

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

MICHAEL KUGLER, )  
)  
Employee-Below, Appellant, )  
) C.A. No. 08A-08-003 MMJ  
)  
v. )  
)  
)  
WILKINSON ROOFING & SIDING, )  
)  
Employer-Below, Appellee. )

Submitted: November 2, 2009

Decided: February 4, 2010

On Cross-Appeals from a Decision of the Industrial Accident Board

**AFFIRMED**

**MEMORANDUM OPINION**

Matthew R. Fogg, Esquire, Wilmington, Delaware, Attorney for Appellant  
Michael Kugler

Cheryl A. Ward, Esquire, Wilmington, Delaware, Attorney for Appellee  
Wilkinson Roofing & Siding

**JOHNSTON, J.**

Michael P. Kugler (“Claimant”) and Wilkinson Roofing & Siding (“Employer”) have cross-appealed the July 22, 2008 decision of the Industrial Accident Board (“Board”). The Board granted Claimant’s Petition to Determine Additional Compensation Due and awarded Claimant compensation for outstanding medical expenses, four months’ compensation for total disability beginning November 29, 2007, medical witness fees, and attorney’s fees.

On appeal, Claimant argues that the Board erred, in part, by awarding a four-month period of temporary total disability benefits post-operatively in lieu of an open-ended period. Employer, on cross-appeal, argues that the Board’s decision – finding that Claimant’s surgery was reasonable, necessary, and causally related to his work accident – was not supported by substantial evidence.

### **FACTUAL AND PROCEDURAL CONTEXT**

On January 29, 2002, Michael P. Kugler, while in the course and scope of his employment, injured his lower back and left lower extremity as a result of the cumulative detrimental effects of his employment. Employer acknowledged that these injuries were compensable. Claimant received compensation for a 37.65% impairment to his lower back and a 47.5%

impairment to his left lower extremity. He also received the maximum applicable total disability compensation until July 2, 2007.

Claimant underwent two surgeries in 2005 to repair his injuries, the first on January 12, 2005 and the second on March 2, 2005. Despite the surgeries, Claimant continued to experience increasing back and leg pain. Claimant complained to Dr. Uday Uthaman, his pain management doctor, of this increased pain. Following a September 5, 2007 neurological consultation, Dr. Kennedy Yalamanchili noted that Claimant suffered from weakness in his left leg, sensory loss in his left leg, diminished reflexes in both legs, and difficulty with ambulation due to his left leg symptoms.

Dr. Yalamanchili opined that Claimant was chronically disabled due to his lower back and had chronic nerve problems involving his left leg. Because of Claimant's persistent disabling conditions, an increase in narcotic dosage with marginal results, and a lack of improvement from conservative treatment, Dr. Yalamanchili recommended Claimant undergo a third surgical procedure. Claimant underwent the third surgery on November 29, 2007.

On October 4, 2007, Claimant filed a Petition to Determine Additional Compensation Due seeking medical expenses for the third surgical procedure and additional total disability benefits beginning on the date of the

surgery. Employer opposed the petition and argued that the third surgery, following the previous two failed surgeries, was unreasonable and unnecessary. The Board held a hearing on June 3, 2008.

During a May 7, 2008 deposition, Dr. Yalamanchili testified that Claimant's last surgery "generally takes about six to eight weeks [before patients] show any signs of progress." He also testified that the anticipated recovery time was about three to four months, but it could take up to a year to see all the surgical improvements.

From a second physical examination on March 17, 2008, Dr. Yalamanchili noted an improvement in Claimant's leg strength and reflexes, and an overall improvement in Claimant's symptoms. Dr. Yalamanchili opined that Claimant remained significantly disabled and unable to work due to both his narcotic dependence and the risk of re-injury if Claimant performed any non-sedentary activities.

