IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

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<tr><td>DENNIS LEISURE,

Claimant, Below-
Appellant,

v.

BFI WASTE SYSTEMS/ ALLIED,
and STATE OF DELAWARE,

Employer, Below-
Appellees.</td><td>)
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C.A. No. 05A-05-003 - JTV</td></tr>
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Submitted: October 12, 2005
Decided: January 31, 2006

Walt F. Schmittinger, Esq., and Lori A. Brewington, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorneys for Appellant.

Maria Paris Newill, Esq., Heckler & Frabizzio, Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of Appellant's
Appeal from Decision of Industrial Accident Board
DENIED

VAUGHN, President Judge

OPINION

Dennis Leisure ("claimant") appeals an April 27, 2005, decision of the Industrial Accident Board ("Board"), which denied his petitions to determine compensation due seeking medical expenses and compensation for temporary total disability. The petitions were filed against BFI Waste Systems/Allied Waste Industries ("BFI") and the State of Delaware ("State") on the theory that the alleged compensable injury arose while the claimant was employed by BFI, or, in the alternative, while he was employed by the State. The claimant raises two issues on appeal as to his claim against BFI: (1) whether the Board erred as a matter of law in its application of the law of causation; and (2) whether the Board erred as a matter of law when it failed to award the "reasonable, necessary and related" medical expenses associated with the July 2004 incident at BFI, despite the Board's acknowledgment that the treatment was compensable. For the following reasons, the decision of the Board shall be ***affirmed.***

FACTS

At its hearing April 15, 2005, the Board heard testimony from the claimant; claimant's physician, Dr. Peter F. Townsend, via deposition; Dr. Stephen Friedman, who testified through deposition on behalf of the State; Harrington Fire Company Board of directors member Joe Zeroles, who handles workers' compensation issues; Harrington Fire Company members Ralph "Bud" Tucker and Mark Langford; Dr. Errol Ger, an orthopedic surgeon who testified via deposition on behalf of BFI; BFI district manager Michael Stang; and BFI operations manager and safety director Joseph Edwards.

Claimant testified that he has worked for BFI since July 1998, including a position as a "roll off" truck driver. The job involves driving to jobs to pick up large, metal, open-top waste containers – approximately 9 feet wide, 20 feet long and 5 feet tall – and then dumping the debris at a site. Claimant initially noticed pain in his right wrist in summer or early fall 2003 and initially attributed it to age-related arthritis. Shifting the gearshift on his work truck aggravated his wrist symptoms. Claimant testified he led a physically active life and that he had fallen down – on the job and off the job – numerous times in his life. He once fell while working for BFI and called in for a substitute driver to complete his run. In October 2003, claimant also noticed pain in his wrist while building a large tree stand that required him to ask for help.

Claimant also has volunteered with the Harrington Fire Company since June 1999, as an EMT since March 2000. While lifting a patient on an ambulance run on October 27, 2003, claimant felt a small pop in his wrist, which aggravated his symptoms. He did not tell anyone about this incident because he didn't think it was significant and his wrist was already bothering him.

Claimant sought treatment for his ongoing wrist pain in December 2003 from Dr. Eric Schwartz, who diagnosed a sprained wrist. Dr. Schwartz prescribed a wrist brace and performed an injection, which helped his symptoms. Claimant last saw Dr. Schwartz in January 2004 and did not keep a follow-up appointment because his wrist was feeling a lot better. He had returned to regular duty driving a "roll-off" truck for BFI in January 2004.

On July 12, 2004, claimant testified he aggravated his wrist condition when

closing the door on a "roll-off" container. While picking up the container with his truck, the door container failed to close all the way when the container rolled onto the truck. As a result, claimant walked back to the container and had to lift the door, at eye level, and attempt to slam the 5 foot by 9 foot hinged door shut. When he tried to slam it shut, it stopped short of closing all the way and the door slipped off the metal part of his brace across the top of his knuckles, forcing his hand back. He heard a loud snap and could barely move his fingers. He immediately reported the incident and soon after sought treatment from Kent Medical Center. Compared to the October 2003 ambulance incident, the claimant described this onset as a lot worse.

