SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Elizabeth B. Lewis, Esquire
Jacobs & Crumplar
2 East 7th Street
P.O. Box 1271
Wilmington, Delaware 19899
Attorney for Appellant-Employee Holly Noel-Liszkiewicz

Cassandra F. Roberts, Esquire
William E. Gamgort, Esquire
Young Conaway Stargatt &Taylor, LLP
1000 North King Street
Wilmington, Delaware 19801
Attorneys for Appellee-Employer La-Z-Boy, Inc.

Re: Holly Noel-Liszkiewicz v. La-Z-Boy, Inc.
C.A. No. 12A-01-012-RRC

Submitted: July 11, 2012
Decided: October 3, 2012

On Appeal from a Decision of the Industrial Accident Board.
AFFIRMED.

Dear Counsel:

I. INTRODUCTION

Employee-Appellant Holly Noel-Liszkiewicz ("Employee") seeks review of a decision of the Industrial Accident Board denying her petition for compensation. At her Board hearing, she contended that chemical exposure at her employer's facility caused her pulmonary fibrosis. Her employer, La-Z-

Boy, Inc., ("Employer") argued that her illness was not occupational. The Board denied her claim and later motion for reargument.

Employee appeals to this Court, asserting that the Board (1) required an unfair burden of proof by requiring that Employee demonstrate an occupational disease to a "medical certainty," rather than by a preponderance of the evidence; (2) improperly favored Employer's medical expert's testimony; (3) improperly rejected Employee's industrial hygienist testimony; and (4) considered Employer's medical expert testimony, despite alleged discovery violations. The Court finds that the Industrial Accident Board did not impose an unfair burden of proof, and had discretion to determine the credibility of all experts and the weight to be afforded to their testimony. The Board did not in any event utilize the challenged evidence in its decision and Employee was not prejudiced by alleged discovery violations. The Board's decision is supported by substantial evidence and the Board otherwise committed no errors of law. Therefore, the Board's determination is **AFFIRMED**.

II. FACTUAL AND PROCEDURAL HISTORY

The facts are extensive but may fairly be summarized as follows:

In July 2007, Employee began working as a customer service representative at Employer's facility in New Castle, Delaware. Employee's job required her to spend time in an area where furniture was repaired. Employee claims she immediately noticed a chemical odor that caused coughing, dry throat, and headaches. She asserted that these symptoms would dissipate when Employee was at home, but would aggravate while at work. Employee acknowledged to the Board that she did not see a doctor early on and instead treated with over-the-counter medications.

Employee's symptoms allegedly worsened in November 2007, coinciding with an increased furniture repair workload during the winter holiday season. Employee contends that many coworkers complained about the odor. By October 2008, Employee had been promoted and spent more time in the repair area. She testified that her symptoms worsened, including aggravated coughing, shortness of breath, and fatigue. Ultimately, Employee sought assistance from her family doctor. Employee was laid off in November 2008 and subsequently complained of headaches, dry cough, shortness of breath, and fatigue. Even after securing employment at a bank,

Employee's condition worsened, ultimately requiring that she be sent home from work in December 2009.

In September 2010, Employee petitioned the Industrial Accident Board ("Board") seeking compensation alleging an occupational disease stemming from chemical exposure at Employer's facility. At the hearing, Employer contended that Employee suffered no employment related injury or illness.

Several hearing witnesses provided testimony germane to this appeal including two coworkers employed in similar positions. Jessica Stewart testified regarding dirty workplace conditions, poor ventilation, and harsh fumes. Stewart explained that she also suffered frequent sinus infections, red eyes, coughing and generally felt ill. Stewart contended that she noticed similar symptoms in her colleagues. Jo Griffith testified that she noticed fumes and asserted they caused her nausea, weight loss, headaches, and reduced appetite. While Griffith explained she had long suffered from migraines, Griffith asserted her migraines were more intense and frequent while working for Employer.

