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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware, Sussex County.

Mary E. BAILEY, Employee-Below/Appellant
v.
MILFORD MEMORIAL HOSPITAL, Employer-Below/Appellee.
MILFORD MEMORIAL HOSPITAL, through one of its carriers, Pennsylvania Manufacturers Association Insurance Company, Employer-Below/Appellee/Cross-Appellant,
v.
Mary E. BAILEY, Employee-Below/Appellant/Cross-Appellee,
v.
MILFORD MEMORIAL HOSPITAL through one of its carriers, Kemper Insurance Company Employer-Below/Appellee
and
James P. Robinson and Richard L. Stone of the Industrial Accident Board of the State of Delaware, Appellees.

Civ. A. No. 94A-03-001.
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Submitted: Aug. 14, 1995.
|
Decided: Nov. 30, 1995.

Upon Appeal from a Decision of the Industrial Accident Board - AFFIRMED in part, REVERSED in part, and REMANDED.

Attorneys and Law Firms

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Sherry V. Hoffman, Deputy Attorney General, Wilmington, for Indus. Acc. Bd.

MEMORANDUM OPINION

GRAVES, Judge.

***1** The matter before this Court involves two actions that have been consolidated for appeal. Both actions arise from the Industrial Accident Board's decision dated December 6, 1993. The first action involves Appellant, Mary E. Bailey's (Ms. Bailey), appeal from the decision of the Industrial Accident Board (Board) denying her claim for total benefits and her claim for full compensation for her medical bills. In response thereto, Appellee/Cross-Appellant, Milford Memorial Hospital (employer or hospital), through one of its carriers, Pennsylvania Manufacturers Association Insurance Company (PMA) filed a motion to affirm the Board's decision regarding the denial of total disability benefits and the denial of full compensation for her medical bills.

The second action involves PMA's cross-appeal from the Board's decision to shift liability between PMA and Kemper Insurance (Kemper) the hospital's compensation insurance carrier prior to PMA. Appellee, the hospital, through one of its carrier's, Kemper, subsequently filed an answering brief wherein it maintains that the Board's decision in full is supported by substantial evidence and should be affirmed.

After PMA's motion to affirm was filed, the parties initially stopped all briefing of both actions. Upon discovery of the fact that the parties stopped briefing, the Court ordered all parties to complete briefing of both actions. Below is the Court's decision on the matters after full briefing thereon.

FACTUAL AND PROCEDURAL HISTORY

Ms. Bailey was born in 1937, has a ninth grade education, and has limited reading ability. Over the past 40 years, she has worked various manual labor jobs. Ms. Bailey's most recent job was in the housekeeping department of the hospital, where she worked for 19 years beginning in 1971. As a worker in the housekeeping department, Ms. Bailey was responsible for cleaning various floors of the hospital including cleaning the hospital rooms, offices, bathrooms and laboratories.

On July 25, 1988, Ms. Bailey injured her back while she was bending over to pick up three trash cans at the hospital. As a result of her back injury, she was out of work for nineteen (19) days. Kemper, the hospital's compensation carrier at the time, via compensation agreement, paid Ms. Bailey total disability benefits. On August 14, 1988, Ms. Bailey returned to work without restrictions.

On September 1, 1988, Ms. Bailey had a similar recurrence of total disability. She again injured her lower back while lifting a trash bag. Kemper again paid the workers' compensation benefits for the recurrence. After being out of work for approximately sixty (60) days, she returned to work full duty. Upon her return, the hospital transferred Ms. Bailey to the first floor of the hospital because cleaning the first floor did not involve as much bending, stooping or lifting as on the fourth floor. Her basic duties, however, remained the same. Ms. Bailey received treatment from specialists at the Dickinson Medical Group (Dickinson) for her September 1, 1988 back injury.

***2** On June 1, 1989, the hospital changed its workers' compensation carrier to PMA. On May 25, 1990, Ms. Bailey injured her back a third time while lifting a trashbag that she did not realize was full of glass slides. As a result of her back injury, Ms. Bailey was out of work for ten (10) days.

On June 3, 1990, Dr. Sutton from Dickinson examined Ms. Bailey's back. Dr. Sutton released her to work with light duty restrictions on June 4, 1990. After four days of light duty, Dr. Sutton released her to full-duty. At that time, the hospital had Ms. Bailey work in the laundry room of the hospital folding towels. She continued there for one week until she took a vacation beginning June 15, 1990.

On July 1, 1990, Ms. Bailey returned to work. On or about July 6, 1990, the hospital terminated Ms. Bailey's employment on the grounds that she could not perform her current duties in light of her back injury. Ms. Bailey's supervisor at the hospital placed her on long-term disability through the hospital and told her that if a less strenuous position at the hospital became available, she would be considered for the position. The hospital originally submitted the claim for total disability to Kemper who paid some benefits; however, Kemper stopped paying benefits when it realized that PMA was the employer's carrier at the time of Ms. Bailey's 1990 accident.

