "without the intervention of a *new or independent accident.*" *DiSabatino & Sons, Inc. v. Facciolo*, Del. Supr., 306 A.2d 716, 719 (1973) (emphasis added). . .
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> In considering whether there is a recurrence or a new injury, the Board's inquiry is two-fold. *Standard Distributing Co. v. Nally*, Del. Supr., 630 A.2d 640 (1996); *Wohlsen Construction Co. v. Hodel*, Del. Super., C.A. No. 94A-04-017 . . . (The fact that there is no successive carrier does not deprive the first carrier of the opportunity to show a claimant's claim was due to a further injury accompanied by an intervening event.) The Board must first determine whether the January 31, 2000 fall constituted an intervening or untoward event. *Id*. at 645. The Board must then determine whether there was a change in Claimant's condition as a result of the fall. A mere increase in symptoms is not enough to establish a new injury. *Id*.

The Board reasoned that the fall was an intervening or untoward event and that the significant increase in back pain which it caused was a new injury, not a mere increase in symptoms.

In reaching its decision, the Board relied upon cases which are part of a line of cases which address successive carrier liability. These are cases in which a claimant has suffered two, separate, industrial accidents, one insured by one carrier, and one insured by a different carrier. The question is which carrier should bear responsibility for the second accident. The rule applicable to successive carrier liability, as stated by the Delaware Supreme Court in *Standard Distributing Company v. Nally*,[5] is as follows:

> The rule we endorse for determining successive carrier responsibility in recurrence/aggravation disputes places responsibility on the carrier on the risk at the time of the initial injury when the claimant, with continuing symptoms and disability, sustains a further injury unaccompanied by any intervening or untoward event which could be deemed the proximate cause of the new condition. On the other hand, where an employee with a previous compensable injury has sustained a subsequent industrial accident resulting in an aggravation of his physical condition, the second carrier must respond to the claim for additional compensation.[6]

This rule is intended for situations where both accidents are covered under workers'

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[5] 630 A.2d 640 (Del. 1993).

[6] *Id*. at 646.

compensation, and the issue is which of two carriers should be responsible. The focus of the inquiry is on the nature of the second event. The rule is influenced by policy concerns which are mentioned in *Standard Distributing Company*.

From the Board's findings and conclusions, it appears that the Board believed that the above-mentioned rule should be applied in this case, which does not involve successive carrier liability, because of this Court's decision in *Wohlsen Construction Co. v. Hodel*.[7] In that case the claimant was injured in two industrial accidents. The first occurred when he was an employee covered by workers' compensation insurance. The second occurred when he was self-employed, after leaving the previous employment. There was no workers' compensation insurance covering the second accident. The Court concluded that the case involved circumstances similar to a successive carrier case. It further concluded that the successive carrier line of cases should apply because to do otherwise would lead to inconsistent results based upon the claimant's insured status. The *Wohlsen* case is distinguishable because the second accident in this case was not work related and the circumstances are, therefore, not similar to a successive carrier case.

The rule of causation applicable where a work-related injury is aggravated by a subsequent, non-work related accident is set forth in a separate line of cases, beginning with *Hudson v. E.I. Du Pont De Nemours & Co., Inc.*.[8] In *Hudson*, the claimant suffered a work-related back injury in October 1964. In August 1966 he experienced

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[7] 1994 Del. Super. LEXIS 574 (Del. Super. 1994).

[8] 245 A.2d 805 (Del. Super. 1968).

significant back pain when he attempted to rise from a beach chair. One of the issues was whether a worsening of the claimant's back pain from his attempt to rise from the beach chair was caused by the October 1964 back injury. The applicable rule of causation, as stated by the court, is that a "subsequent injury is compensable only if it follows as a direct and natural result of the primary compensable injury."[9] The court also observed that if the subsequent injury is attributable to the claimant's own negligence or fault, the chain of causation is broken and the subsequent injury is not compensable.[10]

In *Amoco Chemical Corporation v. Hill*,[11] the claimant suffered a compensable injury while at work in January 1970. He was still able to work, however. In February 1971, he experienced significant back pains after playing basketball. At that point, he became totally disabled. The issue was whether the worsened back condition following the basketball game was caused by the January 1970 back injury. The court set forth the applicable rule of causation as follows:

> A general rule of causation in such cases as this is stated by Larsen's Workmen's Compensation Law, § 1300 as follows:
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> "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out

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[9] *Id*. at 810.

[10] *Id*.

[11] 318 A.2d 614 (Del. Super. 1974).

> of the employment unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."
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> When the question arises as to whether compensability should be extended to an injury or aggravation following a primary compensable injury, the rules that come into play essentially are based upon the concept of "direct and natural results", and of Claimant's own conduct as an independent intervening cause.[12]

Where the subsequent injury or aggravation is not the result of quasi-course of employment activity, the chain of causation may be deemed broken by either negligent or intentional misconduct on the part of the claimant.[13] Under this rule, absent such negligence, a weakened condition stemming from a compensable injury may be deemed the cause of an aggravation of the injury which occurs in a subsequent non-work related accident.[14]

This rule of "direct and natural consequences" is the rule of causation which should have been applied in this case. The Board committed legal error by applying the rule applicable to successive carrier cases. The case will be remanded to the Board so that it may make additional findings and conclusions applying the correct rule of causation.

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[12] *Id.* at 618

[13] *Id.*

[14] *Groce v. Johnson's Used Cars*, 1997 Del. Super. LEXIS 450 (Del. Super. 1997); 1 Arthur Larson, *Larson's Workers' Compensation Law* § 10.06[2] (2002).

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The decision of the Board is ***reversed and remanded*** for further proceedings consistent with this opinion.

IT IS SO ORDERED.

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Resident Judge

oc: Prothonotary
cc: Order Distribution
File