IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LYNN BERNHARD,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 03A-01-005-HDR
	)	
PHOENIX MENTAL HEALTH	)	
	)	
Appellee.	)	

Submitted: October 6, 2003
Decided: January 30, 2004

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, P.A., for Lynn Bernhard.

Scott Simpson, Esq., Elzufon, Austin, Reardon, Tarlov & Mondell, for Phoenix Mental Health.

O P I N I O N

Upon Appeal from a Decision of the Unemployment Insurance Appeals Board
REVERSED

RIDGELY, President Judge

This is an appeal by the Claimant from a decision of the Industrial Accident Board awarding compensation for injuries resulting from a work related car accident but denying compensation for certain medical costs associated with the diagnostic testing and treatment during Claimant's hospitalization after the accident. Because the Board erred as a matter of law in apportioning these medical expenses of the Claimant, the decision of the Industrial Accident Board is reversed.

I. BACKGROUND

The Claimant, Lynn Bernhard, is employed as an aide by Phoenix Mental Health ("Phoenix"). Ms. Bernhard was driving to a client's home at approximately 25 mph when she hit a telephone pole guide line which flipped her car. Ms. Bernhard told the police that she must have "blacked out or something" while reaching for something in the car. Ms. Bernhard had no recollection of how the accident occurred. She was brought to Kent General Hospital and admitted for two days.

During her stay in the hospital, Ms. Bernhard was treated for a mild strain of the cervical spine that resulted from the accident. Additionally, her treating physician, Dr. Samuel M. Wilson, was concerned by Ms. Bernhard's statement that she suddenly lost consciousness while driving. He ordered diagnostic testing to see if there was some physical explanation for this. Tests were done and specialists consulted to determine if there were any neurological, cardiac, liver problems or seizure disorder. All the tests returned negative results, except for

one CAT scan that showed evidence of an old stroke that occurred prior to the accident. The Claimant had not been aware of this stroke.

While the hospital testing resulted in no explanation for the sudden loss of consciousness, Phoenix claims that Ms. Bernhard had a pre-existing medical condition based on statements that Ms. Bernhard made at the hospital and in her testimony to the Industrial Accident Board ("Board"). In these statements, Ms. Bernhard revealed that she had been taking medications for treatment of shoulder, neck and back pain. Upon discontinuing one of the medications, she experienced difficulty sleeping. The night before the accident she went to bed after 12:30 a.m and woke up at 4:00 a.m. On several prior occasions, she recalled drifting off while driving, but these episodes were late at night while returning home from a client's house and did not involve an accident. Ms. Bernhard testified at the Board hearing that these episodes of drifting off were different than the one experienced at the time of the accident.

The medical costs from the accident totaled $11,305.96. Phoenix paid $5,878.90 of these costs leaving $5,427.06 unpaid and the subject of the Claimant's Petition to the Board. This unpaid portion represents the diagnostic tests based upon her loss of consciousness while driving.

II. STANDARD OF REVIEW

Under 29 *Del. C.* § 10142(d), this Court's review of the Board's decisions are limited to a determination of whether the decision was supported by substantial evidence on the record before it.[1] Substantial evidence is evidence from which the agency fairly and reasonably could have reached the conclusion it did.[2] Substantial evidence is defined as "more than a scintilla, but less than a preponderance."[3] The Board, not the court, must weigh the evidence presented and resolve conflicting testimony and issues of credibility.[4] This Court's scope and standard of review are limited to determining whether the decision is supported by substantial evidence on the record and free from legal error.[5] This Court's review of questions of law is *de novo.*[6]

---

[1] *First State Motors, Inc. v. Wearn,* 1989 WL 124895, at *2 (Del. Super. Ct. 1989), *aff'd,* 574 A.2d 264 (Del. Supr. 1990)

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Coward v. Modern Maturity Center, Inc.,* 2003 WL 21001031, at *3 (Del. Super. Ct. 2003), *appeal dismissed*, 825 A.2d 239 (Del. 2003).

III. DISCUSSION

A. The Parties Contentions

The Claimant argues that because the claim was accepted by Phoenix, and the benefits were paid, there is no question of whether a compensable injury occurred. The Delaware Supreme Court has ruled that even in the absence of an agreement as to compensation filed with the Board, where the carrier has paid medical expenses, the claim is deemed accepted under the Compensation Act and not a gift.[7]

The Claimant next argues that the diagnostic tests occurring at the hospital should be paid because they would not have taken place if it were not for the accident. The Claimant cites *Coward v. Modern Maturity Center,*[8] to show that in order for the injury to meet the Delaware compensation requirements,[9] the injury in question must meet a two prong test: First, that the injury occurred within the course of employment; and second, that the injury occurred within the scope of employment.[10]

The first prong, course of employment, was agreed to by both parties

---

[7]*Starun v. All American Engineering Co.,* 350 A.2d 765, 767 (Del. 1975).