Employee's physician, Nicholas Biasotto, M.D. testified on Employee's behalf. Dr. Biasotto was a board certified family practitioner and Employee's primary care physician. He stated that within six months after her discharge from Employer, Employee reported fatigue. Employee was diagnosed with mild sleep apnea and reduced oxygenation. Dr. Biasotto's initial diagnosis was that the oxygenation reduction may have resulted from chemical exposure. Later, Employee supplied Dr. Biasotto with a list of all chemicals utilized by Employer. Dr. Biasotto testified that throughout treatment, Employee's condition continually deteriorated. Dr. Biasotto concluded that Employee suffered from interstitial lung disease secondary to chemical exposure.

Joseph Guth, Ph.D. testified for Employee by deposition. Dr. Guth is a certified Industrial Hygienist, who by trade detects, recognizes, evaluates, and controls workplace hazardous materials, compounds, or conditions. Dr. Guth testified retrospectively that several offending agents could have caused Employee's conditions. Dr. Guth explained that the chemical mixture could cause more damage than a pure exposure of one offending chemical.

Orn Eliasson, M.D., M.P.H., also testified for Employee by deposition. Dr. Eliasson is a certified "B-reader." A B-reader interprets x-rays for

workplace conditions such as pneumoconiosis, asbestosis, and silicosis. Employee presented to Dr. Eliasson in June 2010 with coughing, shortness of breath, swollen ankles, and general symptom worsening. Dr. Eliasson's examination revealed markedly decreased breathing sounds and severely abnormal lung function. Dr. Eliasson asserted that Employee's illness resulted from exposure at Employer's facility. Dr. Eliasson relied upon Employer's data sheets, which identified chemicals used at the facility. Dr. Eliasson explained that Employer utilized numerous chemicals known to cause occupational asthma and hypersensitivity lung disease. After numerous visits and tests, Dr. Eliasson concluded that Employee's workplace caused pulmonary fibrosis, occupational asthma, and respiratory failure.

John Curtis, M.D. testified on Employer's behalf. Dr. Curtis is a medical toxicologist who analyzes chemicals and biological agents such as toxins, venoms, and their physiological interactions. To prepare for his testimony, Dr. Curtis examined Employee and produced a written report that was forwarded to Employee's counsel. In exchange, Dr. Curtis was provided with Dr. Guth and Dr. Eliasson's expert reports. After reviewing all the proffered reports, Dr. Curtis conducted additional research, including visiting the facility and reading a report analyzing a different Employer facility. As discussed below, this forms the basis for one of Employee's claims.

Dr. Curtis disagreed with Employee's experts' diagnoses. Dr. Curtis conducted certain tests, which contradicted Dr. Eliasson's conclusions and questioned Dr. Eliasson's methods. Dr. Curtis testified that his testing was "more precise" than Dr. Eliasson's. Dr. Curtis also disagreed with Dr. Eliasson's findings regarding the toxic agents used at Employer's facility. Dr. Curtis found the agents that Dr. Eliasson described as harmful to be either present only in trace amounts incapable of causing harm, or to be misunderstood by Dr. Eliasson. Finally, Dr. Curtis testified that Employee's alleged chronological disease progression did not comport with Dr. Eliasson's diagnosis.

The testimony began and concluded in August 2011. In November 2011, the Industrial Accident Board ("the Board") issued a decision denying Employee's petition. Employee moved for reargument, asserting that she had been denied a fair hearing because Dr. Curtis had completed additional research and visited the facility after issuing the report and then subsequently testified beyond its scope. Employee moved to reargue the decision on those grounds despite not objecting during the hearing. Employer argued in

response that Dr. Curtis' opinion did not change after his expert report's issuance. The Board denied reargument in December 2011. This appeal followed.

III. THE PARTIES' CONTENTIONS

A. Employee's Contentions

Employee adduces four grounds that Employee contends compel the Court to overturn the Board's findings. First, Employee argues that the Board erred by requiring claimant to demonstrate her occupational disease to a medical certainty, rather than by a preponderance of the evidence. Employee argues that it is "impossible" for an ordinary employee to prove an occupational disease retrospectively because of their limited access to information and scientific evidence.