In 1991, Dr. Sutton left Delaware and he referred Ms. Bailey to Dr. Eugene Godfrey (Dr. Godfrey) for treatment for her back. Dr. Godfrey, an anesthesiologist, specializes in pain management. He provided treatment to Ms. Bailey until the Board hearing. Although his bills were submitted to both carriers, none had been paid at that time. The bills for treatment by Dickinson after the 1988 incident were paid by Kemper; however, most of the bills for treatment after the 1990 incident have not been paid. As a result, Dickinson sued Ms. Bailey and received a judgment against her. She is currently making payments on that judgment.

On October 28, 1991, Ms. Bailey filed a petition with the Board to determine additional compensation due because neither carrier was paying her lost wages or medical bills. In response thereto, Kemper claimed that the 1990 incident constituted a new and separate injury, not a recurrence of her original injury, thereby making PMA liable for the 1990 injury. PMA contended that the 1990 injury was a recurrence for which Kemper remained liable.

On December 6, 1993, a hearing was held before the Board. At the hearing, PMA filed a Motion to Dismiss on the grounds that Kemper assumed liability for Ms. Bailey's 1990 recurrence and was, therefore, estopped from changing its position. The Board, however, denied PMA's Motion to Dismiss and went forward with the hearing.

Ms. Bailey testified at the hearing before the Board. Ms. Bailey testified that she has a ninth grade education, that when she has difficulty understanding something she reads she seeks the assistance of her aunt, and that she has only performed manual jobs since she began working. PMA and Kemper objected to such testimony arguing that it and any testimony that relates to the displaced worker doctrine should not be heard by the Board because Ms. Bailey did not raise or plead the doctrine prior to the Board proceedings; however, the Board overruled their objection and allowed the testimony.

***3** Ms. Bailey testified that her May 25, 1990, back injury occurred while she was bending over to lift a trash can liner that she did not realize contained 60 to 70 glass slides. Ms. Bailey stated that the reason that the trash liner contained the slides was because the hospital was getting ready for an inspection. She stated that she was not supposed to lift the trash can full of slides because it was too heavy for her. According to Ms. Bailey, her fellow employees attempted to instruct her that a man was going to lift the bags because they were to heavy for her; but they missed her and she consequently lifted the bag injuring her back.

Ms. Bailey stated that the 1990 accident incapacitated her more than the 1988 accident. She stated that since the 1990 accident, she consistently experiences pain and stiffness in her neck and shoulder, she has difficulty turning her head, she has not been able to lay on her right side or her back since, she is uncomfortable standing or sitting for any length of time, she is unable to do any lifting, and she is also unable to perform her household chores.

On cross-examination, Ms. Bailey acknowledged that the sixty to seventy glass slides in the trash can that she lifted weighed more than she would usually have to lift. She also acknowledged that a man usually did the heavy lifting in the areas that she cleaned. She also stated that she heard her back snap while she was bending over and picking up the trash can bag full of glass slides.

Dr. Godfrey also testified on behalf of Ms. Bailey. When he first saw her, she was in pain and appeared to be very uncomfortable. His initial diagnosis was nerve root irritation, which was documented in an EMG, as well as myofacial pain. He confirmed that his treatment was related to the work accidents and that she could not return to her former work. He described his treatment as aggressive because of her deteriorating condition. His treatment of her primarily consisted of multiple epidural steroid injections and facet blocks to calm nerve irritation and reduce her tenderness.

Dr. Godfrey testified that up until the time of the hearing, he had seen Ms. Bailey approximately forty four (44) times and his bill totaled thirteen thousand fifty one dollars ($13,351). He stated that his treatment was reasonable and necessary because it was intended to restore her range of motion and reduce her pain. Additionally, he stated that all his treatments were related to Ms. Bailey's work injuries.

On cross-examination, Dr. Godfrey acknowledged that an MRI showed degenerative process and that Ms. Bailey had suffered from a mini-stroke in 1992. However, he maintained that Ms. Bailey's back problems, and treatments, resulted from her 1988 and 1990 accidents. He also admitted that she was capable of performing a sedentary job if she were able to frequently change positions, that she was not able to do work which required constant standing and that she was limited in her ability to push, pull and lift. He confirmed that her inability to continue in her previous work was a result of the 1990 accident, even though her records indicated that Dr. Sutton had released her to full-duty on June 11, 1990.

