IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN SHARP,	)	
	)	C.A. No.: 09A-03-001 RRC
Appellant,	)	
Claimant Below	)	
	)	
v.	)	
	)	
BAYSHORE FORD TRUCK SALES,	)	
	)	
Appellee,	)	
Employer Below.	)	

Submitted: November 2, 2009
Decided: January 5, 2010

On Appeal from a Decision of the Industrial Accident Board.
AFFIRMED.

ORDER

Robert P. LoBue, Esquire, Robert P. LoBue, P.A., Wilmington, Delaware, Attorney for Appellant

Robert H. Richter, Esquire and Nathan V. Gin, Esquire, Elzufon Austin Reardon Tarlov & Mondell, P.A., Wilmington, Delaware, Attorneys for Appellee

COOCH, J.

This 5th day of January, 2010, upon consideration of Appellant's appeal from a decision on the Industrial Accident Board ("the Board"), it appears to the Court that:

1. On December 22, 1998, appellant, John Sharp, injured his back while working as a parts technician at Bayshore Ford.[1] As Mr. Sharp was reaching for some car parts, he felt a "sharp burning, pulling sensation" move from his left leg to his back.[2] The pain was so great that Mr. Sharp took a break from work. He subsequently returned to work later in the day, but the pain persisted, and Mr. Sharp visited his family doctor several days later.[3]

Mr. Sharp first underwent surgery for his back pain in April 1999.[4] Although the surgery relieved some of his pain, Mr. Sharp sought a second opinion (which showed disc disease at multiple levels), and another surgery was performed on November 6, 2001.[5] After the second surgery did not relieve his symptoms, Mr. Sharp visited a pain management specialist from 2002 until 2007.[6]

On February 26, 2007, Mr. Sharp slipped and fell on some ice.[7] Mr. Sharp did not seek professional help after this fall, and eventually underwent a third surgery on June 19, 2008.[8]

2. On April 23, 2008, Mr. Sharp filed a Petition to Determine Additional Compensation Due, seeking to relate his June 19, 2008 surgery to his work accident and seeking compensation for total disability ongoing from that date. A hearing was held on September 8, 2008, and Pawan Rastogi, M.D. testified (by

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[1] Op. Br. at 3.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Ans. Br. at 2-3.
[7] *Id.* at 3.
[8] *Id.*

deposition) on behalf of Mr. Sharp, and John B. Townsend, III, M.D. testified (by deposition) on behalf of Bayshore Ford.[9]

Dr. Rastogi testified that he initially treated Mr. Sharp for back pain on November 14, 2007. Dr. Rastogi determined that Mr. Sharp had a fusion at L5-S1[10] and had significant disc degeneration at L2-3.[11] Dr. Rastogi testified that Mr. Sharp would always have pain at L5-S1, but that the pain at L2-3 was treatable through a surgery, which was performed on June 19, 2008.[12]

When asked about the causal relation between the L2-3 surgery and Mr. Sharp's work injury, Dr. Rastogi related the need for the L2-3 surgery to the work injury sustained by Mr. Sharp on December 22, 1998.[13] Although Dr. Rastogi testified that he was unaware that Mr. Sharp had fallen on ice, Dr. Rastogi still maintained his opinion that the L2-3 surgery was related to Mr. Sharp's work related injury.[14]

In contrast to the opinion of Dr. Rastogi, Dr. Townsend testified that the L2-3 surgery was not causally related to the December 1998 work accident because Mr. Sharp had retrolisthesis at L2-3 and spondylolisthesis at L2 prior to the 1998 accident.[15] Dr. Townsend testified that an MRI taken after Mr. Sharp fell

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[9] Transcript of Hearing, dated September 8, 2008, before the Industrial Accident Board [hereinafter Tr. of Hr'g. at ___.].
[10] Discs of the spinal cord.
[11] Tr. of Hr'g at 5.
[12] *Id.* at 6.
[13] *Id.* at 7.
[14] *Id.* at 10.
[15] *Id.* at 47-48.

on ice showed a disc protrusion at L2-3.[16] Therefore, Dr. Townsend related Mr. Sharp's L2-3 injury to this "new event" and the progression of a preexisting condition (retrolisthesis).[17]

3. Ultimately, the Industrial Accident Board found the testimony of Dr. Townsend more reliable. Thus, Mr. Sharp was denied additional compensation stemming from his June 19, 2008 surgery.