Second, Employee contends the Board abused its discretion by favoring Dr. Curtis' testimony, and by rejecting Dr. Biasotto and Dr. Eliasson's treating physician testimony. Employee argues that the Board's rejection of Employee's medical experts is based on "weak reasoning and misinformation."[1]

Third, Employee asserts that the Board abused its discretion by misconstruing evidence regarding testimony from Employee's industrial hygienist, Dr. Guth. Employee argues the Board improperly attributed less credibility to Dr. Guth because his testimony lacked statistical analysis and specificity about coworkers' ailments, despite two coworkers testifying separately.

Fourth, Employee argues that the Board wrongly based its decision on testimony provided by Dr. Curtis about information not contained within his expert report. Employee asserts that the employer never provided information about Dr. Curtis' additional work or alterations to his expert opinion, and that such a failure contradicted Employee's fundamental right to a fair hearing.[2]

---

[1] Employee's Opening Br. at 25.

[2] In her Reply Brief, Employee attempted to introduce evidence that was not produced before the Board. The new evidence included prescription records, an affidavit from Jessica Stewart, and an explanation of a federal lawsuit. Employer objected. The Court

B. Employer's Contentions

Employer argues that the Board did not legally err because it did not require that Employee demonstrate to a medical certainty that her occupational disease resulted from toxic workplace exposure. Rather, Employer contends that Employee failed to meet the appropriate burden of proof, which required proof by a preponderance of the evidence.

Second, Employer asserts that the Board had discretion to determine expert credibility and acted within that discretion in valuing Employer's medical testimony.

Third, Employer contends that no discovery violation occurred because the information contested was not responsive to Employee's production request because the evidence was collected at a different location and was not relied upon in the expert's opinion.

Last, Employer contends that Dr. Curtis' testimony regarding the facility tour did not constitute an abuse of discretion because the Board ignored the particular testimony and declared it irrelevant to its decision.

IV. STANDARD OF REVIEW

On appeal from a decision of the Industrial Accident Board, the Court's role is limited to determining whether substantial evidence supported the Board's findings, and whether the decision was legally correct.[3] Substantial evidence requires such relevant evidence as a reasonable mind might accept as adequately supporting a conclusion.[4] Legal questions are reviewed *de novo*.[5] When considering the facts, the court

---

finds that the late evidence production is not proper and the Court does not consider it. *See Bradley v. State*, 2003 WL 22232814, at * 5 (Sept 16, 2003) (holding that "[d]ecisions of the Board that are appealed to this Court will be decided on the record. Matters outside of the record below may not be considered on appeal, including evidence or testimony not properly admitted before the Board.") (internal citations omitted).

[3] *Munyan v. Daimler Chrysler Corp.,* 909 A.2d 133, 136 (Del. 2006).

[4] *Histed v. E.I. Du Pont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1993).

[5] *Munyan,* 909 A.2d at 136.

defers to the Board's expertise and competence.[6] The Board determines witness credibility, not the court.[7] An administrative appeal record must be viewed in the light most favorable to the prevailing party below.[8] The court must uphold a Board's decision that is supported by substantial evidence even if, in the first instance, the reviewing Judge might have decided the case differently.[9] If medical evidence is in conflict, as factfinder, the Board must resolve the conflict.[10] In a battle of experts, the Board is ordinarily free to favor one expert's testimony.[11] Where the Board appropriately adopts one expert opinion over another, the opinion adopted by the Board constitutes substantial evidence for appellate review.[12]

V. DISCUSSION

A. The Board Properly Required Employee to Demonstrate an Occupational Disease by a Preponderance of the Evidence.

Workers' compensation is the exclusive remedy for injuries arising from employment, regardless of fault.[13] Workers' compensation provides redress for work related injuries and attempts to relieve the expense and uncertainty of civil litigation.[14] Workers' compensation laws are intended primarily to benefit the employee and should be liberally construed.[15] A

