



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

### ORDER

COOCH, Judge

This 27th day of September, 1995, upon consideration of the briefs of the parties and of the record it appears to the Court that:

#### Nature of the Action

This is an appeal by Georgia-Pacific Corporation (Employer) from a December 8, 1994 Amended Remand decision of the Industrial Accident Board (Board) granting the petition of Linda S. Walden (Employee) for temporary partial disability compensation for injuries to her left and right knee. Employer argues that the Board's decision in this regard is not supported by substantial evidence.

This is also an appeal by Employee from the Board's December 8, 1994 Amended Remand Decision denying temporary partial disability compensation for injuries to Employee's neck. Employee argues that the Board's decision in this regard is not supported by substantial evidence.

This is further an appeal by Employee from the Board's Remand Order (Part III) dated December 13, 1994 denying temporary partial compensation for injuries to employee's low back. Employee argues that the Board's decision (1) is not supported by substantial evidence and (2) constitutes an error of law because Employer admitted liability for the low back injuries by agreeing to pay compensation and paying medical bills. By separate order issued today, this Court has remanded the lower back aspect of this case back to the Board.

#### Factual and Procedural Background

On June 7, 1991 Employee was injured in an industrial accident. Employer and Employee entered into an Agreement as to Compensation for temporary total disability compensation for the period from June 8, 1991 through June 19, 1991. The Agreement was approved by the Industrial Accident Board on September 5, 1991. The agreement describes the injury as "sprain - both ankles, and left knee."

On October 22 and October 23, 1992 Employee experienced difficulty with her ankles, lower back and knee. Employee received a Disability Certificate from her doctor, Dr. Bakst.<sup>1</sup>



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

On February 22, 1993 Employee filed a Petition to Determine Additional Compensation for temporary partial disability compensation and medical bills related to injuries to her left knee, right knee (suffered from over-compensating for the injured left knee), both ankles, and low back.

On May 14, 1994 Dr. Charles Mauriello performed an Independent Medical Examination (IME) on the Employee. Although Employee's injuries were to her low back, knees and ankles, Dr. Mauriello also performed several tests on her neck. Shortly after the completion of the IME, Employee alleges that she began experiencing stiffness and numbness in her neck. Approximately one week later Dr. Steven J. Rodgers diagnosed Employee's neck condition as a neck strain/sprain. (Bd.Record at 15). Employee <sup>2</sup> and Dr. Rodgers <sup>3</sup> testified that this injury was caused by Dr. Mauriello's IME, and not by the June 7, 1991 accident.

On September 8, 1993 Employer and Employee, by then no longer employed by Employer, entered into a second Compensation Agreement for temporary total disability for the period from October 22 through October 23, 1992. The Agreement indicated that the compensation was for "recurrence" of injuries sustained on June 7, 1991 and described the "Nature of Injury" as "sprain of left and right ankles and left knee."

On December 8, 1993 a hearing before the Industrial Appeals Board was held to determine Employee's Petition for Additional Compensation described above.

On March 18, 1994 the Board issued a Decision denying all of Employee's claims for temporary partial disability compensation. Employee filed a timely appeal of the decision to the Superior Court.

On August 19, 1994 this Court vacated the decision of the Board and remanded the case to the Board with instructions. <sup>4</sup> *Walden v. Georgia-Pacific Corporation*, Del. Super., C.A. No. 94A-03-024, Barron, J., (August 19, 1994)(Mem.Op.).

On December 8, 1994 (coincidentally exactly one year after the original hearing) the Board issued a Remand Order awarding Employee temporary partial disability compensation benefits from April 22, 1993 through the present for injuries to Employee's left and right knee which the Board found were caused by the accident that occurred on June 7, 1991. The Board however denied compensation for the Employee's neck injury finding that the injury was not caused by Dr. Mauriello's IME on May 14, 1994.