Claimant went to Health Works for treatment two times and was referred to Dr. Michael Mattern, who looked at X-rays and referred claimant to Dr. Townsend. Dr. Townsend placed claimant on limited duty and recommended surgery. Claimant continued working for BFI full-time, with no loss of pay, doing whatever he could within the restrictions. Claimant last worked February 2, 2005, and underwent surgery February 3, 2005. Claimant expected to return to work at BFI once approved by Dr. Townsend.

Dr. Townsend testified that the incident at BFI was sufficient enough to cause claimant's problem. He diagnosed claimant with a dissociate carpal instability pattern of the scapholunate joint. During surgery, the doctor removed one of the bones that was unstable. He used that bone as a graft, fusing four of the other small bones to provide stability to the wrist. He placed claimant on a no-work restriction, which he continued through his most recent visit on April 1, 2005. On cross examination, Dr. Townsend stated claimant did not tell him his wrist symptoms began

when he had trouble shifting gears with his truck or that he had purchased a wrist brace or that he hurt his wrist while lifting a patient as an EMT.

Dr. Friedman, who testified by deposition for the State and examined claimant on February 9, 2005, stated claimant had a pre-existing scapholunate ligament instability. He attributed it to one of the many falls claimant described to him and believes the injury likely occurred prior to August 2003. Dr. Friedman testified that the injury was not caused by the October 2003 EMT incident because such a mechanism is not consistent with the injury and claimant was having wrist problems before the incident. The doctor also testified that the July 2004 incident did not cause the tear because the incident is inconsistent with the development of acute wrist ligament tear and claimant had pre-existing wrist problems leading up to the time of that incident also. Dr. Friedman agreed, however, that the July 2004 trash container incident while working at BFI prompted claimant to seek treatment because this incident caused him to be more symptomatic. Additionally, Dr. Friedman stated neither work injury aggravated, accelerated, caused or contributed to claimant's underlying instability, and that neither resulted in the claimant requiring surgery.

Three individuals with the Harrington Fire Company testified. Mr. Zeroles stated he asked claimant in summer 2004 why he was wearing a wrist brace to which claimant responded he needed it to shift gears in his truck. In November 2004, Mr. Zeroles completed the first report of the EMT incident after being told by the fire company president that claimant reported a work accident that happened on October 27, 2003. Claimant stated he didn't report the injury sooner because he didn't think it meant anything. He also told Mr. Zeroles that he injured his wrist closing the lid

on the trash container. Mr. Tucker, who was on the ambulance run with claimant during the purported injury, said he does not remember claimant being injured but did recall claimant telling him he injured his wrist driving a BFI truck. Mr. Langford, who also was on the ambulance run, stated he did not recall the claimant injuring his wrist.

Testifying by deposition for BFI, Dr. Ger said neither the gear shifting nor the July 12, 2004, container lid incident caused or aggravated claimant's injury. Dr. Ger said he could not state with a reasonable degree of medical certainty that the October 2003 EMT injury caused or aggravated the injury. Dr. Ger noted that Dr. Schwartz took an X-ray and diagnosed a right wrist strain. The X-ray showed a gap in the scaphoid lunate area of the wrist that would suggest a condition called scapholunate dissociation, where the ligament between the scaphoid and lunate has been injured and torn. An August 2004 MRI confirmed scapholunate ligament tear and carpal instability.

Dr. Ger testified that Dr. Schwartz placed claimant on modified duty restrictions in December and saw him again in January and February 2004. Dr. Ger testified that the container lid incident was not sufficient to cause the ligament tear. He testified that the EMT injury likely caused the tear. However, he said, if the claimant's falls were significant, then Dr. Ger would guess it was a fall. However, Dr. Ger could not state to a reasonable degree of medical probability what caused the tear. He also stated the July 2004 incident did not aggravate, accelerate, cause or contribute to the tear. Dr. Ger stated individuals with similar injuries may opt for surgery or do nothing except for wear a brace for discomfort. The brace may provide

some relief but may not take away pain completely.