On cross-examination, Dr. Yalamanchili admitted that smoking could inhibit the ability of bone to heal. Dr. Yalamanchili testified that he warned Claimant of the negative effects of his continued smoking, and that Claimant had smoked two packs of cigarettes per day for at least twenty years. Dr. Yalamanchili also stated that Claimant's weight also could adversely affect his lumbar function.

At the hearing, Claimant testified that the two surgeries in 2005 did not alleviate the pain, tingling and numbness in his leg or back. He testified that although the third surgery resolved the symptoms in his legs and a poking sensation he experienced in his back, he continued to have a burning pain in his back, which was alleviated slightly with medication. Claimant testified that he recently had reduced the number of cigarettes he smoked per day and had begun to lose weight. Claimant also testified that Dr. Yalamanchili's physician's assistant conducted the physical examination following the third surgery, and not Dr. Yalamanchili himself.

On behalf of the employer, Dr. Steven Grossinger examined Claimant's medical records and conducted physical examinations of Claimant in April of 2007, October of 2007, and April of 2008. During a May 16, 2008 deposition, Dr. Grossinger testified that Claimant's subjective complaints of pain did not correlate to the objective findings following Claimant's April 2007 and October 2007 examinations. Dr. Grossinger opined that Claimant may have embellished or magnified his symptoms.

Before Claimant's third surgery, Dr. Grossinger noted that the number of procedures Dr. Yalamanchili intended to perform during the surgery, along with Claimant's smoking history, weight, diabetes, and his two previously failed surgeries, lessened the chance of a third surgery's success.

Dr. Grossinger opined that the third surgery was unreasonable and unnecessary.

During the October 2007 examination, Dr. Grossinger found that Claimant's condition remained objectively unchanged since his second and third surgeries. He also noted that Claimant took a higher dose of narcotics following the third surgery than preceding it. From his April 2008 examination of Claimant, Dr. Grossinger again found no objective improvement in Claimant's condition stemming from the third surgery.

On cross-examination, Dr. Grossinger admitted that he does not perform back surgery and that he made his conclusions without having reviewed Dr. Yalamanchili's November 2007 operative report. Dr. Grossinger acknowledged that his reports do not state specifically that Claimant was magnifying his symptoms. Dr. Grossinger also agreed that the medical notes from Dr. Uthaman from May through July 2007 show that he noted Claimant displayed an increase in symptoms leading up to Claimant's surgical procedure. Dr. Grossinger conceded that some objective data taken after the third surgery indicated an improvement in Claimant's condition. He also conceded that Claimant reported to him some subjective improvement in his leg symptoms following the third surgery.

In an opinion dated July 22, 2008, the Board found that Claimant demonstrated, by a preponderance of the evidence, that the third surgery was reasonable, necessary, and causally related to his work injury, that Claimant required four months' total disability benefits to recover, and that Claimant's counsel was entitled to reasonable attorney's fees.

Claimant appealed the Board's ruling on August 7, 2008, challenging the Board's finding that Claimant was limited to four months' total disability benefits. Employer cross-appealed, arguing that the Board's decision, on the causal relationship and the compensability of the surgical intervention, was not supported by substantial evidence.

### **STANDARD OF REVIEW**

On appeal from the Industrial Accident Board, the Superior Court must determine if the Board's factual findings are supported by substantial evidence in the record.<sup>1</sup> "Substantial evidence" is less than a preponderance of the evidence but is more than a "mere scintilla."<sup>2</sup> It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>3</sup> The Court must review the record to determine if the evidence is legally adequate to support the Board's factual findings.<sup>4</sup> The Court does

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<sup>1</sup> *Histed v. E.I. DuPont deNemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>2</sup> *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

<sup>3</sup> *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (1981)).

<sup>4</sup> *Johnston v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

not “weigh evidence, determine questions of credibility or make its own factual findings.”<sup>5</sup> If the record lacks satisfactory proof in support of the Board’s finding or decision, the Court may overturn the Board’s decision.<sup>6</sup> On appeal, the Superior Court reviews legal issues *de novo*.<sup>7</sup>

## **DISCUSSION**

### ***Claimant’s Third Surgery Was Reasonable and Necessary***

Employer asserts that the Board’s findings are not supported by substantial evidence.