On December 16, 1994 Employer filed a Notice of Appeal from the Board's December 8, 1994 Remand Order challenging the portion of the order granting compensation to Employee for injuries to her left and right knee. *Georgia-Pacific Corporation v. Walden*, Del. Super., C.A. No. 94A-12-006.

On December 23, 1994 Employee filed a Notice of Cross-Appeal from the Board's December 8, 1994 Remand Order challenging the portion of the order denying compensation to Employee of her neck



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

problems.

On January 3, 1995 the Board issued a Remand Order (Part III), dated December 13, 1994, finding that Employee's low back problems were not related to her June 7, 1991 industrial accident.

On January 13, 1995 Employee filed a Notice of Appeal from the Board's Remand Order (Part III) dated December 13, 1994 challenging the denial of compensation for Employee's lower back injuries. *Walden v. Georgia-Pacific Corporation*, Del. Super., C.A. No. 95A-01-009.

The appeals were consolidated by agreement of the parties.

### Standard of Review

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. *General Motors v. Freeman*, Del. Supr., 53 Del. 74, 164 A.2d 686, 688 (1960); *Johnson v. Chrysler Corp.*, Del. Supr., 59 Del. 48, 213 A.2d 64, 66-67 (1965). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a Conclusion. *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp.*, Del. Super., 517 A.2d 295, 297 (1986), app. disp., Del. Supr., 515 A.2d 397 (1986). The Superior Court, sitting as an appellate court, does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, supra, at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 Del.C. § 10142(d). As to errors of law, the Court's review is plenary. *Brooks v. Johnson*, Del. Supr., 560 A.2d 1001, 1002, (1989).

### Issues Presented

I. Employer's Appeal of the Board's Award of Temporary Partial Compensation for Injuries to Employee's Left and Right Knee

Employer offers the following arguments in support of its contention that Employee's knee injuries are not compensable.

First, Employer asserts that the Board's reliance on prior agreements between the Employer and Employee constituted reversible error. This argument is based on Employer's contention that Employee's current condition is the result of a distinct subsequent injury unrelated to the original industrial accident and, therefore, unrelated to the prior agreement.

Second, Employer contends that the Board's Conclusion that Employee's current knees problems are causally related to the June 7, 1991 industrial accident is not supported by substantial evidence.



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

Employer contends that the opinion of Dr. Brent R. Noyes <sup>5</sup> was speculative and that the Board's reliance on his opinion "for establishing the causal connection between the injury and the accident is misplaced and constitutes reversible error." (Employer's Opening Brief at 14). Employer completes this argument with the assertion that Employer's witnesses provide substantial evidence for denying compensability.

Third, Employer argues that the Board's finding that "but for" the industrial accident the claimant would not have current knee injuries is not supported by substantial evidence. Since "but for" is a definition of proximate cause and the purpose of "but for" analysis is "fixing the [causal] relationship between an acknowledged industrial accident and its aftermath" <sup>6</sup> this argument is essentially the same as Employer's second argument described above.

Finally, Employer contends that compensation for the injury to the right knee is premised on a determination that the injury to the left knee is compensable. Based on Employer's position that the current injury to the left knee is not related to the June 7, 1991 industrial accident, Employer claims the injury to the right knee cannot be related to the June 7, 1991 industrial accident.

### Employer's Contention that the Board's Reliance on Prior Agreements Constitutes Reversible Error

The first question is whether the Board improperly relied on the two voluntary agreements between the Employer and the Employee in forming its Conclusion that Employee's current injury is causally related to the June 11, 1991 injury.

The Board, in its Amended Remand Order, states that "by agreement, the employer admitted that the claimant's work-related injuries existed in October 1992." (Amended Remand Order at 4). Using this date as its starting point the Board then found that "medical evidence documents the persistence of symptoms and treatment from October 1992 throughout 1993." (Amended Remand Order at 4.).

