**IN THE SUPERIOR COURT IN THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

| | | |
|---|---|---|
| MBNA | ) | |
| | ) | CIVIL ACTION NUMBER |
| Employer/Appellant | ) | |
| v. | ) | 02A-04-002-JOH |
| | ) | |
| CHRISTOPHER NARDO | ) | |
| | ) | |
| Employee | ) | |

*Submitted: November 19, 2002*
*Decided: January 17, 2003*

***MEMORANDUM OPINION***

*Appeal from a Decision of the Industrial Accident Board -*
*Decision - **AFFIRMED***

Colin M. Shalk, Esquire, of Casarino Christman & Shalk, Wilmington, Delaware, attorney for appellant

Joseph W. Weik, Esquire, of Weik Nitsche & Dougherty, Wilmington, Delaware, attorney for employee

HERLIHY, Judge

MBNA appeals an Industrial Accident Board decision finding it, rather than the claimant Christopher Nardo's subsequent employer liable for his benefits. In an

earlier, unappealed decision, the Board had found that Nardo's work conditions at MBNA substantially caused his mental illness.

After a time off from work, Nardo obtained employment with another credit card company. But his symptoms returned or worsened. At the time, he was under the care of psychiatrist who told the Board that he advised Nardo to stop work at the second job because of the return of symptoms Nardo reported to him. The doctor never checked with the second employer about any of the conditions Nardo told him were leading to the return of his symptoms.

The issues presented are whether that return is an aggravation of the prior mental illness or a recurrence and who has the burden of showing which it is. Since the Board held the return of symptoms was a recurrence and not an aggravation the next issue is whether its decision is supported by substantial evidence.

The Court holds that MBNA had the burden to show an aggravation. The Court also holds that there was sufficient evidence for the Board to find Nardo's symptoms recurred. The Board's decision is **AFFIRMED.**

***Facts***

Nardo worked at MBNA from January 3, 1993, to August 16, 1999, at which time he went out on disability for generalized depression and anxiety disorder. The Board conducted a hearing on a January 18, 2000, during which the existence of Nardo's mental illness was undisputed. The sole issue before the Board was whether Nardo's work was a substantial cause of that illness. The Board determined that Nardo

was able to objectively prove stress at his employment and that the stress was a substantial cause of his depression and generalized anxiety disorder. In particular, it found that Nardo was subject to sales goals which he had difficulty meeting. During the employment, Nardo also experienced difficulties with his hearing despite the fact that MBNA provided a hearing aid for his use. In turn, this hearing impediment made it very difficult for Nardo to comply with MBNA's quotas and time limit on handling customer phone calls. The Board concluded that these requirements, among others, were objective stressors that were, collectively, a substantial cause of Nardo's illness and awarded benefits saying:

> Thus, objectively, there were quotas to be met that Claimant failed to meet. Objectively, there were time limits imposed that Claimant had difficulty meeting. Claimant was placed in a position answering phones despite, objectively, having a known hearing problem. Finally, objectively, Claimant was placed on report only a few months after he was transferred to a phone intensive position. These all qualify as objective actual stressors that did not exist only in Claimant's mind.[1]

MBNA did not appeal this decision.

While working at MBNA, Nardo was under the care of Dr. Gerald Sager, a psychiatrist. Dr. Sager referred Nardo to Dr. Jay Weisberg in February, 1999, for a second opinion. This was about six months before Nardo left MBNA. After Dr. Sager retired, Dr. Weisberg picked up Nardo's care in May 2001. He saw Nardo approximately 15 times between May, 2001, and January, 2002. Nardo had also been

---

[1] Industrial Accident Board Hearing No. 1151277, (January 31, 2000), at 16.

continuing under the care of Dr. Rick Galaris, a psychologist, who started to see and treat Nardo in October 1998. It was he who referred Nardo to Dr. Sager. Dr. Galaris testified at the earlier hearing.