***4** Dr. Godfrey acknowledged that he performed a thermogram of Ms. Bailey's whole body, for which he charged Ms. Bailey five hundred seventy five dollars ($575,000). A thermogram is a controversial testing procedure that measures heat that the body emits. Dr. Godfrey acknowledged that the American Academy of Orthopedic Surgeons in July of 1991 issued a statement that the use of thermography as a clinically useful diagnostic or prognostic test could not be scientifically justified. However, Dr. Godfrey testified that he believes thermography, if properly done, is a valid study. Dr. Godfrey testified that he usually, as he did in the case of Ms. Bailey, conducts a thermogram if other conventionally accepted tests reveal that everything in the patient is normal but the patient continues to complain of pain.

Ms. Geri Papae (Ms. Papae), the health nurse at the hospital, also testified on behalf of Ms. Bailey. She gave a history of Ms. Bailey's injuries, the days she was out of work and her treatment. Ms. Papae stated that Ms. Bailey's September, 1988 injury also occurred while Ms. Bailey was lifting slides in the laboratory. She confirmed that she suggested to Ms. Bailey that she seek the help of an orthopedic physician. At that time, she assured Dickinson Medical Group that Ms. Bailey's injury was a workers' compensation case and that the employer's carrier would pay the bills.

Ms. Papae testified that the hospital's insurance carrier had been changed from Kemper to PMA effective June 1, 1989. Ms. Papae admitted however, that she sent the claim for Ms. Bailey's May, 1990 incident to Kemper because she believed that it was not a new injury but a “re-occurrence”. She stated that she “determined it to be an extension of the injury that had happened previously.” Finally, she acknowledged that she was aware that Ms. Bailey was terminated by the hospital and that Ms. Bailey applied for and received disability benefits

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through the hospital's long-term disability policy after the six month waiting period.

On cross-examination, Ms. Papae acknowledged that Ms. Bailey's May, 1990 injury was not reported to PMA because she made an independent judgment that the claim was Kemper's responsibility. She also acknowledged that she did not report any of the details about the inspection or the other circumstances surrounding Ms. Bailey's 1990 back injury to Kemper. According to Ms. Papae, Ms. Papae reported to Kemper that Ms. Bailey was doing her regular duties when she hurt her back.

Dr. Joseph Barsky, Jr. (Dr. Barsky) testified on behalf of PMA. He performed two independent medical examinations of Ms. Bailey, one on September 11, 1992 and the other on November 10, 1993. Based on his examinations, he concluded that Ms. Bailey had some tenderness in her low back and a reduced range of motion. Based on an MRI that he performed, in his opinion, Ms. Bailey's condition was a result of degenerative changes, and it was not accelerated by her work accidents.

***5** Dr. Barsky also reviewed Ms. Bailey's medical records and test results. He did not agree that the thermogram was an accepted diagnostic tool. He also did not believe that Dr. Godfrey's treatments should have continued beyond three or four months because, in his opinion, they did not provide a permanent benefit to Ms. Bailey. Dr. Barsky testified that he felt that Dr. Godfrey should have discontinued injection treatment because, in his opinion, steroid injections are dangerous and can cause problems if administered over a long period of time.

Dr. Barsky testified that Ms. Bailey was not totally disabled, but that she was able to perform some type of sedentary work. He concluded that the 1990 incident was a recurrence of the 1988 accident. On cross-examination, Dr. Barsky acknowledged that his use of the word “recurrence” was a medical term meaning a continuation or return of a previous problem.

After hearing testimony and considering the evidence, the Board determined that Ms. Bailey is not totally disabled from any and all employment because she was released by Dr. Sutton to return to work full-duty after the 1990 accident. Furthermore, the Board found Ms. Bailey's testimony that she is unable to continue with her housekeeping job insufficient to meet her burden of proof that she is entitled to total disability benefits.

Nonetheless, the Board concluded that Ms. Bailey has work restrictions related to her 1990 industrial accident. Based on the fact that she was able to return to her housekeeping position after the 1988 incident, but not after the 1990 accident, the Board held that her restrictions were related to the 1990 accident. As a result, the Board found PMA liable because it was employer's carrier at the time of the 1990 accident. In considering the medical bills, the Board concluded that Kemper was liable for all of the Dickinson bills prior to May 25, 1990 and PMA was liable for all Dickinson bills after this date. However, relying on the testimony of Dr. Barsky, the Board found the treatment of Dr. Godfrey to be unnecessary. Therefore, the thermogram was held not to be compensable and the Board limited payment of Dr. Godfrey's bills to six months. The Board held PMA liable for this amount.

In her appeal, Ms. Bailey claims that the Board's decision is not supported by substantial evidence. She argues that the Board erred (1) in finding that she is not entitled to total disability benefits; and (2) in concluding that only a portion of Dr. Godfrey's bills should be paid. She contends that the Board should have considered her a displaced worker. Therefore, the Board's decision should be reversed.

