

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EDITH VIRGINIA WESSELLS, )

)

Claimant/Appellant )

)

v. ) C.A. No.: 01A-05-003-RSG

)

AMERICAN INTERNATIONAL CROUP, )

)

Employer/Appellee )

Submitted: September 25, 2001

Decided: January 2, 2002

ORDER

Upon review of Claimant/Appellant's appeal from a Industrial Accident Board's ("IAB") decision to deny workers' compensation benefits, it appears to the Court:

1. On October 22, 1999, Claimant at work. At the time of the accident, Claimant was performing as an employee. Claimant was carrying a basket and rounded a workstation partition where other baskets were kept on the floor. Tripping over the baskets on the floor she fell to the floor.

2. Complicating an otherwise straightforward workers' compensation claim, Claimant suffered from pre-existing medical conditions affecting her right shoulder.
3. In the Summer of 1999, Claimant carried buckets of water for her landscaping during a drought to conserve water used in the household. In doing so, Claimant sustained injury to her right shoulder. At that time, she only received conservative treatment consisting of ice, exercises, and the prescription Vioxx. Claimant did not participate in physical therapy, and an X-ray was unremarkable.
4. By September 30 of the same year, Claimant reported to her doctor that the shoulder injury was improving and her doctor, Dr. Hocutt, noted continued improvement to the shoulder.
5. After the work related injury on October 22, 1999, on October 27 Claimant reported to Dr. Hocutt that she had fallen at work and was experiencing pain in her right elbow and right knee. Dr. Hocutt conducted an examination where he noted a) abrasions on Claimant's right knee; b) tenderness in the lateral edge of Claimant's right elbow; c) positive empty can sign; d) doubling of symptoms upon the lifting of Claimant's arms above her head; and e) an exasperation of Claimant's pre-existing shoulder sprain.

6. Dr. Hocutt recommended that Claimant limit her lifting of objects, continue with the prescription Vioxx, and use ice packs to control swelling.
7. During the next three months, Claimant reported to Dr. Hocutt that her main complaint involved her neck and shoulder. The elbow continued to be bruised with residual swelling. Claimant testified that she did not consider the elbow complaints to be a priority because Claimant's family background in medicine led her to believe that bruises do not warrant complaints. Dr. Hocutt testified that Claimant did not like to unnecessarily complain and would only discuss those complaints that bothered her the most.
8. On January 22, 2000, Claimant arose from sleep to find that the right elbow would not bend or straighten. Later in the day, Claimant decided to visit the Silverside Medical Center resulting in X-rays to the elbow.
9. Dr. Hocutt diagnosed Claimant as suffering from degenerative joint disease and could not determine what was preventing her from bending or straightening the right elbow. He then referred her to Dr. Sharps, an orthopedic surgeon, for an evaluation.
10. Dr Sharps ordered an MRI of the elbow and it revealed a) the presence of an 12 millimeter body located in the

posterior joint space; b) degenerative joint disease; and  
c) moderate joint effusion.

11. Dr. Sharps proceeded to excise and withdraw accumulated fluid from within Claimant's elbow. Dr. Sharps also performed arthroscopic surgery to remove calcified chondroma.<sup>1</sup> The surgery was not entirely successful as Dr. Sharps could not remove the entire chondroma due to size. Subsequent to surgery, Claimant underwent physical therapy where she performed exercises and partook in weight strengthening training.
12. Dr. Sharps indicated that the trip and fall sufficiently irritated the chondroma to cause symptoms where they otherwise might not have occurred.
13. Dr. Hocutt deposed that the trip and fall created an injury to such a degree that it must be the most likely leading factor for causing Claimant's symptoms. Dr. Hocutt testified that the work accident was the precipitating, causal event that produced symptoms in Claimant's elbow and that it was not mere coincidence.
14. Finally, Dr. Hocutt was not surprised by the fact that Claimant's flare-up did not occur until approximately

---

<sup>1</sup> Chondroma: a tumor or tumor-like growth of cartilage cells. It may remain in the interior or substance of a cartilage or bone (true chondroma, or enchondroma), or may develop on the surface of a cartilage and project under the periosteum of a bone (ecchondroma, or ecchondrosis). Miller-Keane Medical Dictionary, 2000.

three months after the trip and fall. He opined that continuous inflammation, such as inflammation caused by an aggravating trip and fall, will begin to break down tissue enough to allow it to move into position that will impede the normal range of motion. In fact, Dr. Hocutt indicated that no symptoms would generally be expected until after the chondroma has sufficiently changed its position which could take months or years.

15. Dr. Ger was chosen by American International Group ("AIG") to examine Claimant and act as AIG's expert witness. Dr. Ger examined Claimant only once. In January 2001, after approximately two years had lapsed, Dr. Ger opined that the surgery performed by Dr. Sharps was related to pre-existing conditions and not the work injury. Dr. Ger opined that the chondroma's movement to impede range of motion was coincidental in time with respect to the new trauma sustained in Claimant's trip and fall.

16. Dr. Ger also opined that if the trip and fall was the cause of Claimant's need for surgery, the need should have occurred much sooner than the three months that elapsed from the work accident. Dr. Ger stated that Claimant's surgery and physical therapy were all necessary and reasonable for her condition.

17. The issue presented before this Court is whether the IAB erred in holding that Claimant's elbow infirmaries were not the causal result of her work-related trip and fall.