[8]2003 WL 21001031, at *10-11.

[9]19 *Del. C.* § 2304 *Compensation as Exclusive Remedy*, stating that every employer shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence, and to the exclusion of other rights and remedies.

[10]*Coward,* 2003 WL 21001031, at *10-11.

because the accident occurred while the Claimant was on her way to a client's home in order to accomplish her work duties. It is the second prong, the injury occurring in the scope of the employment, around which the Claimant's argument centers. The Claimant cites *Coward* for the proposition that it is not necessary that an essential causal relationship between the injury and the employment exist. She argues that once the work injury is established the "but for" standard from *Reese v. Home Budget Center*[11] governs the relationship between any particular medical expenses and the work related injury. The "but for" standard laid out in *Reese* is:

> "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 the purposes of compensability."[12]

The Claimant further argues that the only reason she had the diagnostic testing was because of the accident and that but for the accident, none of these tests would have been done. The Claimant asserts that the question is not would these tests hypothetically have been done at some time in the future given her "history" but rather did she need this treatment at the time as the result of the work injury. She contends that if this treatment was needed because of the work related injury then it is compensable.

---

[11]619 A.2d 907 (Del. 1992), *rev'g* 1992 WL 91123 (Del. Super. Ct. 1992).

[12]*Id.* at 910.

Phoenix agrees that the automobile accident was work related and arises in the course of the Claimant's employment. However, Phoenix argues that the fainting caused the accident and was not a result of the accident, therefore, the medical conditions associated with the fainting did not arise out of the scope of the employment. Thus, Phoenix contends that only the injuries that were directly caused by the accident, the orthopedic injuries, are compensable.

Phoenix distinguishes the *Coward* case, by stating that in *Coward* the issue was the causal link between the activities of employment and the injury. Phoenix argues that the issue in this case is the causal link between the injury and the ensuing medical condition which was specifically not addressed in *Coward.* Phoenix contends that the Claimant has failed to establish any causal connection between her employment and the blacking out that caused the accident. Phoenix points out that Dr. Wilson testified that with a prior history of "syncopal episodes" and drifting off the road, he would have recommended these diagnostic tests with or without this accident.

Additionally, Phoenix contends that the fact that none of the diagnostic testing revealed any physical problems is irrelevant, because the only reason the testing was ordered was because of the Claimant's history of drifting off and not any anticipated outcome of the testing. Phoenix argues that the fact that no diagnosis was made simply supports the employer's position that the testing was completely unrelated to the automobile accident.

Phoenix contends that treatment for a condition unrelated to the accident is compensable only if necessary to treat a work related injury. It contends there was

no medical testimony to indicate that treatment of the pre-existing syncopal episodes would be necessary to treat a mild cervical spine injury.

B. The Board's Conclusions

The Board agreed with Phoenix that the cardiac and neurological evaluations were not related to the Claimant's compensable orthopedic injury. The Board decided Phoenix should pay only for the orthopedic injury treatment and expenses and not any of the diagnostic testing related to any loss of consciousness. The Board further concluded that the Claimant did not meet her burden of proof and that the cardiac and neurological testing were related the accident.

C. Analysis

Both parties focus their attention on whether the fainting is non-compensable because it preceded or caused the accident, or conversely, whether the fainting is compensable because it occurred within the same time frame as the work related accident. However, the central issue in this case is whether compensation for treatment of injuries and diagnostic testing due to a work related accident can be apportioned under Delaware law.

It is undisputed that the accident was work related. Both parties agree that the Claimant was driving to a client's home and therefore the accident occurred within the course of employment. The insurance carrier paid for over one-half of the medical expenses resulting from the accident. Under *Walden v. Georgia*

Pacific,[13] once a carrier has paid medical expenses and a claimant accepts the benefit there has in fact been an agreement in accordance with the Workman's Compensation Act and the only conclusion that can be made is that the Carrier has considered itself obliged to make this payment under the Workman's Compensation Act. Therefore, the only issue to address is whether the compensation can be apportioned between a "pre-existing" condition and the work related accident.

According to *Sewell v. Delaware River and Bay Authority,*[14] the Board may not apportion compensation between an asymptomatic pre-existing condition and the work related injury that aggravated the condition without legislative authority. Only a minority of five states,[15] Delaware not included, follow the rule that when a pre-existing disease is aggravated by employment, compensation is payable only for the percentage of disability attributable to the accident.[16] The only evidence here of a pre-existing asymptomatic condition is the old stroke revealed by the CAT scan during the diagnostic testing, however, this condition was not aggravated by the accident, it was merely detected incidentally after the accident.

Phoenix argues that the Claimant had a pre-existing condition because she had a history of blacking out, despite the Claimant's testimony that she was really

---

[13] 1994 WL 534907, *5 (Del. Super. Ct.1994).