PMA maintains that the Board's decision as to its denial of total disability benefits and the limited liability for medical bills should be affirmed because it did not abuse its discretion in concluding that Ms. Bailey failed to meet her burden, and it made findings of fact supported by substantial evidence. Furthermore, Ms. Bailey failed to raise the issue of displaced worker before or at the hearing; therefore it may not be raised on appeal. However, in its cross-appeal, PMA contends that the Board applied the incorrect standard in determining liability between successive insurance carriers. Therefore, the Board's decision on this issue should be reversed.

***6** Kemper contends that the Board's decision on both issues is supported by substantial evidence and should be affirmed.

Finally, Ms. Bailey maintains that the Board's allocation of her medical bills between the two insurance carriers is supported by substantial evidence and should be affirmed.

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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. *Johnson v. Chrysler Corp.,* Del.Supr., 213 A.2d 64, 66-67 (1965); *General Motors v. Freeman,* Del.Supr., 164 A.2d 686, 688 (1960). 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. dism.,* Del.Supr., 515 A.2d 397 (1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp,* 213 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del.C.* §10142(d).

DISCUSSION

I. Did the Board err in concluding that Ms. Bailey is not entitled to total disability benefits?

The Board concluded that Ms. Bailey failed to persuade the Board that she is totally disabled from any and all employment. In particular, in its decision, the Board stated that it did not find Ms. Bailey's own testimony that she was unable to continue with her housekeeping job sufficient in light of the fact that her treating physician, Dr. Sutton, released her to full-duty. Nonetheless, the Board recognized that Ms. Bailey did have restrictions after the 1990 accident. This was based on the testimony of both Dr. Godfrey and Dr. Barsky, who confirmed that Ms. Bailey could not perform her old duties but that she would be able to perform some type of sedentary work, as well as the fact that the hospital terminated her because she was no longer able to perform her duties.

On appeal, Ms. Bailey contends that the Board's determination that she is not entitled to total disability benefits or payment of all her medical bills is not supported by substantial evidence and should be reversed. She contends that the Board should have considered her a *prima facie* displaced worker and awarded her total disability benefits. Both PMA and Kemper maintain that the Board's decision on this issue is supported by substantial evidence and should be affirmed. Furthermore, they argue that because Ms. Bailey did not raise the displaced worker issue until the Board hearing she is precluded from arguing it on appeal.

This Court, in *Whaley v. Purnell,* Del. Super., C.A. No. 94A-04-003, Graves, J. (November 30, 1994) Memo. Op. at 5-8, outlined the displaced worker doctrine as follows:

> ***7** *The Displaced Worker Doctrine - Background*
>
> 19 *Del.C.* §2324 compensates employees for a loss of earning capacity if they are injured during the course of employment. *Chrysler Corp. v. Chambers,* Del. Super., 288 A.2d 450, *aff'd,* Del. Supr., 299 A.2d 431 (1972). Total disability benefits may be granted not only when a claimant is completely physically disabled, but also under certain circumstances, such as when he or she is economically disabled. *See Franklin Fabricators v. Irwin,* Del. Supr., 306 A.2d 734, 736 (1973) (concluding that total disability benefits may continue after the employer has sustained its burden of showing that the claimant is no longer totally physically disabled if evidence is presented that the employee is a displaced worker). An economically disabled or “displaced worker” is one who, although not completely incapacitated, is “so handicapped by a compensable injury that he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially created job if he is to be steadily employed.” *Ham v. Chrysler Corp.,* Del. Supr., 231 A.2d 258 (1967).
>
> *Origin of Doctrine and Two-Prong Test*
>
> In order to quantify when a claimant is sufficiently economically disabled to warrant an award of total disability, the Supreme Court developed the displaced worker doctrine. The doctrine, which is applicable in both termination of benefits and determination of compensation due cases, permits a claimant who may not be completely physically disabled to collect total disability. The Supreme Court laid its foundation for this doctrine in *M.A. Hartnett, Inc. v. Coleman,* Del. Supr., 226 A.2d 910 (1967). There, the Supreme Court acknowledged that a worker may not be totally disabled physically, but rather totally disabled economically because he is unable to secure employment.
>
> Later, in *Ham v. Chrysler Corp., supra,* the Supreme Court set forth a two-prong test to determine whether an employee is *prima facie* displaced. First, the claimant must show that he is an unskilled worker, unable to perform any task other than general labor; and, second, he must demonstrate that his inability to perform the duties of a

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general laborer is causally related to the accident in issue. In determining whether a claimant is unskilled, the Court will consider factors such as physical impairment, mental capacity, education, training and age. *Hensley v. Artic Roofing, Inc.,* Del. Supr., 369 A.2d 678, 679 (1976); *Ham v. Chrysler Corp.,* 231 A.2d at 261. The Board then weighs these factors together with the medical testimony in order to render a decision. *Ham v. Chrysler Corp.,* 231 A.2d at 261.