Speaking for BFI, Mr. Stang said he was aware of claimant's wrist problems prior to July 12, 2004, as claimant had told him that he would need to take some time off work at some point to take care of wrist problems. Additionally, Mr. Edwards stated he first became aware of claimant's wrist problem at the end of 2003 when claimant complained it hurt when he shifted gears. In February 2004, BFI accommodated work restrictions placed by Dr. Schwartz by assigning claimant to trucks with automatic transmissions and by providing claimant with a helper to assist on the runs. Claimant also reported his July 12, 2004, injury to him on the date of the injury. Mr. Edwards sent claimant to get medical treatment and completed an accident report. He testified doors on containers do get rusty and can fail to close smoothly.

The Board determined that the claimant did not meet his burden of proof in proving causation as to the three claims he submitted: gearshifting activities during his work with BFI; lifting a patient while serving as an EMT with the Harrington Fire Company on October 27, 2003; and as a "roll-off" truck driver during the July 12, 2004, incident.

PARTIES' CONTENTIONS

Claimant first argues the Board erred in its application of the law of causation. Claimant contends he would have continued working full-time, regular duty but for the door-closing incident at BFI in July 2004, which aggravated his pre-existing condition and required him to seek treatment, including surgery. This, he argues, entitles him to compensation under the legal principles set forth in *Reese v. Home*

Budget Center, Inc.[1] and *Blake v. State.*[2] Specifically, the claimant asserts that the Board erred in holding that the claimant's wrist injury was not the causal result of the July 12, 2004 incident at BFI.

BFI argues that the Board did not misapply the legal standard in *Reese* and that it was the exclusive province of the Board to come to a factual conclusion as to what role, if any, the July 2004 BFI door-closing incident played in claimant's wrist problems.

On the issue of medical expenses, claimant argues the Board erred in not awarding medical expenses claimant accrued from Health Works to treat a flare-up of his condition that occurred while working at BFI. The Board declined to award the expenses because claimant did not include these bills as an exhibit with his case. Claimant argues this should not penalize him from receiving these awards.

BFI argues the Board's ruling was proper and in accordance with Board rules and due process. BFI argues the claimant did not supply medical bills more than 30 days prior to the hearing and no evidence was presented during the hearing that these medical bills were incurred.

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

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[1] 619 A.2d 907 (Del. 1992).

[2] 792 A.2d 188 (Del. 2002).

the record to support the Board's findings of fact and conclusions of law.[3] "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[4] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[5] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.[6] Adequate evidence to support the Board's conclusions should not be disturbed absent an error of law.[7] The court must give "due account of the experience and specialized competence of the Board and of the purposes of our workers' compensation law."[8] When reviewing the Board's findings, the reviewing court should accept those findings, even if acting independently, the reviewing court would reach contrary conclusions.[9] Absent an error of law, the standard of review is abuse of discretion.[10] An abuse of discretion

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[3] *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); *Robinson v. Metal Masters, Inc.,* 2000 Del. Super. LEXIS 264.

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

[5] *Johnson,* 213 A.2d at 66.

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

[7] *Blake v. State,* 792 A.2d 188 (Del. 2002).

[8] *Histed,* 621 A.2d at 342.

[9] *H&H Poultry v. Whaley,* 408 A.2d 289, 291 (Del. 1979).

[10] *DiGiacomo v. Bd. of Publ. Educ.,* 507 A.2d 542, 546 (Del. 1986).

arises only where the Board's decision has "exceeded the bounds of reason in view of the circumstances."[11] Only where no satisfactory proof exists to support the factual finding of the Board may the Superior Court overturn it.[12]

The Board has the discretion to accept the testimony of one expert over that of another when evidence is in conflict and the opinion relied upon is supported by substantial evidence.[13] Also, when an expert's opinion is based in large part upon the patient's recital of subjective complaints and the trier of fact finds the underlying facts to be different, the trier is free to reject the expert's testimony.[14]

DISCUSSION

1. Law of Causation

The claimant argues that the Board incorrectly applied the legal standard of causation. However, after reviewing the Board's decision and the record of the case, it is clear there was substantial evidence to support the Board's findings of fact and conclusions of law.