It is clear that the Board's reliance on the compensation agreement was limited to recognizing Employer's acknowledgement that in October 1992 Employee's problems with her knees and ankles were the result of Employee's work-related accident. The Board used medical evidence, and not the compensation agreement, to form the basis for its award of temporary partial disability from the date of the agreement forward.

Employer's appeal is based on the premise that Employee's current knee symptoms are indicative of a subsequent knee injury. Employer bases this premise on its expert's testimony that the symptoms are inconsistent with the injury that occurred on June 7, 1991 injury. Employer accordingly asserts that the voluntary compensation agreement for the original injury is irrelevant to the Board's determination of compensation for symptoms resulting from the subsequent injury.

This Courts finds no legal error in the Board's limited use of this voluntary compensation agreement.



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

At the very minimum the voluntary compensation agreement was properly relied upon for the Conclusion that Employee suffered a compensable work-related injury and that claimant's symptoms existing during the time period covered by the agreement resulted from that injury. Employer apparently does not dispute the use of the compensation agreement for this limited purpose.<sup>7</sup> The Board observed that "at the December 8, 1993 hearing, the employer presented no reasons to reopen the agreements." (Amd. Remand Order at 3).<sup>8</sup>

The Court notes that, even assuming that at the time of the hearing Employee's knee symptoms were more severe than her symptoms immediately after the injury, that would not justify ignoring the compensation agreement if the medical evidence supported the Conclusion that the current symptoms developed as a result of the initial accident.

To the extent that Employer's argument is based on Employer's perception that the Board awarded compensation based solely on the compensation agreement, this argument appears misplaced.

The Court therefore turns its attention to Employer's second basis for appeal and considers whether there is substantial evidence to support the Board's award of temporary partial disability for employees' knees.

Employer's Contention that Board's Decision Regarding Employee's Knees is not Supported by Substantial Evidence and that the Opinion of Dr. Noyes is Speculative

Employer argues that Dr. Noyes'<sup>9</sup> opinion is "nothing more than conjecture" and "under Delaware law, a finding of medical causation may not be based on speculation or conjecture." Employer argues when Dr. Noyes testimony is excluded the Board's decision granting continuing temporary partial compensation for claimant's knees and ankles is not supported by substantial evidence.

In support of Employer's position, Employer makes the following assertions:

Dr. Noyes did not examine Employee "until April 23, 1993, almost two years after the date of the accident." (Employer Opening Brief at 12).

"Dr. Noyes chooses to disregard the medical records of Drs. Bakst and Kamali which [according to employer] are not indicative of even the beginnings of a partially torn ACL [anterior cruciate ligament]." (Employer Opening Brief at 13).

Dr. Noyes "recklessly states the doctor's missed something." (Employer Opening Brief 13).

While it is true that Dr. Noyes did not examine Employee until two years after the industrial accident, neither did Employer's experts, Dr. Mauriello and Dr. Gross.<sup>10</sup> Medical opinions are necessarily formed from a review of the patient's medical history and medical examinations that occur after the



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

injury. There does not appear to be any reason why Dr. Noyes' opinion should have been discredited by the Board on this basis.

The record does not indicate that Dr. Noyes "[chose] to disregard the medical records of Drs. Bakst and Kamali" as suggested by Employer. Dr. Noyes' opinion appears to be based on the three medical reports that exist from June of 1991: the two doctor's reports and the June 12, 1991 Omega Physical Therapy notes.<sup>11</sup>

After reviewing each of these reports,<sup>12</sup> Dr. Noyes was asked if in his opinion Employee's knee problems are "related to the original incident of June 1991." (Bd.Record at 206). He answered that they were. (Bd.Record at 206). When asked why, he testified that

the mechanism was consistent with an injury to the left knee. I think the subsequent treatment, including the therapy notes, were very substantial for an early injury to the knee, and I think it was overlooked by her initial treating physicians. (Bd. Record at 207).

With respect to the Omega Physical Therapy notes Dr. Noyes testified that

the left knee, in my opinion, has the most significant limitation on the whole page [of the initial Omega Therapy evaluation], even in comparison to the injured left ankle.