Nardo began looking for new work in January, 2000, but testified that when he read the "want ads" he would see "the lady from MBNA" which would bring back memories of his prior employment and cause him to feel ill. He remained symptomatic as a result of his experience with MBNA. Nardo eventually found new employment with Cross Country Bank/Applied Card Systems and started work there on August 6, 2001. Dr. Weisberg thought that there were good reasons for him to return to work even though he was unsure whether Nardo was yet ready for employment. Nevertheless, the doctor allowed him to return to work. Soon after starting with Applied Card, Nardo began suffering panic attacks. Severe chest pains, similar to those he experienced with MBNA, accompanied the attacks. He also suffered from light headedness and sleeping problems. He felt that MBNA had somehow blackballed him and that former MBNA employees, now employed by Applied Card, were watching him and asking him to spy on co-workers. Despite medication, he became more and more dysfunctional until Dr. Weisberg recommended that he leave work, which he did on October 11, 2001. Dr. Weisberg talked to none of Nardo's supervisors or co-workers at Applied Card, but relied upon Nardo's descriptions.

Nardo filed a petition with the Board on October 17, 2001, contending that he had a recurrence of total disability as of October 11, 2001. The Board agreed and

granted Nardo's petition to determine additional compensation due and awarded total disability benefits ongoing from October 11, 2001. It found Nardo to be credible and accepted Dr. Weisberg's opinion that Nardo was totally disabled. While his mental condition worsened when he returned to work, the Board found Nardo never fully recovered as he remained under treatment in the interim between MBNA and Applied Card. The Board found there was no evidence of a new or independent event at Applied Card. Consequently, it held Nardo had suffered a recurrence and not an aggravation of his mental illness which had been caused by his work at MBNA. The Board found Nardo totally disabled. MBNA appealed that decision to this Court, arguing that it was erroneous both factually and as a matter of law.

MBNA first argues that the Board erred when it held that to prevail Nardo did not have to prove that objective stressors at Applied Card caused his disability. In effect, the Board held MBNA failed to meet its burden in this situation. By way of analogy to a physical injury claim, MBNA contends that the Board's interpretation of the law is untenable because it would lead to the situation where if the claimant were disabled because of a physical inability to do one job, then the claimant could later claim to be disabled again without any proof that the claimant was unable to perform a new and different job.

Alternatively, MBNA argues that the Board's decision lacks substantial evidence. The Board accepted the testimony of Dr. Weisberg, but, MBNA contends, Dr. Weinberg had no basis for his opinion. Because the doctor's opinion was based

solely upon Nardo's claims of pain and discomfort, and not upon any separate medical tests, MBNA essentially maintains that the doctor's opinion was nothing more than the claimant's opinion dressed up in a lab coat.

### *Standard of Review*

The duty of this Court on an appeal from the Board is to determine whether its decision is supported by substantial evidence and free from legal error.[2] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] Only where there is no substantial, competent evidence to support the Board's factual findings may this Court overturn the Board's decision.[4] In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below.[5] If there is substantial evidence and no mistake of law, the Board's decision will be affirmed.[6]

### *Discussion*

#### *A*

In a case where a dispute or the dispute is over whether an injury is a recurrence or an aggravation, the law is now settled that the first-in-line employer (insurer) has the

---

[2] *Lemmon v. Northwood Constr.,* 690 A.2d 912, 914 (Del. 1996).

[3] *Olney v. Cooch,* 425 A.2d 610, 614 (Del. 1981).

[4] *Streett v. State,* 669 A.2d 9, 11 (Del. 1965).

[5] *General Motors Corp. v. Guy,* Del. Super., C.A. No. 90A-JL-5, Gebelein, J. (August 16, 1991) at 8.

[6] *M.A. Hartnett, Inc. v. Coleman,* 226 A.2d 910 (Del. 1967).

burden of showing aggravation.[7] If there has been an aggravation, the second-in-line employer (insurer) is liable. In this instance MBNA, therefore, had to show that Nardo's work with Applied Card aggravated his prior mental illness. An aggravation is a "new work-connected accident or episode whether or not due to unusual exertion"[8] A recurrence, on the other hand, is "the return of an impairment without the intervention of a new or independent accident."[9] In *Standard Distributing v. Nally,* the Supreme Court said:

> 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. The burden of proving the causative effect of the second event is upon the initial carrier seeking to shift responsibility for the consequences of the original injury.[10]

In this case, the Board was faced with a situation where Nardo had already established that a compensable mental condition was causally related to his employment with MBNA. Therefore, Nardo's mental illness and compensability were not in dispute. The burden of proving the existence of a second event and the

---

[7] *Standard Distributing Co. v. Nally,* 630 A.2d 640, 646 (Del. 1993).

[8] *Id.* at 644 *(quoting DiSabatino & Sons, Inc. v. Facciolo,* 306 A.2d 716, 719 (Del. 1973)).

[9] *Id.*

[10] *Id.* at 646. (citations omitted).