Recently, the Supreme Court clarified under what circumstances this doctrine applies. In *Oakwood Mobile Homes v. Mosley,* Del. Supr., 608 A.2d 729 (1991),[1] the Supreme Court concluded that the claimant was not displaced, because, although he could not perform his original duties, he could still work in some capacity. The Court wrote:

> ***8** The fact that Mosley may not be able to do the same job as he did before the injury is not the relevant inquiry. Whether Mosley could do that which is required of a general laborer is the proper question. Both doctors believed that some type of gainful employment, short of "hard labor," could be pursued by Mosley.
>
> *Oakwood Mobile Homes v. Mosley,* Del. Supr., No. 304, 1991, Moore, J. (February 12, 1992), Order at 7. The displaced worker doctrine, thus, generally applies only to unskilled workers who, due to their injuries, cannot return to heavy labor jobs and do not have the training or education for any comparable employment. *Zdziech v. Delaware Authority for Specialized Transportation & IAB,* Del. Super., C.A. No. 87A-AU-10, Gebelein, J. (October 13, 1988), Mem. Op. at 9.
>
> *Burden of Proof*
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> The displaced worker doctrine imposes an additional burden on employers not only in termination of benefit cases, but also cases where the claimant who seeks compensation is *prima facie* displaced. For example, in a petition to determine compensation due, if the Board determines that a claimant is *prima facie* displaced, the employer must show the availability of regular employment within the claimant's capabilities. *Hebb v. Swindell-Dressler, Inc.,* Del. Super., 394 A.2d 249 (1978); *Franklin Fabricators v. Irwin,* 306 A.2d at 737. This burden is met upon a showing that the claimant is physically capable of returning to work and that work generally exists within the claimant's specific restrictions. *ABEX Corp. v. Brinkley,* Del. Super., 252 A.2d 552, 553 (1969). The employer need not show that someone has actually agreed to hire the claimant, but merely that regular employment opportunities exist. *Jennings v. University of Delaware,* Del. Super., C.A. No. 85A-MY-4, Taylor, J. (February 27, 1986) (Order).
>
> On the other hand, if the Board finds that the worker is not *prima facie* displaced, the primary burden rests on the employee to show that "he has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury." *Franklin Fabricators v. Irwin,* 306 A.2d at 737. If the claimant can show that he has conducted a reasonable job search without success, he may qualify for total disability, provided the Board finds this evidence credible and it is not rebutted by the employer.

In this case, Ms. Bailey argues that the Board erred in its decision that she is not entitled to total disability benefits because it failed to find that she is a prima facie displaced worker and therefore entitled to total disability benefits. On the other hand, PMA and Kemper argues that the Board's action was appropriate because Ms. Bailey failed to raise the displaced worker doctrine prior to the Board hearing.

This Court has acknowledged that the displaced worker doctrine should be raised or explored by the parties at a stage prior to the Board hearing. *Peuchen, Inc. v. Heluck,* Del. Super., 391 A.2d 220, 224 (1978). In *Peuchen,* a termination of disability benefits case, the displaced worker doctrine was not addressed or raised by the parties or the Board at any time prior to or during the Board proceedings; however the Board raised the doctrine in its decision. The Board held that the employee was a displaced worker and that the employer failed to sustain its burden of proving availability of regular employment within the employee's capabilities. In view of such, the employer appealed the Board's decision arguing that it should be afforded an opportunity to present evidence that could relieve it of compensation liability. This Court in deciding to remand the case to the Board for the purpose of hearing evidence on the subject of availability of regular employment within the capability of employee, recommended that the Board adopt pre-hearing procedures such that the parties will be alerted to the fact that a case involves the displaced worker doctrine prior to the Board hearing.

***9** Apparently, the Board has since instituted such pre-hearing procedures.[2] Under Rule 9 of the *Industrial Accident Board, State of Delaware Workers' Compensation Rules* (1995) the parties in all cases except disfigurement, are required to prepare a pre-trial memorandum.[3] In the instant case, the pretrial memorandum that the parties used was essentially a form which lists in part, the petitions that the claimant filed, the expenses and fees sought by the claimant, and the defenses intended to be relied upon by the employer or carrier. The parties have an opportunity to elect from this list which petition, expenses, fees and defenses that the parties intend to seek.

In the parties' pretrial memorandum, the claimant, Ms. Bailey indicated that she filed a petition to determine compensation and additional compensation due. Ms. Bailey also marked on the memorandum that she was seeking total disability under 19 *Del. C.* § 2324. Under the section of the pretrial memorandum where Ms. Bailey marked that she was seeking total disability there is a space where Ms. Bailey could have elected that she was seeking “Displaced Worker Status”; however, Ms. Bailey failed to make such election.