[6] *Histed,* 621 A.2d at 342. *See also* 29 *Del. C.* § 10142(d) ("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.").
[7] *Simmons v. Delaware State Hosp.,* 660 A.2d 384, 388 (Del. 1995).
[8] *Sewell v. Delaware River and Bay Authority,* 796 A.2d 655, 660 (Del. Super. 2000).
[9] *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 653 (Del. 1973).
[10] *Munyan*, 909 A.2d at 136.
[11] *See Standard Distrib. Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993) ("[T]he Board [is] entitled to accept the testimony of one medical expert over the views of another.").
[12] *Munyan,* 909 A.2d at 136.
[13] 19 *Del. C.* § 2304.
[14] *Kofron v. Amoco*, 441 A.2d 226, 231 (Del. 1982).
[15] *Magness Construction Company v. Water*, 269 A.2d 554,555 (Del. 1970).

claimant bears the burden of establishing the claim by a preponderance of the evidence.[16]

"[D]iseases arising from the nature of employment are among the cost of production [that] industry must bear."[17] For an occupational disease to be compensable, "evidence is required that the Employer's working conditions produce the ailment as a natural incident of the employee's occupation. . . ."[18] Toxic exposure need not be proven to a scientific/medical certainty.[19] A claimant must only demonstrate that it is more likely than not that the employer's working conditions produced the ailment.[20] However, simply contracting or aggravating a condition is insufficient; the standard requires that the conditions produce the ailment.[21]

The Board held Employee to the proper standard of proof at the hearing as articulated clearly in the Board's decision. The Board reasoned that "[a]fter weighing the evidence, the Board finds that Claimant has failed to prove by a preponderance of the evidence that her current respiratory problems were caused by exposure to chemicals in the workplace at La-Z-Boy."[22] In the Board's concluding paragraph, the Board emphasized that

> [t]he evidence reviewed above supports Dr. Curtis' opinion finding no causal relationship between Claimant's current pulmonary condition and her work environment at La-Z-Boy. . . . The Board need not determine whether Dr. Eliasson or Dr. Curtis is ultimately correct in his diagnoses regarding Claimant's current pulmonary condition. . . .The Board is satisfied, however, that the evidence does not prove, by a preponderance of the evidence, that Claimant's current respiratory problems were caused by work environment at La-Z-Boy.[23]

---

[16] 29 *Del. C.* § 10125(c); *Goicuria v. Kauffman's Furniture*, 1997 WL 817889, at *2 (Del. Super. Oct. 30, 1997), *aff'd,* 706 A.2d 26 (Del. 1998).
[17] *Raffery v. Hartman Walsh Painting Co*., 760 A.2d 157, 159 (Del. 2000).
[18] *Anderson v. General Motors Corp*., 442 A.2d 1359, 1361 (Del. 1959).
[19] *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Diamond Fuel Oil v. O'Neal*, 783 A.2d 1060, 1065 (Del. 1998).
[20] *Steppi v. Conti Electric, Inc.*, 991 A.2d 19 (Del. 2010) (TABLE).
[21] *Anderson*, 442 A.2d at 1361.
[22] *Holly Noel-Liszkiewicz v. La-Z-Boy*, Hearing No. 1358425, Decision on Petition to Determine Compensation Due, (Nov. 3, 2011) at 25.
[23] *Id*. at 30.

While workers' compensation laws are intended primarily to benefit employees, Employee has failed to demonstrate a legal error requiring the Board's reversal. The Board held Employee to the proper burden of proof by requiring a preponderance of the evidence. The Board found insufficient evidence that Employer's workplace conditions caused Employee's condition. The Board did not legally err as it applied the proper burden of proof and substantial evidence otherwise supported the Board's findings.

B. The Board Could Apportion Credibility to Expert Testimony in its Discretion.

Employee relies upon the so-called "treating physician rule," which provides deference to opinions of treating physicians because of the doctor's familiarity with the patient's condition.[24] Delaware has not explicitly adopted the treating physician rule, but Delaware courts and the Board have found treating physician testimony more credible than non-treating physician testimony in some cases, based on the case's particular facts.[25]

Employee relies upon *Diamond Fuel Oil v. O'Neal*[26] to assert that greater weight should be accorded to treating physician opinions. In *O'Neal*, the Supreme Court affirmed the Superior Court's reversal of a Board decision and found that substantial evidence did not support the Board's decision.[27] The Supreme Court cited to cases about other jurisdictions' treating physician rules to emphasize that substantial evidence was lacking.[28] While the Supreme Court noted that treating physicians often benefit from patient familiarity, the Court also found the treating physician's testimony more credible because it was more direct and non-conjectural than conflicting expert testimony.[29]