The left knee only has a motion from 5 to 35; it lacks extension of the negative 5. (Bd.Record at 206).

On cross-examination, Dr. Noyes was asked why the records of Drs. Kamali and Bakst did not contain more significant documentation of Employee's injury to the knee. With respect to Dr. Kamali, Dr. Noyes' observed that his examination occurred at the St. Francis Emergency Room where "I think he focused on her acute problem." (Bd.Record at 214). According to Dr. Noyes, Dr. Kamali "primarily would review what he thought was the must current injury from x-rays and looking at her." (Bd.Record at 201). Dr. Noyes testified that this type of knee injury "is difficult to examine early on." (Bd.Record at 201). In addition, Dr. Noyes testified that at the time Dr. Kamali saw Employee she may not have had any noticeable swelling.<sup>13</sup>

With respect to Dr. Bakst, Dr. Noyes testified that:

In the recording of his [Dr. Bakst's] physical exam, he did not record in a sense, what I think he missed, examining the knee for ligament injury, or at least, he missed recording it.

But yet, in his impression, he recorded two ankle sprains and a torn knee. Whether its a meniscus or an ACL (anterior cruciate ligament), he did get the correct Impression, in my opinion; he didn't record it. I don't know how, by this test [apparently in reference to the physical exam], I'm not sure how he got to impression number two<sup>14</sup> [left knee, "consider internal derangement]." (Bd.Record at



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

212).

Dr. Noyes' testimony concerning the examination notes of Drs. Kamali and Bakst appears to be an attempt to reconcile the three reports available in June 1991 of the original injury. According to Dr. Noyes, the Omega Therapy notes indicate significant limitations in the range of motion of Employee's knee. Dr. Noyes' testimony indicates that he believes Dr. Bakst was aware of this problem with the left knee based on Dr. Bakst's recorded "Impression" of the left knee, "consider internal derangement." <sup>15</sup> When a recorded medical history forms the basis for an opinion by a different medical professional, that professional must make a best effort, based on all the information available, to determine the meaning of the record. Dr. Noyes appears to have done that in this case. It was clearly not an abuse of discretion on the part of the Board to accept his testimony.

There is some disagreement among the experts concerning the interpretation of Dr. Bakst's examination.

Dr. Mauriello identified several aspects of the initial examination that he considered inconsistent with Dr. Noyes' current diagnosis of a torn ACL.

First, Dr. Mauriello opined that there was no examination of the left knee; however, he offered no explanation for Dr. Bakst's "impression" of possible "internal derangement." (Bd.Record at 118, 120).

Second, Dr. Mauriello observed that Dr. Bakst checked the reflexes in her knees with a rubber reflex hammer. Dr. Mauriello stated that doctors usually do not perform this kind of test "unless you're looking for a gross neurologic deficit because it's painful." (Bd.Record at 119). In response to Dr. Mauriello's observation, Dr. Noyes testified that:

So despite his [Dr. Bakst] findings, he still had to examine her nerves, whether it causes pain or not. That's what the plus 2 patella deep tendon reflexes and the plus 2 Achilles' reflexes are about.

His focus, when asking her to walk on her toes and her Babinski's, and all that, is to rule out any neurologic injury at the time of the accident. (Bd.Record at 211)(emphasis added).

Third, Dr. Mauriello examined a "radiograph of the left knee on June 14, 1991." (Bd.Record at 121). Dr. Mauriello testified that when you have "a partial tear due to trauma in an anterior cruciate ligament, the knee swells. And on a routine x-ray, they note effusion. They specifically looked and found no effusion." (Bd.Record at 122). It does not appear from the record that Dr. Mauriello used the Omega Therapy notes in forming his opinion concerning the diagnosis of the knee. <sup>16</sup> In response to this testimony, Dr. Noyes testified that:

I don't think there has to be swelling. He saw her fairly early on, within, I think, two or three days. I don't think she had a complete tear over her anterior cruciate ligament, so that she may not have





## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

noted it to be a swollen knee. (Bd.Record at 208).