The claimant argues his wrist problems began in the summer or fall of 2003, but the BFI work incident in July 2004 provided the "setting" or "trigger" for him to seek treatment that eventually led to surgery. The Board disagreed, finding that

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[11] *Floudiotis v. State,* 726 A.2d 1196, 1202 (Del. 1999); *Lilly v. State,* 649 A.2d 1055, 1059 (Del. 1994).

[12] *Johnson,* 213 A.2d at 64.

[13] *Reese,* 619 A.2d at 910; *DiSabatino v. Wortman,* 453 A.2d 102, 106 (Del. 1982).

[14] *Breeding v. Contractors-One-Inc.,* 549 A.2d 1102, 1104 (Del. 1988).

the BFI incident was not causally related to the claimant's injury. The claimant takes issue with the following statement by the Board:

> [S]imply because there are activities or incidents at work that produce pain and these incidents, along with occurrences outside of work (such as building at (sic) tree stand, lifting a cup of coffee, and falling down) contribute to Claimant's decision to seek treatment, does not mean that Claimant has suffered a compensable work injury.

The claimant contends this is contrary to the court's definition of causation in the workers' compensation context. The claimant argues the Board misapplied the *Reese* standard, which holds the accident need not be the sole cause of injury. The claimant states that, under *Reese*, if a work injury accelerates the need for surgery, the incident is compensable. Thus, according to claimant, the door-closing incident is a compensable work incident because this event aggravated claimant's symptoms and accelerated his need to seek treatment for his condition.

In *Reese*, the Supreme Court held that a pre-existing condition is not a bar to workers' compensation if the employment "aggravated, accelerated, or in combination with the infirmity produced the disability."[15] The Supreme Court held the "but for" definition of proximate cause, similar to that arising in tort, is the

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[15] *Reese,* 619 A.2d at 910 citing *General Motors Corp. v. McNamara,* 202 A.2d803, 806-07 (1964). The *Reese* case involved a claimant who – prior to his workplace injury – suffered from mental infirmities, including alcohol addiction. The Board in that case determined the claimant suffered from a compensable workplace injury, but stated he could not receive compensation for resulting mental anxiety and depression that ensued from the injury because the work accident was not a "substantial cause of the claimant's psychiatric condition."

appropriate standard in "fixing the relationship between accident and its aftermath."

Here, however, the Board, using the "but for" standard, clearly evaluated the testimony of medical experts and determined that the claimant's work place injury was not causally related to his need to seek treatment. In *Reese*, the Board improperly disregarded the medical expert opinion because it found that more is required in finding an injury compensable than a "setting" or "trigger" for the manifestation of the injury. Here, the Board considered whether the July 2004 incident accelerated or aggravated the claimant's condition and found that it did not.

The Board stated the only medical expert to causally relate the door-closing incident at BFI to claimant's injury was Dr. Townsend. But, the doctor made this determination with incomplete information as the doctor stated the claimant did not disclose to the doctor that he had symptoms prior to the July 2004 incident, that he wore a brace prior to the event or that he had hurt his wrist while lifting a patient as an EMT in October 2003. Additionally, Dr. Townsend had not reviewed several medical records when he made this conclusion. The Board stated two other doctors – Dr. Friedman and Dr. Ger – considered all of the records and the claimant's entire history of wrist-related complaints and each concluded that the door-closing incident was not causally related to claimant's wrist injury.

Ultimately, the Board accepted Dr. Ger's and Dr. Friedman's testimony over Dr. Townsend in finding that the "July 12, 2004 door-closing event did not cause (or aggravate or worsen) Claimant's injury." The Board also found claimant's own testimony to be insufficient to establish causation. Though claimant stated he heard a snap after the door-closing incident, that sound was likely not the cause of the injury

because the tear was already present. Dr. Ger stated a scaphoid tear cannot be worsened or aggravated: once the ligament is torn, it's torn. The Board disagreed with claimant's argument that the door-closing incident is compensable irrespective of when the scaphoid tear actually occurred because it aggravated his symptoms and prompted him to seek treatment. The Board stated, "Therefore, even if the work incidents were factors that Claimant considered in making his decision to undergo surgery, they in no way contributed to his *need* for surgery, or worsened his wrist condition." The Board relied on testimony from the doctors who evaluated the claimant, two of whom stated the BFI incident was not causally related to claimant's injury. The Board also credited testimony from Mr. Stang and Mr. Edwards that claimant told them prior to July 2004 that he would eventually need to leave work to take care of his wrist problem.