---

[24] *Appeal of Morin*, 669 A.2d. 207, 210 (N.H. 1996).
[25] *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060 (Del. 1999); *Valmont Structures v. Mode*, 2010 WL 4188303 (Del. Super. Oct. 8, 2010); *Diocese of Wilmington v. Williams*, 2009 WL 989175 (Del. Super. Apr. 13, 2009).
[26] *O'Neal*, 734 A.2d 1060 (Del. 1999).
[27] *Id*. at 1066.
[28] *Id*. at 1065
[29] *Id.*

The Board is free to choose between competing expert opinions that are each supported by substantial evidence.[30] Instead of adopting the treating physician rule, Delaware courts have emphasized the Board's flexibility both as factfinders and in making expert witness credibility determinations, irrespective of treating doctor status.[31] When conflicting expert opinions are presented, it can be appropriate for the Board to accord more weight to a non-treating expert over a conflicting treating expert, provided substantial evidence is proffered.[32]

The Board acted within its discretion in according more credibility to Dr. Curtis' testimony over that of Employee's medical testimony. Substantial evidence supported the Board's credibility assessment. In part, substantial evidence is fulfilled by Employee's late reporting of symptoms and not seeking treatment until after her discharge. Additionally, the Board relied upon Dr. Curtis' diagnostic test results.

The Board's finding credibility in Dr. Curtis' testimony over Employee's experts was not an abuse of discretion and was supported by substantial evidence. "Where substantial evidence exists to support conflicting expert opinions, the Board is free to choose one expert testimony over that of another."[33] "[I]t is the role of the Board, not this Court, to resolve conflicts in testimony and issues of credibility and decide what weight is to be given to the evidence presented."[34]

C. The Board Acted Within Its Discretion in not Finding Dr. Guth's Testimony Credible.

The Board discounted Dr. Guth's opinion in part because Dr. Guth admitted the retrospective analysis of environmental exposure required *post hoc* assumptions.[35] The Board found that Dr. Guth made incorrect

---

[30] *Disabatino Bros. v. Wortman*, 453 A.2d 102, Del. 1982); *Peden v. Dentsply Int'l*, 2004 WL 2735461, at *5 (Del. Super. Nov. 1, 2004);
[31] *Clements v. Diamond State Port Corp*., 831 A.2d 870, 877-78 (Del. 2003).
[32] *Id*. at 877.
[33] *State v. Cornish*, 1995 WL 413252, at * 3 (Del. Super. June 8, 1995) (citations omitted).
[34] *Id*. (citations omitted).
[35] *Holly Noel-Liszkiewicz v. La-Z-Boy*, Hearing No. 1358425, Decision on Petition to Determine Compensation Due, (Nov. 3, 2011) at 26-27.

assumptions in his analysis. The Board cited the lack of coworker ailment specificity and quantifiable data as undermining Dr. Guth's testimony.

Like the treating physician testimony, the Board's accordance of credibility to Dr. Curtis over Employee's experts was not an abuse of discretion and was supported by substantial evidence.[36] The Board was entitled to determine that a lack of statistical evidence undermined the testimony when that absence did not alone underlie the denial, but rather was one factor compelling the Board's decision.[37] The Board had sufficient evidence and Employee has not demonstrated that the Board's credibility determination constituted an abuse of discretion.

D. The Board's Determination was not Impacted by the Portions of Dr. Curtis' Testimony Challenged by Employee.

The Board "is not strictly bound by the Delaware Rules of Evidence."[38] It "may relax the rules of evidence and allow the proceedings to be less formal than a trial."[39] "The Board may not, however, relax rules which are designed to ensure the fairness of the procedure."[40] Discovery violations may compel this Court to reverse a Board decision.[41]

Prior to the Board hearing, Employee had requested that Employer produce "any and all reports or documentation from any expert concerning the claimant as well as a current CV or resume for any such expert."[42] The request additionally provided that "this request is continuing and must be supplemented as additional materials are received."[43]