Dr. Daniel J. Gross's also testified for the Employer. His testimony is based on his reviewed the Employee's medical history and his physical examination of Employee. Based on his physical examination he concluded that:

[Employee] does presently have degeneration of both knees, as well as a mild laxity of the left anterior cruciate, and as a result of this she should be placed on light-duty restriction. (Bd.Record at 236).

Dr. Gross was asked, "The laxity of the left cruciate, would that be caused by her fall at Georgia-Pacific in June of '91?" (Bd.Record at 239). He responded that:

Laxity is a gradual stretching and, again, I cannot see how it could be caused by that [the original injury] because it has no restrictions of knee motion documented, no swelling of the left knee documented after the accident by the treating physicians. (Bd.Record at 239)(emphasis added).

Dr. Gross' opinion is premised on lack of documented restrictions in motion; yet, the Omega Therapy notes, according to Dr. Noyes, documented a significant restriction in motion.<sup>17</sup> It is unclear from the record whether Dr. Gross reviewed the Omega Therapy notes<sup>18</sup>

Dr. Gross also noted that "if she had these symptoms, then she would have had progressive symptoms in that first year of working at [Georgia-Pacific]." (Bd.Record at 240). Asked to comment on Dr. Gross' opinion Dr. Noyes stated:

I think there's a lot of people with injured knees who can continue to be employed, and in standing or sitting positions, and particularly with a partial injury. (Bd.Record at 208-209).

Obviously, there were significant disagreements among the experts concerning the extent of the initial injury and its progression into her current symptoms. It is within the exclusive purview of the Board to determine and weigh the credibility of witnesses. *Coleman v. Department of Labor*, Del. Supr., 288 A.2d 285, 287 (1972); *Starkey v. Unemployment Ins. Appeal Bd.*, Del. Super., 340 A.2d 165, 166 (1975), *aff'd* 364 A.2d 651 (1976). In reviewing a decision of the Board it is not the function of this Court to sit as trier-of-fact or to substitute its judgment for that of the Board. *Johnson v. Chrysler*, Del. Supr., 312 A.2d 64, 66-67 (1965). In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below. *Stigers v. Speakman*, Del. Super., C.A. No. 92A-08-21, *Herlihy, J.*, (March 19, 1993) *aff'd*, Del. Supr., No. 125, 1993, *Moore, J.* (Sept. 28, 1993)(ORDER).

This Court concludes that that there is substantial evidence on the record to support the Board's decision with request to Employee's knees. While there are significant disagreements among the experts, when considered in the light most favorable to the party prevailing below, there is





## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

substantial evidence to support the Board's Conclusion that Employee's current knee problems are causally related to her original industrial accident. Employer's interpretation of the records attempts to draw a Conclusion that is inconsistent with all the information available. Dr. Noyes is the only expert who clearly on the record based his opinion on all the medical records available concerning the original injury. While the medical records are not completely harmonious in their description of Employee's original injury, Dr. Noyes' opinion goes the furthest to reconcile the medical records into a sensible whole. It is clearly within the discretion of the Board, not this Court, to weigh the credibility of witnesses and resolve conflicting testimony. *Johnson v. Chrysler Corp.*, Del. Supr., 59 Del. 48, 213 A.2d 64, 66-67 (1965). It was not an abuse of discretion for the Board to rely on Dr. Noyes' testimony.

In the absence of legal error by the the Board, its decision granting temporary partial compensation for Employee's left knee is AFFIRMED.

Employer's Contention That the Award of Compensation for the Right Knee is not Supported by Substantial Evidence

The Board found that "the knee injuries are interrelated. Because the left knee injury is compensable, the right knee injury is also compensable." (Amended Remand Order at 5.) The Board's decision is based on Dr. Noyes' testimony that "the claimants' right knee had to compensate for the weakness in the left knee." (Amended Remand Order at 5).

