IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

EARLENE SHAMBURGER-GIVENS,	)	C.A. No. N19A-07-005 MAA
Claimant-Appellant,	)	ON APPEAL FROM THE INDUSTRIAL ACCIDENT BOARD, HEARING NO. 14533984
v.	)	
JOHNSON CONTROLS,	)	
Employer-Appellee.	)	

APPEAL FROM INDUSTRIAL ACCIDENT BOARD

REPORT AND RECOMMENDATION THAT THE DECISION OF THE INDUSTRIAL ACCIDENT BOARD SHOULD BE AFFIRMED

I. INTRODUCTION

This is an appeal from the Industrial Accident Board ("Board"). Appellant, Earlene Shamburger-Givens ("Employee") appeals from a June 12, 2019 Board decision, denying her Petition to Determine Additional Compensation Due. For the reasons stated herein, the Board's decision should be AFFIRMED.

II. FACTUAL AND PROCEDURAL HISTORY[1]

On January 3, 2017, Employee suffered serious injuries in a work accident while pulling a cart from a lift at Johnson Controls ("Employer"). The parties stipulated that the injuries occurred within Employee's course and scope of her employment with Employer. Employee underwent two left shoulder surgeries – one on April 17, 2017 and the second on October 9, 2017. Employer agreed that both surgeries were compensable. In September of 2018, Employee was diagnosed with carpel tunnel syndrome. Two months later, Employee underwent a left carpal tunnel surgery performed by Dr. Morgan. The parties agree that the work injury did not directly cause the carpal tunnel syndrome. However, Employee's expert opined that the left shoulder surgeries directly caused the carpal tunnel syndrome. Employer's expert refutes that the left shoulder surgeries are causally related to the subsequent injury. The Board found that the weight of the evidence supported Employer's views and denied Employee's Petition to Determine Additional Compensation Due. On appeal, Employee argues that substantial weight should have been given to Dr. Morgan's opinions, and therefore, the Board's decision lacks substantial evidence in the record and should be reversed.

[1] The facts set forth herein were adopted from the parties' Stipulation of Facts attached to Trans. ID# 64328159, Employee's Opening Brief at Exhibit A.

III. STANDARD OF REVIEW

In considering an appeal from the Board, the Court is limited to determining whether the Board's conclusions are supported by substantial evidence and free from legal error.[2] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] It is "more than a scintilla but less than a preponderance..."[4] Although the Court reviews legal issues *de novo*,[5] this Court "does not sit as trier of fact with authority to weigh the evidence, determine questions of credibility, or make its own factual findings. It merely determines if the evidence is legally adequate to support the Board's findings."[6] In doing so, the Court reviews the entire record, in a light most favorable to the prevailing party, to determine whether the Board could have fairly, and reasonably,

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[2] *Morgan Properties Payroll Srvs., Inc. v. Bowers*, 2017 WL 2350108, at *2 (Del. Super. May 31, 2017); *Bedwell v. Brandywine Carpet Cleaners*, 684 A.2d 302, 304 (Del. Super. 1996) (citing *Gen. Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960)).

[3] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981), quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

[4] *Id.*, quoting *Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979).

[5] *Whitney v. Bearing Const., Inc.* 2014 WL 2526484, at *2 (Del. May 30, 2014).

[6] *Lecompte v. Christiana Care Health Sys.*, 2002 WL 31186551, at *2 (Del. Super. Oct. 2, 2002); citing *ILC of Dover, Inc. v. Kelley,* 1999 WL 1427805, at *1 (Del. Super.1999). *See also* 29 Del. C. §10142(d).

reached its conclusion, and only if there is no satisfactory proof of support of the Board's factually findings, will this Court overturn the decision.[7]

IV. DISCUSSION

Dr. Morgan testified by deposition for Employee. According to Dr. Morgan, Employee had a rotator cuff repair, and a "certain number" of rotator cuff repairs in her age group develop carpal tunnel after the surgery.[8] Dr. Morgan also testified that women in Employee's age group may have underlying or "subclinical" carpal tunnel and gravity causes the swelling from the healing of the shoulder to travel down to the wrist.[9] Dr Morgan diagnosed Employee's carpal tunnel syndrome in September of 2018 and testified that this was "related to" the work injury surgeries.

In contrast, Dr. Gelman testified that although Employee's theory is plausible, there was no evidence of swelling of the left hand or wrist to have caused Employee's carpel tunnel syndrome and therefore, the surgery and injury were unrelated. Employer also submits that Dr. Morgan did not testify that Employee had post-operative swelling down to her wrist as a result of the surgery that directly caused her to experience carpal tunnel symptoms. In response, Employee argues

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[7] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Supr. 1965); *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1258-59 (Del. 2013) (internal citations omitted).

[8] Trans. ID # 64416784 Ex B, February 5, 2019 Oral Deposition of Craig Morgan, M.D. at p. 8 (hereinafter "Morgan Trans. at ___").