Following the hearing, the Board found that Claimant had demonstrated, by a preponderance of the evidence, that the third surgery was reasonable, necessary, and causally related to his work injury. The Board first found that Claimant’s condition had deteriorated in the time between his second and third surgeries, resulting in a necessary neurological consultation.

Although Dr. Grossinger opined that Claimant did not demonstrate a change in condition following his second surgery, the Board found that this conclusion contradicted Dr. Grossinger’s own admission that Claimant’s right leg symptoms in May of 2007 were “new.” The Board recognized Drs. Yalamanchili and Uthaman’s corroborating evidence in the form of

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<sup>5</sup> *Olney*, 425 A.2d at 614.

<sup>6</sup> *Johnson*, 213 A.2d at 66-67.

<sup>7</sup> *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del 2009).



Claimant's subjective complaints, a May 2007 MRI, and physical examinations. In light of the corroborating evidence, the Board found Claimant to be "very credible" regarding the deterioration in his condition beginning around May 2007.

The Board next found that Dr. Yalamanchili's decision to recommend additional surgery was reasonable. The Board recognized that Claimant's condition did not improve with conservative treatment and increased medication only yielded marginal improvement.

The Board did not agree with Dr. Grossinger's opinion that the surgery was unreasonable due to the fifty-fifty chance of significant success. The Board found that Dr. Yalamanchili was clear that "Claimant's chance for *significant improvement* would be fifty-fifty," considering Claimant's risk factors. Nevertheless, Dr. Yalamanchili's opinion did not preclude all improvement. The Board found that the determination of a patient's candidacy for surgery, in light of the relevant risk factors, is best left to the treating physician.

The Board next disagreed with Dr. Grossinger's assertion that repeated surgery in light of the previously unsuccessful surgeries was unreasonable and unnecessary. Although Dr. Yalamanchili agreed with Dr. Grossinger's general assertion that repeated surgeries on the same area of the

spine yield very low success rates, he countered that the third surgery was on a section of Claimant's spine separate from those previously targeted. For that reason, the Board found Dr. Grossinger's rationale inapplicable to their analysis.

Finally, in response to Dr. Grossinger's opinion that the November 2007 surgery was not justified because Claimant did not show any subsequent improvement, the Board noted that the outcome of any surgical procedure, whether successful or otherwise, is not absolutely determinative of the reasonableness and necessity of the procedure. The Board also disagreed with Dr. Grossinger's assertion that Claimant had not shown any improvement from the third surgery. Both Dr. Yalamanchili and Claimant testified that, although Claimant still experienced some back pain, the pain in his legs had significantly diminished and Claimant's leg strength and reflexes were improved. Dr. Grossinger himself testified that Claimant had a "normal gait" and no longer relied on the assistive devices he previously used. Dr. Grossinger also admitted that he had not reviewed any of Dr. Yalamanchili's post-operative reports, relying instead only on his own physical examinations.

Employer does not claim that the Board committed any legal errors, only that the Board's conclusions are not supported by substantial evidence.

In coming to its decision, the Board reviewed the medical evidence submitted and the testimony of Claimant, Dr. Yalamanchili and Dr. Grossinger. When both conflicting expert opinions are supported by substantial evidence, the Board is free to accept one opinion over the other opinion.<sup>8</sup> The Court should defer to the Board's "experience and specialized competence" in its findings of fact.<sup>9</sup>

After reviewing the totality of the evidence, the Board accepted the opinion of Dr. Yalamanchili over that of Dr. Grossinger. That decision was within the Board's purview. Employer has failed to demonstrate that the Board's findings were not supported by substantial evidence in the record.