Mr. Sharp has now appealed the Board's decision arguing that the Board did not have substantial evidence to deny benefits because the Board's decision contains facts that are contradictory to the evidence.[18]

Mr. Sharp's argument stems from an October 3, 2000 opinion given by Dr. Townsend, which appears to contradict Dr. Townsend's 2008 opinion (the opinion that the Board accepted). On October 3, 2000, Dr. Townsend had stated:

> It is my opinion that surgery to the lumbar spine with internal fusion and/or anterior lateral fusion . . . would not be unreasonable given the findings on the patient's discogram. The only question would be the possibility of surgery to the L2-3 level given that this is symptomatic. It may very well be that this is the level which has produced the patient's pain in the past. If one were going to consider surgery however, a fusion at L5-S1, one might also consider a surgical procedure at L2-3 given that this has also been shown to be a pain generator or be it an atypical pain generator.[19]

The decision of the Board states in pertinent part:

> Third, it was not until July 2002 that Dr. Devotta recorded claimant's complaint of pain in the L2-3 area. Dr. Townsend also recorded a complaint of pain at the L2-3 in his July 27, 2002 office note. The time between December 1998 and July 2002 is significant allowing time for progression of degenerative changes . . .

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[16] *Id.* at 48.
[17] *Id.* at 47-48.
[18] Op. Br. at 6-7.
[19] *Id.* at 7 (citing Dr. Townsend's report dated October 3, 2000).

> Finally, I must emphasize that there is no record of claimant complaining of upper back pain immediately or at any period that was close in time with the work accident . . . When there is no clear association of L2-3 pain with the accident or the treatment therefore, A relationship is very difficult to make. In this case, The work accident is simply too far back in time.[20]

Mr. Sharp asserts that the Board's decision must be overturned because it states that the claimant did not start to complain of pain until at least 2002. Mr. Sharp argues that this is contradictory to the evidence because Dr. Townsend's own prior opinion was that the pain at L2-3 existed as of October 3, 2000.

4. While the Superior Court is empowered to review findings of the Industrial Accident Board, the scope of review is narrow.[21] The function of this Court is to determine whether substantial evidence exists to support the Board's decision.[22] Substantial evidence is such relevant evidence as a reasonable person might accept as supporting a conclusion;[23] it is more than a scintilla, but less than a preponderance.[24]

"When reviewing a decision on appeal from an agency, the Superior Court does not weigh the evidence, determine questions of credibility, or make its own factual findings."[25] The Board acts as the trier of fact.[26] Therefore, the Board is

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[20] Decision of the Industrial Accident Board at 13-14.
[21] *Craig v. Synvar Corp*., 233 A.2d 161 (Del. Super. Ct. 1967).
[22] *A. Mazzetti & Sons, Inc. v. Ruffin*, 437 A.2d 1120, 1121-22 (Del. 1981).
[23] *Delaware Alcoholic Beverage Control Comm'n v. Alfred I. DuPont School District*, 385 A.2d 1123, 1125 (Del. 1978).
[24] *Mellow v. Board of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1988) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[25] *Holowka v. New Castle County Bd. of Adjustment*, 2003 WL 21001026, at *3 (Del. Super.).
[26] *Johnson v. Chrysler Corp*., 213 A.2d 64, 66 (Del. 1965).

vested with the power to "resolve conflicts in testimony and issues of credibility."[27]

In determining whether substantial evidence exists to support the Board's decision, this Court must look at the record in the light most favorable to the prevailing party.[28] If a decision of the Board is supported by substantial evidence, the Court must affirm that decision even if the Court might have, in the first instance, reached an opposite conclusion.[29]

5. Here, there is substantial evidence in the record to affirm the Board's decision. The Board was entitled to accept the 2008 testimony of Dr. Townsend as reliable and was entitled to resolve any discrepancies in that testimony. This Court will not disturb that determination. This Court will only determine whether the 2008 opinion of Dr. Townsend provides substantial evidence to support the Board's decision.

Under the circumstances of this case, the 2008 opinion of Dr. Townsend does provide substantial evidence to support the Board's decision that Mr. Sharp's 2008 surgery was not causally related to his work accident. Although this Court acknowledges the apparent contradiction between Dr. Townsend's 2000 opinion and his 2008 testimony, it is not the role of this Court to resolve that discrepancy. Resolving the discrepancy is the function of the Board. Dr. Townsend stated in

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[27] *Holowka*, 2003 WL 21001026, at *3.
[28] *E.I. DuPont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1046-47 (Del. Super. Ct. 2004).
[29] *Brogan v. Value City Furniture*, 2002 WL 499721, at *2 (Del. Super. Ct. 2002).

his 2008 testimony that Mr. Sharp's 2008 surgery was not causally related to Mr. Sharp's work accident. This testimony provides substantial evidence for the Board to issue its decision in favor of Bayshore Ford. Therefore, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED

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Richard R. Cooch, J.

oc: Prothonotary
cc: Industrial Accident Board