[9] Morgan Trans. at pp. 8, 12.

that Dr. Morgan concluded they were related, and, as the treating physician, his opinion should be accorded "substantial weight."[10]

The Board relied on the following record to support its findings. In March of 2017, Employee was administered an EMG test that was negative for carpel tunnel syndrome. Employee's records reflected an uneventful, normal, recovery from the left shoulder surgeries. In January of 2018, Employee returned to work full-time and full-duty and without event.[11] The carpel tunnel syndrome did not appear until eleven months after the second surgery. During this time, there was no indication of swelling of the hand or wrist in the medical records. Employee testified that she first had symptoms in early July of 2018, but when she saw Dr. Morgan on July 5, 2018, she was asymptomatic, and did not report any swelling in the left hand or wrist.[12] Employee saw Dr. Morgan five times between the second surgery and the September 2018 visit when he noted the onset of pain in his records. Dr. Gelman testified that despite the multiple visits, there was no documentation to evidence swelling in the left hand or wrist.[13] Put simply, Dr. Gelman testified that:

> there is nothing that would have provided a causal relationship, meaning there was no interval injury; there

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[10] *See e.g. Diamond Fuel v. O'Neal*, 734 A.2d 1060, 1065 (Del. 1999).

[11] Dr. Morgan testified that at one point "[s]he was pretty much all better with regards to the shoulder." Morgan Trans. at p. 23.

[12] *See* Board Decision at p. 9.

[13] Employee acknowledges this as well. *See* Board Decision at pp. 8-9.

> are no metabolic factors such as thyroid disease; she is not pregnant; there is no documentation that there was ever any left hand, wrist, or finger swelling postoperatively. So there is no mechanism to suggest or support her acknowledged left shoulder injury and the treatment for her carpal tunnel syndrome.[14]

Ultimately, the Board accepted Dr. Gelman's opinion as more credible and found that the record supported a finding that Employee's carpal tunnel syndrome developed insidiously and is idiopathic.[15]

Employee bore the burden of demonstrating by a preponderance of the evidence that there was a causal connection between the left shoulder surgeries and the occurrence of the carpel tunnel syndrome. Although both experts agreed that theoretically, the shoulder surgery could cause swelling, which could also cause carpel tunnel symptoms, the Board found that the medical records did not demonstrate that Employee experienced the necessary swelling in her left hand or wrist to causally connect the surgery and the carpal tunnel. Employee agrees the Board is free to rely on one expert's opinion over that of another.[16] "Where the Board elects to adopt one expert opinion over another, the adopted opinion

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[14] Trans. ID # 64416784 Ex D, February 25, 2019 Oral Deposition of Andrew J. Gelman, M.D. at p. 13 (hereinafter "Gelman Trans. at ___").

[15] Meaning that there is no specific mechanism to support the diagnosis and it just happened. Gelman Trans. at p. 25.

[16] *DiSabitino Brothers v. Wortman Inc.,* 453 A.2d 102, 106 (Del. Super. 1982); citing *General Motors v. Veasey,* 371 A.2d 1074, 1076 (Del. 1977).

constitutes substantial evidence for the purpose of appellate review."[17] The Board did not disregard the substantial weight to be afforded to Dr. Morgan.[18] Rather, the Board found Dr. Gelman's testimony was more reliable.[19]

Employee also argues that the Board improperly relied on the delay of diagnosis. However, the Board's focus was not on the delay, but rather on an absence of information in the record. The Board concluded that there was no evidence of swelling in the left hand or wrist and Employee had not met her burden of demonstrating by a preponderance of the evidence that the shoulder injury and carpal tunnel were connected. The Board's decision is supported by relevant evidence that is reasonably adequate to support its conclusions and the Board did not abuse its discretion. This Court should not contravene the Board's reconciliation of inconsistent testimony nor intervene in the Board's credibility determinations.[20] The

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[17] *Morgan Prop. Payroll Srvs.*, 2017 WL 2350108, at *3 (internal citations omitted).

[18] *See* Board Decision at p. 16.

[19] In *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060 (Del. 1999), the experts relied on evidence the employee was exposed over nine years to a product with known health hazards and ultimately opined that it was "more likely than not" and "most probable" that the illness and employment were connected. In the present case, the Board found that the absence of swelling in the left hand or wrist, undermined Dr. Morgan's testimony. Dr. Gelman's view that there needs to be swelling or a feeling of numbness to relate the carpel tunnel symptoms to the surgery was found to be more credible.

[20] *Morgan Prop. Payroll Srvs.*, 2017 WL 2350108, at *3, quoting *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1995) (citing *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1106 (Del. 1988)); *Martin v. State*, 2015 WL 1548877, at *3 (Del. Super. Mar. 27, 2015).

decision here is free from legal error, is supported by substantial evidence, and therefore should be affirmed.

V. CONCLUSION

In consideration of the foregoing, it is recommended that the Board's decision be **AFFIRMED**.

IT IS SO ORDERED this 14th day of February, 2020.

Commissioner Katharine L. Mayer