Employer argues that since the left knee symptoms are not casually related to her industrial accident that it logically follows that Employee's right knee problems are not related either. Since this Court finds that the Board's decision awarding compensation for the left knee is supported by substantial evidence, this Court will not disturb the decision of the Board with respect to the right knee.

No legal error having been committed by the Board, its decision granting compensation for temporary partial disability of Employee's right knee is AFFIRMED.

II. Employee's Appeal of the Failure of the Board to Award Compensation for the Injury to Employee's Neck

On May 13, 1993 Dr. Mauriello performed an independent medical examination (IME) on the Employee. Employee claims that during the course of this examination Dr. Mauriello performed a maneuver <sup>19</sup> that caused an injury to Employee's neck. <sup>20</sup>

In its original decision on December 6, 1993, the Board denied compensation to Employee for the alleged injury to her neck. In support of its decision the Board stated that it "accepts the testimony of both Dr. Mauriello and his assistant ... that he did not force the claimant's neck from side to side." (Bd.Record at 23-24). In addition the Board noted that Employee's neck injury could have been caused



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

by degenerative conditions in her neck. (Bd.Record at 24). The Board's decision did not refer to the testimony of Dr. Rogers, who testified on behalf of Employee.<sup>21</sup>

This Court remanded "to the Board for clarification" its decision concerning Employee's neck. Walden, *supra*, at 14. This Court noted that the Board did not "attempt to resolve the conflict between [Dr. Rogers'] testimony and Dr. Mauriello's [testimony]." Walden, *supra*, at 14.

On remand the Board once again denied compensation. In support of its decision, the Board commented on the testimony of the witnesses. The Board noted that Dr. Rogers was not present during the IME and had no "direct knowledge of the testing conducted by Dr. Mauriello." (Amd.Remand Order at 7). "Having observed Dr. Mauriello's demeanor when he testified . . . the Board concludes that he was credible and further, that his examination of the claimant did not include forced motion." (Amd. Remand Order at 7). Based on its observations, the Board apparently placed greater weight on Dr. Mauriello's testimony than on the testimony of Dr. Gross.

The Board also discussed "Spurling's Test," a name Dr. Mauriello used in his notes to describe his examination of Employee's neck. Dr. Rogers testified that neither he nor any of his colleagues had ever heard of Spurling's Test but after some research "found that it was an archaic diagnostic study and demonstrated [it] for the Board." (Amended Remand Order at 7). Based on the testimony of Dr. Rogers and Dr. Mauriello, the Board concluded that the test conducted by Dr. Mauriello was not a Spurling's Test, despite the reference to the test in Dr. Mauriello's notes. Based on the testimony concerning Dr. Mauriello's examination the Board concluded that "claimant's neck injuries were not caused by Dr. Mauriello." (Amended Remand Order at 7). Finally the Board noted that while "Dr. Rodgers and the claimant testified that [her] neck complaints did not exist before Dr. Mauriello's examination, Dr. Mauriello testified that Dr. Bakst's September 1991 records document neck complaints."<sup>22</sup> (Amended Remand Order at 8).

Employee alleges the following errors in her appeal regarding her neck injury: first, she asserts that Dr. Mauriello's testimony is not credible; second, she asserts that the Board erred by failing to apply the appropriate standards of "but for" causation." (Employee Opening Brief at 30-31).

While there is evidence that casts perhaps some doubt on the testimony of Dr. Mauriello,<sup>23</sup> it is not the role of this Court to evaluate the credibility of the witnesses. Questions of conflict in testimony and witness credibility are resolved by the fact finder, whether the Board or referee, and not the Court. Johnson, *supra*, at 66-67. The credibility issue does not provide a basis for this Court to disturb the decision of the Board.

Employee asserts that the Board failed to apply the appropriate standards of "but for" causation. This Court explained the "but for" standard in its remand order.