18. It is well established law that the Court can only decide an appeal on the record below.<sup>2</sup> The Court may not expand the record to include other evidence, such as, additional records, testimony, etc.<sup>3</sup> The role of this Court in reviewing an Agency Action is limited to determining whether the Agency Action is supported by substantial evidence and is free from legal error.<sup>4</sup> In the absence of an error of law, the Court will affirm an Agency Action which is supported by substantial evidence.<sup>5</sup> Substantial evidence is more than a scintilla and less than a preponderance.<sup>6</sup> In reviewing the record for substantial

---

<sup>2</sup> Parker v. State of Delaware, Del.Super., I.D. No. 97A01020-NAB, Baron, J. (August 26, 1997). See Super.Ct.Rule 72(g). See also 21 Del.C. § 10142.

<sup>3</sup> See id. (citing Hubbard v. Unemployment Ins. Appeal Bd., 352 A.2d 761 (Del.Supr. 1976) (holding that the Court cannot expand the record to include additional reports or testimony because the Court is limited to consideration of the evidence of record)).

<sup>4</sup> Smith v. The Placers, Inc., Del.Super., 1993 Lexis 483, 4 (citing 19 Del.C. § 3323(a) (1985); Unemployment Ins. Appeal Bd. of Dep't. of Labor v. Duncan, Del.Supr., 337 A.2d 308, 309 (1975); Ridings v. Unemployment Ins. Appeal Bd., Del.Super., 407 A.2d 238, 239 (1979); Longobardi v. Unemployment Ins. Appeal Bd., Del.Super., 287 A.2d 690, 692 (1971), aff'd, Del.Supr., 293 A.2d 295 (1972)).

<sup>5</sup> Longobardi at 692.

<sup>6</sup> Smith at 4-5 (citing Olney v. Cooch, Del.Supr., 425 A.2d 610, 614 (1981); Plants v. Unemployment Ins. Appeal Bd., Del.Super., C.A.No. 86A-OC-1, Martin, J. (Oct. 22, 1987)).

evidence, the Court will consider the record in the light most favorable to the party prevailing below.<sup>7</sup>

19. This case involves a battle of the experts. As long as substantial evidence is found and weighed by the IAB, its decisions as to the credibility of those experts shall be within the IAB's exclusive purview.<sup>8</sup>

20. This case also involves work injuries vis-à-vis pre-existing conditions. The Delaware Supreme Court has held that a pre-existing disease, illness, or other type of medical infirmity whether overt or latent does not bar an employee's claim for workers' compensation per se if the employment created an aggravation and/or an acceleration of the disease, illness, or infirmity.<sup>9</sup> Further, a pre-existing condition when combined with a new disease, illness, or other type of medical infirmity is not per se barred.

21. It is undisputed that Claimant suffered from a work accident. All of the doctors involved in Claimant's treatment agree that a work accident occurred. It is also undisputed that Claimant had a calcified chondroma lodged within her right elbow. While Claimant experienced pain

---

<sup>7</sup> Id. at 5 (citing GMC v. Guy, Del.Super., C.A.No. 90A-JL-5, Gebelein, J. (Aug. 16, 1991)).

<sup>8</sup> Standard Distributing Company v. Nally, Del.Super., 630 A.2d 640, 646 (1993).

<sup>9</sup> Reese v. Home Budget Center, Del.Super., 619 A.2d 907, 910 (1992).

in her elbow, she proceeded to complain foremost about what was the most painful, i.e., the right shoulder.

22. Dr. Ger testified that while the chondroma existed before the work injury, the calcified chondroma could have lasted a lifetime and never manifest symptoms or medical problems.
23. Dr. Ger relied on coincidence to explain that in his opinion the chondroma moved not because of the trip and fall but because it just coincidentally moved and locked Claimant's elbow.
24. Dr. Arminio also supported the coincidence theory and testified that the acute responses, fluid buildup, irritation, partial impaction, and myalgia were all coincidental happenstance having nothing to do with the trip and fall occurring approximately three months earlier.
25. Drs. Hocutt and Sharps testified that Claimant had a pre-existing condition which had not manifested itself until after the trip and fall. Drs. Hocutt and Sharps testified as to their opinion as to the causation.
26. The Court can not substitute its judgement as to which experts to believe and therefore cannot say that substantial evidence did not exist to support the Board's

decision as to the elbow injury. That decision must be **AFFIRMED**.

27. As to the issue of Claimant's shoulder injury the testimony of the treating physician, Dr. Hocutt, was to the effect that a pre-existing injury "was improving" prior to her fall at work.
28. Dr. Arminio who examined Claimant at the request of the Employer, testified that Claimant's pre-existing injury which was healing was exacerbated by her fall at work.
29. Dr. Ger testified to the effect that her work injury caused her "symptoms" to come back but did not aggravate the injury.
30. The Board concluded that her shoulder injury was a pre-existing injury and denied compensation.
31. Claimant required physical therapy for the shoulder injury only after the work accident and all expert testimony was to the effect that the shoulder was improving until the fall.
32. The Board's decision to deny compensation for the shoulder injury is not supported by substantial evidence. For that reason, it must be **REVERSED**.

WHEREFORE, this case is **REMANDED** to the Board for further proceedings consistent with this Decision.

**IT IS SO ORDERED.**

---

The Honorable Richard S. Gebelein

cc: Matthew M. Bartkowski, Esq.  
Maria Paris Newill, Esq.