***Claimant was Totally Disabled For a Period of 4 Months***

The Delaware Code provides, in part: "For injuries resulting in total disability occurring after July 1, 1975, the compensation to be paid during the continuance of total disability shall be 66 2/3% of the wages of the injured employee."<sup>10</sup> The term "total disability" as used within the statute is not to be interpreted as "utter helplessness."<sup>11</sup> "Total disability" means "a disability which prevents an employee from obtaining employment

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<sup>8</sup> *Standard Distrib. v. Hall*, 897 A.2d 155, 158 (Del. 2006).

<sup>9</sup> 29 Del. C. § 10142(d) (2009) ("The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.")

<sup>10</sup> 19 Del.C. § 2324.

<sup>11</sup> *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967).

commensurate with his qualifications and training” and may be found “if the claimant's physical condition is such as to disqualify him from regular employment in any well-known branch of the labor market.”<sup>12</sup>

Dr. Yalamanchili testified over four months after the surgery that Claimant remained “significantly disabled” and was “unable to work under further assessment.” Although Dr. Yalamanchili testified that Claimant remained totally disabled, the Board found that Claimant required total disability benefits for a closed period of four months to recover from the surgery. The Board found that Dr. Yalamanchili’s conclusions were speculative and contradicted by Claimant’s testimony.

Dr. Yalamanchili testified that the typical recovery period following the third surgery was three to four months. Although he stated that full recovery could take up to a year, the Board found the latter assertion speculative, especially in light of the evidence that Claimant’s weight and continued smoking might hinder recovery. The Board noted that although Dr. Yalamanchili testified about Claimant’s risk of re-injury, he stated that the risk arose if Claimant performed activities above a sedentary level. The surgery would not preclude him from sedentary work after four months.

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<sup>12</sup> *Id.*

Further, the Board did not credit Dr. Yalamanchili's assertion that Claimant's narcotic intake would prevent him from returning to work. The Board noted that Claimant did not testify about any functional difficulties due to his medication and that Claimant had driven himself to the hearing. Claimant did not testify about any negative side effects from the medication. He testified that the medication reduced his back and leg pain but that his back pain was still the same as it was before his surgery. He stated that medication and physical therapy made the pain tolerable.

Employer did not challenge Claimant's entitlement to *temporary* disability benefits from the date of the November 29, 2007 surgery.

When seeking to terminate total disability benefits, the employer has the initial burden to demonstrate that the employee was not completely incapacitated for work.<sup>13</sup> “[U]ncontradicted evidence need not necessarily be accepted as true, where there is evidence or circumstances from which contrary inferences may be drawn.”<sup>14</sup>

In this case, Claimant's evidence of total disability, beyond the four-month period following surgery, was disputed and inconsistent. The Court

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<sup>13</sup> *Chrysler Corporation v. Duff*, 314 A.2d 915, 918 n. 1 (Del. 1973).

<sup>14</sup> *Chrysler Motors Corp. v. Howe*, 1996 WL 111142, at \*2 (Del. Super. 1996) (quoting *Miller Land Constr. v. I.A.B.*, Del. Super., C.A. No. 89A-MR1, Lee, J. (May 1, 1990)); see also *Sears, Roebuck & Co. v. Farley*, 290 A.2d 639, 641 (Del. 1972) (relying on *DeBernard v. Reed*, 277 A.2d 684 (Del. 1971)).

finds that the Board's award of four months of total disability benefits was supported by substantial evidence in the record.

**CONCLUSION**

The Court, having found that the Board's July 22, 2008 Decision granting Claimant outstanding medical expenses for the November 29, 2007 surgery and other related medical treatment, a four-month period of total disability beginning November 29, 2007, and attorney's fees, was supported by substantial evidence in the record, hereby **AFFIRMS** the decision in its entirety.

**IT IS SO ORDERED.**

**/s/ Mary M. Johnston**  
The Honorable Mary M. Johnston