Despite her failure to plead the displaced worker doctrine, the Board, over both PMA's and Kemper's objections, heard evidence relevant to the displaced worker doctrine at the hearing before the Board. Specifically, the Board allowed testimony concerning Ms. Bailey's level of education, her ability to read, her physical limitations since the 1990 incident and the fact that she is an unskilled worker. In addition, it was established that although Ms. Bailey could not return to her former work as a housekeeper, a fact the hospital specifically stated when Ms. Bailey was terminated, she would be able to perform some type of sedentary work. This evidence put the displaced worker doctrine directly at issue. However, the Board failed to address and resolve the issue in its decision.

Despite the Board's pretrial procedures this Court in previous instances where the Board and the parties have failed to adequately raise the displaced worker doctrine, has remanded the case for a determination of the employee's status. *Hebb v. Swindell-Dressler, Inc.,* Del.Super., 394 A.2d 249, 251 (1978) (concluding that where neither the employee, employer, nor the Board properly raised the displaced worker doctrine as a basis for deciding the issue of temporary total disability of ironworkers, and where there was sufficient evidence from which the Board could find that the worker was displaced by layoff because of his prior arm injury, the case should be remanded for an express determination); *Peuchen, Inc. v. Heluck,* Del. Super., 391 A.2d 220 (1978); *Phoenix Steel v. Trivets,* Del. Super., C.A. No. 511, 1977, Christie, J. (March 9, 1978) Letter Op. *See Ashley v. North American Smelting Co.,* Del. Supr., No. 296, 1980, McNeilly, J. (June 24, 1981) (Order) (ordering that it is proper for the Superior Court to remand the case to the Board so that they can make explicit findings of fact and conclusions of law as to the displaced worker doctrine, in a case where the displaced worker issue was not squarely raised by the parties prior to or at the Board hearing, but where sufficient evidence relating thereto was presented at the Board hearing so as to call for a more complete ruling by the Board).

***10** Therefore, the Board's decision relating to whether or not Ms. Bailey is entitled to total disability benefits is hereby reversed and remanded to the Board for a rehearing. On remand, all parties will have the opportunity to present evidence relevant to their respective burdens under the displaced worker doctrine. This will establish a complete record from which the Board may then articulate a decision.

II. Did the Board err in limiting liability for Dr. Godfrey's bills to six months?

In her appeal, Ms. Bailey contends that substantial evidence does not support the Board's decision to limit payment of Dr. Godfrey's bills to six months. She claims that the Board should have relied on the testimony of her treating physician in determining if the treatment was reasonable. PMA maintains that the Board's decision is supported by substantial evidence and should be affirmed.

The crux of the Board's decision is a credibility determination. When parties present testimony from expert witnesses, the Board is free to choose between conflicting medical opinions, and either opinion will constitute substantial evidence for purposes of an appeal. *Reese v. Home Budget Center,* Del. Supr., 619 A.2d 907, 910 (1992). It is within the Board's discretion to weigh the credibility of witnesses and to determine whether to accept or reject medical testimony. *Oakes v. Triple C. Railcar,* Del.Super., C.A. No. 93A-09-003, Toliver, J. (October 14, 1994). The Board is free to adopt the testimony of any of the experts and to reject the others when the evidence presented clearly conflicts and the Board's reliance upon one would satisfy the substantial evidence requirement. *DiSabatino v. Wortman,* Del. Supr., 453 A.2d 102 (1982). The Board is not obligated to give the treating physician's testimony greater weight than an evaluating physician; rather, the Board may accept the testimony of one expert witness over the testimony of another. *Medical Center*

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of Delaware v. Quinn, Del.Super., C.A. No. 93A-07-018, Carpenter, J. (June 21, 1994).

In the instant case, the Board heard testimony from Dr. Godfrey, a treating physician of Ms. Bailey's, and Dr. Barsky, a physician who conducted independent medical examinations of Ms. Bailey. Both physicians testified regarding the reasonableness of Dr. Godfrey's medical treatment Ms. Bailey. The Board based its decision not to award full compensation for Dr. Godfrey's treatment of Ms. Bailey on the testimony of Dr. Barsky. Dr. Barsky testified that he did not believe that Dr. Godfrey's treatment was necessary or effective.

As indicated above, the Court's jurisdiction is limited to determining whether the Board's factual findings were supported by substantial evidence. The Court may not weigh evidence or determine credibility of witnesses on appeal. Therefore, this Court finds that the Board's decision to limit liability for Dr. Godfrey's bills to six months is supported by substantial evidence and is hereby affirmed.

III. Is Kemper estopped from denying liability for Ms. Bailey's 1990 accident since it originally started making payments to Ms. Bailey after the 1990 accident?

***11** PMA argues that regardless of whether it is liable for Ms. Bailey's 1990 accident, Kemper is estopped from denying liability because Kemper originally paid some of Ms. Bailey's claim. In response thereto, Kemper argues that the fact that it mistakenly paid Ms. Bailey's 1990 claim based upon erroneous and incomplete information given to it by Ms. Papae, a nurse at the hospital, does not forever bar Kemper from denying liability; therefore, this Court should not disturb the Board's decision to shift liability to PMA.