"causative effect of the second event" was with MBNA. Instead of providing the Board with evidence of a second event, however, MBNA maintained that Nardo had the burden to prove that he was still disabled and that the same objective stressors at MBNA that caused his depression also exist at Applied Card. That contention is contrary to the holding in *Standard Distributing*. In this case, there was no duty on Nardo to reprove compensability and if MBNA wanted to relieve itself of liability, it had to prove Nardo's disability was caused by a new or independent event at Applied Card. MBNA failed to do so and the Board correctly found so.

MBNA cites cases holding that a claimant must prove that his or her mental illness was substantially caused by his or her employment.[11] But none of those cases involved the issue present here, whether the mental illness symptoms were a recurrence or the result of an aggravation. Decisions on the issue of recurrence versus aggravation since *Standard Distributing* have dealt with on the context of physical injury and not mental illness. First, of course, mental illness is a compensable work "injury." Mental injury which is gradually caused by job stress in the absence of a specific and identifiable injury is compensable if the worker offers evidence demonstrating objectively that his or her work conditions were actually stressful and that such conditions were a substantial cause of the worker's mental disorder.[12]

Second, like physical injury, there is no reason why a compensable mental

[11] *Alfree v. Johnson Controls,* Del. Super., C.A. No. 96A-01-004, Goldstein, J. (March 20, 1996); *Shade v. Sussex County EMS,* Del. Super., C.A. No. 97A-06-004, Toliver, J. (August 7, 1998); *Saleh v. Wilmington Trust Co.,* Del. Super., No. 97A-10-020.

[12] *State v. Cephas,* 637 A.2d 20, 27 (Del. 1994).

illness cannot recur or be aggravated just as a physical injury can. As a result of *Standard Distributing,* when that happens with a physical injury the first employer/insurer has the burden of showing aggravation. To the extent no court has addressed that burden in a case involving mental illness, this Court holds the ruling in *Standard Distributing* applies to disputes also to disputes involving mental illness.

***B***

MBNA's second argument that the Board's decision is not supported by substantial evidence is linked to its mistaken view of which party has the burden of proving aggravation. Its attack on the Board's decision that Nardo's mental illness recurred is that the Board accepted Dr. Weisberg's testimony. MBNA's criticism of that is that Dr. Weisberg, in reaching his conclusion of recurrence, relied exclusively on Nardo's descriptions of events at Applied Card and of his symptoms. MBNA contends that Dr. Weisberg needed to corroborate Nardo's descriptions by checking with Applied Card employees or conduct some kind of independent tests. In short, it asserts Dr. Weisberg's testimony should be disbelieved or discounted since he relied exclusively on Nardo's subjective complaints.

The trouble with this argument is severalfold. One, MBNA offered no real evidence in an effort to meet its burden of showing that Nardo's undisputed mental illness was aggravated by his work at Applied Card. Its approach, as noted, is premised on its mistaken belief Nardo has some burden of proof in that issue.

Another problem with MBNA's argument is that the Board is within its powers

to accept Dr. Weisberg's testimony even though it was based on Nardo's subjective complaints.[13] The Board knew of its prior determination that Nardo had suffered a mental illness as a result of his work at MBNA. The symptoms he described while working at Applied Card were like those suffered at MBNA. Nardo had been under constant care with Dr. Weisberg and Dr. Galaris while still at MBNA, during the period between jobs and while at Applied Card. They could see Nardo's deterioration after his time at Applied Card. In short, there was ample evidence upon which the Board could rely. It, as the fact finder has the power to determine witness credibility.[14]

Further, if the Board has the power to reject a doctor's opinion if it is based on statements it finds not credible,[15] it has the right to accept such opinion testimony where it finds the statement credible. It found Nardo to be credible.

There is, therefore, substantial evidence in the record to support the Board's finding that (1) MBNA failed to meet its burden of showing aggravation and (2) Nardo suffered a recurrence. Its decision must be affirmed.[16]

***Conclusion***

For the reasons stated herein, the decision of the Industrial Accident Board is **AFFIRMED.**

_____

[13] *Sears, Roebuck & Co. v. Farley,* 290 A.2d 639 (Del. 1972).

[14] *Lemmon v. Northwood Constr.* 690 A.2d 912, 914 (Del. 1996).

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

[16] *A. Mazzetti & Sons, Inc. v. Ruffin,* 437 A.2d 1120 (Del. 1981).

J.