[14] 796 A.2d 655, 663 (Del. Super. Ct. 2000), *appeal dismissed*, 755 A.2d 387 (Del. 2000).

[15] *See Id.* at 661, listing the following states as having the minority rule for apportionment: California, Florida, Mississippi, North Dakota, and South Carolina.

[16] *Id.*

just drifting off due to lack of sleep. In order to prove the existence of a pre-existing condition, the employer must show more evidence than one doctor's opinion that the condition was probably pre-existing.[17] A review of Delaware cases by this Court in *First State Motors*, revealed that the employer normally must show that a doctor had diagnosed the employee as having the condition sometime before the industrial accident.[18] In this case, the Claimant had never been diagnosed for any loss of consciousness condition. The only treatment the Claimant received was for shoulder, neck and back pain. It was only Dr. Wilson that opined the possibility of a pre-existing condition, basing this opinion solely on the Claimant's statements following the accident.

As there is no legislative authority designating apportionment for injuries that are non-permanent physical injuries, this Court in *Sewell,* turned to treatises and legal encyclopedias for guidance.[19] Professor Larson in *Larson's Worker's Compensation Law,* states that apportionment does not apply unless the state has a special statute on aggravation of disease for when industrial injury precipitates disability from a latent prior condition such as heart disease, cancer, back weakness and the like.[20] Without this legislative authority the entire disability is

---

[17]*First State Motor,* 1989 WL 124895, at *4.

[18]*Id.*

[19]*Sewell,* 796 A.2d at 662.

[20]*Id.*

compensable.[21] Likewise, *American Jurisprudence 2d,*[22] reiterates that in the absence of a provision for apportionment of the compensation between an injury and pre-existing disease there is no requirement to determine the relative contribution of the accident and the prior disease to the final result.[23] In addition, *Sewell* cited this Court's holding in *H&A Electric v. Bickling*[24] that a work related accident that aggravates a prior non-disabling defect or disease is not apportionable.[25] In work related claims, as in personal injury claims, the employer takes the employee as he finds him.[26] Additionally, the employer's liability is not limited to injuries which a physically able and mentally sound employee would sustain in similar accidents.[27]

The reasoning behind the emphasis not to apportion is that Workman's Compensation Law and the General Assembly advance the public policy of providing complete relief.[28] Therefore, in order to apportion, a complete change in the legislative scheme would be necessary. Furthermore, in *H&A Electric*, this

---

[21] *Id.*

[22] 82 AM. JUR. 2D *Worker's Compensation* § 319 (1992).

[23] *Sewell,* 796 A.2d at 662-63.

[24] 1995 WL 562166 (Del. Super. Ct. 1995).

[25] *Sewell,* 796 A.2d at 663.

[26] *Id.,* citing *Reese,* 619 A.2d at 910.

[27] *Sewell,* 796 A.2d at 663, citing *Reese,* 619 A.2d at 910.

[28] *Sewell,* 796 A.2d. at 664.

Court held that apportionment does not apply in any case in which the prior condition was not a disability in the compensation sense.[29] In *H& A Electric,* the Claimant suffered from a peripheral neuropathy that was the result of diabetes.[30] This condition led to a loss of sensation in his lower extremities.[31] At work, the employee stepped on a screw that lodged in his foot and unaware that the screw was there for several hours developed complications.[32] This Court found the pre-existing condition of diabetic peripheral neuropathy was not a previous permanent injury as defined under 19 *Del. C.* § 2327, and thus the employer had to bear full responsibility for Claimant's total disability resulting from the work-related aggravation of his pre-existing condition.[33] In this case, where there is no established pre-existing condition, and there is no newly discovered physical condition or aggravation of a latent physical condition, there cannot be an issue of apportionment of the medical expenses.

---

[29]1995 WL 562166, at *4. *See also Id.* at *2, citing *Nastasi-White, Inc. v. Futty*, 509 A.2d 1102,1103 (Del. Supr. Ct. 1986), *aff'g* 1985 WL 636431 (Del. Super. Ct. 1985) where the Board correctly concluded, there was no evidence that Claimant's pre-existing condition of osteoporosis was a disability in the compensation sense prior to the time of the work injury. Therefore, it was not a previous permanent injury under 19 *Del.C.* § 2327, even though the cracked vertebra suffered by the Claimant was in part caused by osteoporosis and in part caused by work related lifting of a box.

[30]*H&A Electric,* 1995 WL 562166, at *1.

[31]*Id.*

[32]*Id.*

[33]*Id.* at *4.

IV. CONCLUSION

In conclusion, as there is no statutory authority to apportion medical costs associated with diagnosis and treatment following a work-related accident, the Board erred as a matter of law. The diagnostic testing was done here because the work related accident occurred. Accordingly, the decision of the Industrial Accident Board is **REVERSED**.

IT IS SO ORDERED.

/s/ Henry duPont Ridgely
President Judge