The industrial accident is a cause of the claimant's present problems if those problems would not



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

have occurred but for the accident; conversely, the accident is not a cause of her problems if she would have experienced those problems if the accident had not occurred. Walden, *supra*, at 9, citing Reese v. Home Budget Center, 619 A.2d 907, 910 (1992).

Clearly, "but for" Employee's work-related injury she would not have required an IME by Dr. Mauriello. If an injury occurred during the course of her IME it would be within the chain of causation emanating from her original injury. But the application of the appropriate standard of causation is not the issue. The issue is whether an injury occurred during the examination. This is an issue of fact.

There is some evidence to support Employee's claim. The absence of a documented medical history of neck problems prior to the IME combined with documented medical problems after the IME are facts from which the Board could have, but did not, infer that Employee suffered a neck injury during the examination. Employee's testimony and the testimony of Dr. Rogers also supported her claim.

Against this evidence is the testimony of Dr. Mauriello and his assistant, Ms. Rose Marie Wooters. Dr. Mauriello testified his belief that Employee had a history of neck problems based on an examination of Employee's neck by Dr. Bakst in September of 1991 when Dr. Bakst apparently "found tenderness in the trapezius muscle." (Bd.Record at 136).

Resolving this issue is a question of fact. As stated above, the appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. Johnson, *supra*, at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 Del.C. § 10142(d). In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below. Stigers, *supra*.

In the absense of an error of law or a clear abuse of discretion the decision of the Board denying compensation to the Employee for the injury to her neck is AFFIRMED.

### Conclusion

This Court finds, after considering the testimony in favor of the party prevailing below and all other evidence in the record that the Board's award of temporary partial compensation for the work-related injury to Employee's knees, both left and right, was supported by substantial evidence and there was no legal error in the Board's limited use of the voluntary compensation agreement. The decision of the Board is AFFIRMED.

This Court also finds, again after considering the testimony in favor of the party prevailing below and all other evidence in the record that the Board did not abuse its discretion in denying compensation for the injury to Employee's neck. The issue involved in this portion of the appeal is one of fact and properly determined by the Board. The decision of the Board is AFFIRMED.



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

IT IS SO ORDERED.

Richard R. Cooch

1. Dr. Bakst did not testify before the Board.
2. (Bd.Record at 80).
3. (Bd.Record at 16).
4. With respect to the lower back and knee injuries this Court ordered the board to "(1) articulate and apply the proper [legal] standards of "recurrence" and "but for" causation, (2) give due consideration to the voluntary agreements between the employer and the claimant . . . (3) resolve the conflicts in the medical testimony and (4) weigh the evidence rather than simply picking a favorite witness." Supra, at 12. 1994). With respect to the neck injury this Court ordered the Board to "resolve the several contradictions in the testimony regarding the claimant's neck problems." Id. at 14.
5. Dr. Noyes testified on behalf of Employee concerning the nature and cause of Employee's injuries.
6. Walden v. Georgia-Pacific Corporation, supra, at 9 citing Reese v. Home Budget Center, Del. Supr., 619 A.2d 907 (1992).
7. "It was appropriate for the Board to consider the Agreement as possible evidence of knee symptomatology in October, 1992." (Employer Reply Brief at 7). "[Employer] has never contested the fact that Claimant initially suffered a mild sprain of her left knee as a result of the industrial accident." (Employer Opening Brief at 11).
8. The Board may set aside a voluntary settlement agreement on the basis of fraud or mutual mistake. Moore v. Perdue, Inc., Del. Super., C.A. No. 90A-09-001, Lee, J., (Jan. 2, 1991) (Mem.Op) citing Donovan v. Glasgow Thriftway, Del. Super., C.A. No. 89A-FE-11, Babiarz, J. (July 16, 1990) (Mem.Op.) (mutual mistake); Comegy v. Chrysler Corp., Del. Super., C.A. No. 83A-SE-5, Taylor, J., (July 20, 1994) (Mem. Op.) (fraud).
9. Employee was referred to Dr. Noyes by Dr. Bakst. (Bd.Record at 189).
10. Dr. Noyes first examined Employee on April 23, 1993. (Bd.Record at 189). Dr. Mauriello examined Employee on May 13, 1993. (Bd.Record at 114). Dr. Gross examined Employee on October 26, 1993. (Bd. Record at 224).
11. Dr. Noyes' testimony concerning these reports covers pages 199-214 of the Record.
12. Record at 199-206.
13. "He [Dr. Kamali] saw her fairly early on, within, I think, two or three days. I don't think she had a complete tear over her anterior cruciate ligament, so that she may not have noted it to be a swollen knee at that time." (Bd.Record at 208).