Applied to prevent injustice, estoppel arises when a party to a transaction by word, deed or silence conducts himself in such a manner that the law forbids enforcement of a claim but for the estoppel. *Harmony Mill Limited Partnership v. Donald C. Magness, et al.,* Del. Super., C.A. No. 84C-OC-40, Barron, J. (May 1, 1990) citing *Timmons v. Campbell,* Del. Ch., 111 A.2d 220 (1955). To establish estoppel in Delaware, it must appear that the party claiming the estoppel lacked knowledge of and means of learning the true facts, that he relied upon the conduct of the party against who estoppel is claimed, and that he suffered a prejudicial change in his position as a consequence of such reliance. *Delmar News, Inc. v. Jacobs Oil Co.,* Del. Super., 584 A.2d 531 (1990) citing *Wilson v. American Ins. Co.,* Del. Supr., 209 A.2d 902 (1965); *Ainscow v. Alexander,* Del. Super., 39 A.2d 54, 60 (1944). The doctrine of estoppel, as it applies to the actions of an insurer, usually consists of misleading conduct by or on behalf of the insurer which is relied upon by the insured to his detriment. *See Radzewicz v. Neuberger,* Del. Super., 490 A.2d 588 (1985) citing *First Fed. S & L v. Nationwide Mut. Fire Ins.,* Del. Supr., 460 A.2d 543, 545 (1983); *Nathan Miller v. Northern Ins. Co. of New York,* Del. Super., 39 A.2d 23 (1944).

On appeal, PMA has not properly developed a case establishing the elements of estoppel. Accordingly, the Court will not address such argument.

IV. Did the Board apply the incorrect standard in determining liability between successive insurance carriers?

In the instant case, the Board determined that PMA was liable for Ms. Bailey's second episode. In reaching its decision to place liability upon PMA for the episode, the Board stated the following:

> In considering the respective responsibility of the two carriers, the Board considers the burden of proof in *Standard Distributing,* Del. Supr., No. 395, 1992, Walsh, J. (September 17, 1993) Although the claimant was somewhat inarticulate about describing exactly what she was doing in May of 1990, the Board concludes that she was lifting the heavy slides and that was a substantial cause that led to a change in her condition.

On appeal, PMA argues that the Board erred as a matter of law in determining that PMA is liable for Ms. Bailey's 1990 accident because it improperly applied the recurrence/aggravation analysis espoused in *Standard Distributing Co. v. Nally,* Del. Supr., 630 A.2d 640 (1993). PMA argues that for liability to be shifted to the second carrier, Ms. Bailey's "second incident must cause a worsening of the worker's condition, resulting in a new injury, due to an untoward event." PMA's Opening Brief at 6 citing *Nally,* 630 A.2d at 645-646. Furthermore, PMA contends that the Board, in its decision to shift liability to PMA for Ms. Bailey's 1990 episode, improperly applied the substantial cause test enunciated in *Duvall v. Charles Connell Roofing,* Del. Supr., 564 A.2d 1132 (1989), rather than applying the unusual exertion test enunciated in *DiSabatino & Sons v. Facciolo,* Del. Supr., 306 A.2d 716 (1973). In response thereto, Kemper claims that the Board properly determined that Ms. Bailey's 1990 accident was a new injury and correctly applied the appropriate standard in assessing successive carrier liability; therefore, its decision should be affirmed.

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***12** Successive carrier recurrence/aggravation disputes, like the instant case, involve a situation where the condition of an employee seeking worker's compensation is due to two different accidents which occurred while the employer was insured by two different insurance carriers. In situations where liability has been conceded by the insurers, as here, the reviewing Court is faced with the task of determining which carrier should be liable for the employee's second accident.

The first case in which the Delaware Supreme Court squarely addressed the successive carrier problem in the case of accidental injury was *DiSabatino & Sons, Inc. v. Facciolo,* Del. Supr., 306 A.2d 716 (1973). In *Facciolo,* the Supreme Court adopted the recurrence/aggravation standard for determining insurer liability. *Id.* Under *Facciolo,* if the Board or reviewing Court finds that the employee's second episode was a true recurrence, the return of an impairment without the intervention of a new or independent accident, responsibility for the second episode rests on the first insurer. *Id.* at 719. On the other hand, if the Board or reviewing Court finds that the employee's condition is not a true recurrence, but finds that it is "brought about or aggravated by a new work-connected accident, the liability falls upon the insurer whose policy is in effect at the date of the new accident." *Id.* at 719. The Court held that a finding by the Board or reviewing Court that the new work-connected accident or episode was due to "unusual exertion" by the employee necessarily implies the existence of an aggravation of the first injury, thereby making the new insurer liable. *Id.* at 720.