The claimant also cites the case of *Blake v. State,*[16] in which the Supreme Court reversed a Superior Court ruling because there was sufficient evidence for the Board to infer that a work accident accelerated a condition that prompted the claimant to undergo surgery. In *Blake,* the Supreme Court reiterated the *Reese* holding that the "but for" standard is the appropriate standard for causation when it reversed a Superior Court ruling.[17] The Superior Court judge erred in finding that medical testimony did not support a requisite finding of causation because the doctor testified that he was satisfied to a reasonable degree of medical certainty that the work

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[16] 792 A.2d 188 (Del. 2002).

[17] *Blake,* 792 A.2d at 188.

accident was merely a "substantial cause" of the acceleration of the claimant's condition.[18] The Supreme Court reversed the ruling because the doctor went on to state unequivocally that he was satisfied that the accident in question accelerated the condition that required the claimant to undergo surgery.[19] The Supreme Court also held that the proper standard "is whether the surgery would have been required *at that time* but for the accident."

In *Blake,* the Board properly inferred that the workplace injury proximately caused the claimant's need to undergo surgery because the doctor stated unequivocally that the accident accelerated the condition. Here, the Board considered a similar question, but after using the "but for" standard of causation, determined that the claimant did not prove the causal connection. In this case, two doctors stated unequivocally that the BFI incident did not accelerate the claimant's need to seek treatment such as surgery.

The Board's decision will be affirmed as there is substantial evidence supporting it. The Board properly used the "but for" standard in determining that the claimant lacked evidence to demonstrate that the workplace event was the proximate cause of his decision to seek treatment. In so finding, the Board relied on expert opinions of two doctors over another doctor, which is clearly within the Board's discretion. Additionally, the Board found that the only medical expert stating that the event was causally related to the decision to seek treatment was relying on incomplete

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[18] *Id.*

[19] *Id.*

information, which the Board was entitled to consider in its determination. As such, the Board's decision is ***affirmed.***

II. Medical Expenses

Although the Board acknowledged claimant would be entitled to recover for medical expenses he paid to Health Works associated with the flare-up symptoms from the door-closing incident, it did not grant that relief because the claimant did not include those expenses in his claim.

The claimant argues that the Board erred in not awarding medical expenses because, although the claimant did not include those medical bills as evidence, the Board frequently awards the "reasonable, necessary and related" medical expenses when it makes an award, even without the actual bills in evidence. Because the Board acknowledged that claimant could be compensated for those expenses, claimant argues the Board had an obligation – as factfinder – to award medical bills that were "reasonable, necessary and related" to the flare-up.

However, Industrial Accident Board Rule 9(D)(2) states:

> At the time of the noticed pretrial, the following information or documentation must be provided:
> ...
> (2) a complete statement of what the petitioner seeks and alleges. When a claimant seeks an order for payment of medical expenses either by petition or when raised as an issue in the pretrial conference on the employer's petition, copies of the bills shall be provided to counsel with the petition at least 30 days before the hearing.

The Board does not abuse discretion in enforcing a well-known procedural rule as "[s]uch an action serves the interests of order and efficiency in Board proceedings as well as the prevention of unfair surprise."[20] In denying payment of claimant's medical expenses at Health Works, the Board followed its own rule.

Therefore, the decision of the Board is ***affirmed.***

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

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[20] *Haveg Indus., Inc. v. Humphrey*, 456 A.2d 1220, 1222 (Del. 1983). *See also K-Mart, Inc. v. Bowles,* 1995 Del. Super. LEXIS 175, *5-6.