## 09/27/95 GEORGIA-PACIFIC CORPORATION v. LINDA S.

1995 | Cited 0 times | Superior Court of Delaware | September 27, 1995

14. Impression number one was "two ankle sprains." (Bd.Record at 212).

15. Unfortunately, doctors do not always record their examinations as completely or as accurately as one would like when a reviewing court attempts to determine the facts as they existed at the time of the examination. Another example of this problem in this case is Dr. Mauriello's record of his examination of Claimant's neck that included a passing reference to the "Spurling's test" discussed in the second part of this Order. Dr. Mauriello also testified that he performed a test for thoracic outlet which is recorded in his notes as abduction testing.

16. Question: "Now, so that, more or less, concludes what you reviewed in reaching the opinion, the medical records of Dr. Bakst, and some of Dr. Noyes and Dr. Kamali, and St. Francis; correct?" Answer: "Yes, sir." (Record, at 135). Dr. Mauriello's testimony does not include any Discussion of the physical therapy notes nor any reference to the physical therapy notes that would indicate that he was aware of them, although his comments concerning Dr. Bakst's September 4, 1991 examination contain the following statement, "if it's not treated and rehabed -- and she really had no therapy at that point to the knee -- the muscles get weaker in the knee." (Record, at 129).

17. (Bd.Record at 206)(quoted above on page 10).

18. Dr. Gross commented on a letter to Dr. Bakst of June 21, 1991, apparently from Omega Physical Therapy. On the record, Dr. Gross comments are limited to Employee's ankles: "There was a full range of motion of the right ankle. On the left, there was restriction of dorsiflexion, but no other abnormality." Dr. Gross' testimony concerning his review of Employee's medical records appears on pages 224-231 of the Board's record. He reviewed the MRI reports of the knees from March of 1993, the cervical spine on June 22, 1993 and the lumbar spine on August 16, 1993 (Bd.Record at 224). He reviewed the office records of Dr. Rogers, Dr. Noyes and Dr. Bakst. (Bd.Record at 225-226). He "reviewed the records of Omega Physical Therapy notes, for her knee there in December of '92 through January of '93."

19. According to Ms. Walden, "it was like a sudden jerk that I wasn't wasn't prepared for." (Record at 79).

20. Claimant testified that on her way home her neck began to hurt. "The next morning when [she] woke up, it was completely stiff; I couldn't turn it at all." (Record at 80). Claimant called Dr. Baskt who prescribed physical therapy. Claimant testified that the symptoms continued and extended to her left arm. (Record at 82). Apparently on the suggestion of her physical therapist, Claimant saw Dr. Rogers on June 3, 1993.

21. Apparently on the suggestion of her physical therapist, Claimant saw Dr. Rogers on June 3, 1993.

22. Dr. Mauriello testified that "Dr. Bakst did examine her neck and found tenderness in the trapezius muscle." (Record at 136).

23. Claimant cites the following: (1) Dr. Mauriello's unfamiliarity with certain testing devices; (2) the discrepancies between Dr. Mauriello's record of his examination compared with his testimony concerning the examination, and (3) his assistant's testimony concerning Dr. Mauriello's upset demeanor after the examination.