The Delaware Supreme Court moved away from the *Facciolo* unusual exertion test in successive carrier cases where compensability is conceded by the carriers in *Standard Distributing Co. v. Nally,* Del. Supr., 630 A.2d 640 (1993).[4] In *Nally,* the Court noted that the Board and reviewing Court's task of "determining liability between carriers, should not turn on whether unusual exertion is present but whether a genuine intervening event has occurred which brings out a new injury." *Id.* at 645. The Court held that the focus of the Board and reviewing Courts inquiry must be returned to the nature of the second event. *Id.* at 645. According to the Court, the Board and reviewing Courts must establish that an untoward event, an accident or event beyond the normal duties of employment, was the proximate cause of the employee's new condition for liability to shift to the second carrier. *Id.* at 646.

Specifically, the Court stated the following:

> 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.
> ***13** (citations omitted) *Id.* at 646.

Consequently, under *Nally,* when the Board is faced with a recurrence/aggravation dispute where the successive carriers have conceded that one of them is liable for an employee's injury, it must determine whether an untoward event, defined as an accident or event beyond the normal duties of employment, was the proximate cause of the employee's new condition. If the Board determines that the injury was caused by such event then liability for the second episode shifts to the second carrier.

In the instant case, the Board properly cited *Nally* in its decision to shift liability from Kemper to PMA, but it did not make the appropriate findings required by *Nally.* Under *Nally,* the Board must determine whether Ms. Bailey's lifting of the trash bag full of sixty to seventy glass slides was an untoward event beyond the course of her normal duties as a worker in the housecleaning department of the hospital that proximately caused her May, 1990 back injury. If the Board determines that Ms. Bailey's lifting of the trash bag was such untoward event, then liability for the 1990 episode is shifted to PMA. On the other hand, if the Board determines that it is not such untoward event, then liability remains with Kemper.

Accordingly, the Court, reverses, and remands this case to the Board for further proceedings consistent herewith.

CONCLUSION

For the above reasons, the decision of the Board is affirmed in part, reversed in part and remanded to the Board for further proceedings consistent herewith.

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IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1995 WL 790986

Footnotes

1 This opinion is an unpublished order; the text may be found at *Oakwood Mobile Homes v. Mosley,* Del. Supr., No. 304, 1991, Moore, J. (February 12, 1992) (Order).

2 In light of the recommendations made by this Court to the Board in *Peuchen,* I, via letter dated November 9, 1995, requested that the Board's attorney inform the Court of the Board's pre-hearing procedures for raising the displaced worker doctrine. According to the Board's attorney, the parties are required to prepare a pretrial memorandum wherein the claimant indicates whether or not he or she will seek displaced worker status.

3 In pertinent part, Rule 9 *Industrial Accident Board, State of Delaware Workers' Compensation Rules,* (1995) provides the following:

Formulation of Issues - Pretrial Procedures.

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(D) The attorney for the petitioner, or the petitioner, will be assigned a pretrial hearing date by the Board. The Board assumes petitioners are prepared to go forward with their petitions on the date of filing except in cases involving Statute of Limitations problem. At the time of the noticed pretrial the attorneys for the parties or the claimant, if unrepresented, must be prepared with the following information:

(1) Names and addresses of prospective medical and lay witnesses will be supplied.

(2) The pretrial memorandum shall contain the names of all witnesses known to each party at the time of the pretrial conference and expected to be called at the time of the hearing. Witnesses can be added following the pretrial with written notice to the opposing party and the pretrial officer not later than twenty-one (21) days before the hearing date.

(3) Complete statement of what the petitioner seeks and alleges....

(4) Complete statement of defenses used by the opposing party....

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(8) In the absence of unusual circumstances, the pretrial memorandum shall be exchanged by mail in accordance with the procedures established by the Board's secretary and submitted to the opposing party and the Board no later than three (3) working days prior to the scheduled pretrial.

(E) Either party may modify the pretrial memorandum any time up to twenty-one (21) days prior to the hearing for which the pretrial was held. Within twenty-one (21) days of the hearing, modification of a pretrial memorandum can only be done by permission of the pretrial officer or the Board.

4 The Court also noted that the "substantial causation" standard espoused in *Duvall v. Charles Connell Roofing,* Del. Supr., 564 A.2d 1132 (1989) should not be applied in successive carrier disputes. *Standard Distributing Co. v. Nally,* Del. Supr., 630 A.2d 640 (1993). Under the substantial causation standard a claimant may recover, regardless of any preexisting weakness or disease, if it is shown that "the ordinary stress and strain of employment is a substantial cause of the injury." *Duvall v. Charles Connell Roofing,* Del. Supr., 564 A.2d 1132 (1989). According to *Nally,* the substantial causation standard is limited to situations where compensability of the employee's claim is still at stake. *Nally,* 630 A.2d at 645.

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