---

[36] "Where substantial evidence exists to support conflicting expert opinions, the Board is free to choose one expert testimony over that of another. …"[I]t is the role of the Board, not this Court, to resolve conflicts in testimony and issues of credibility and decide what weight is to be given to the evidence presented." *Cornish*, 1995 WL 413252, at *3 (Del. Super. June 8, 1995) (citations omitted).
[37] *Minner v. Dean Whitter/Discover Card*, 723 A.2d 839 (Del.1998) (TABLE).
[38] *Gehr v. State*, 2000 WL 305495 (Del. Super. Jan. 31, 2000)
[39] *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995).
[40] *Id*.
[41] *Delaware Home and Hosp. v. Martin*, 2012 WL 1414083, at *1 (Del. Super. Feb 21, 2012).
[42] See Employee's Opening Br. at Ex. H ¶2.
[43] *Id*.

In *Delaware Home and Hospital v. Martin*, an employee failed to fully disclose information in response to discovery, yet the Board awarded compensation for the employee.[44] The Superior Court reversed and remanded the case because the inadequate disclosure prevented effective cross examination and thus thwarted a fair Board adjudication.[45]

Employee in this case moved to reargue the Board's decision, asserting that she was denied a fair hearing because Dr. Curtis had completed additional research and had visited Employer's facility after issuing his expert report, and then subsequently testified beyond the report's scope. In its opinion on the motion for reargument, the Board stated there was no evidence that the Employer's expert report changed from the expert report's issuance until his live testimony at the Board hearing. The Board specifically reasoned that:

> [t]here is no evidence any reports or other documents upon which the experts relied was withheld from the opposing party prior to the hearing. Claimant cites no specific instances to support her contention that Dr. Curtis testified 'far beyond' the four corners of his report, and the Board disagrees that Dr. Curtis' opinions expressed at the hearing were materially different from those written in his report. Dr. Curtis and the other experts had ample opportunity to review each others' reports and, as is appropriate, took the opportunity during their testimony to comment on or rebut the opposing opinions.[46]

Additionally, the Board unequivocally rejected Dr. Curtis' testimony insofar as it addressed his facility tour.

> Furthermore, the visit by Dr. Curtis to the La-Z-Boy facility in June 2011 had no impact on the Board's decision in this case. It became clear during the testimony presented at the hearing that extensive changes had been made to facility between the time Claimant worked there and the time Dr. Curtis

[44] *Delaware Home and Hosp.*, 2012 WL 1414083, at *1.
[45] *Id*. at 2.
[46] *Holly Noel-Liszkiewicz v. La-Z-Boy*, Hearing No. 1458425, Order on Motion for Reargument (Dec. 28, 2011) at 2.

> visited the facility, including the addition of a new ventilation system. This rendered any observations Dr. Curtis may have made about the facility during his visit irrelevant.[47]

There is no evidence that Dr. Curtis' facility tour changed his opinion. Notably, the facility tour had no bearing upon the Board's decision because extensive changes had been made to the facility in the interim, rendering the expert's observations irrelevant. While Employee contends that the lack of notice regarding the expert's facility tour prohibited adequate preparation for the hearing, the Board's rules do not allow claimants to tour facilities because such tours are contrary to the policy favoring speedy resolution of workers' compensation claims.[48] Finally, while the Delaware Rules of Evidence are relaxed before the Board, admissibility objections must be made at the hearing or are waived because timely objections are required to preserve evidentiary issues for appeal.[49]

The Board did not base its determination upon Dr. Curtis' site tour because the Board deemed it irrelevant. There is no indication that Dr. Curtis' opinions changed after considering a report from another facility. While Dr. Curtis' testimony was perhaps not as directly duplicative of his expert report as possible, this evidence was not outcome determinative, did not prejudice Employee, and did not inhibit the Board's substantial evidence.

VI. CONCLUSION

As noted, the Court must defer to the Board's expertise.[50] This Court does not weigh evidence, resolve credibility questions, or make its own factual findings.[51] An administrative appeal record must be viewed in the light most favorable to the prevailing party below.[52] The Board was free to favor one expert's testimony over that of another expert.[53] Here, the Board

---

[47] *Id*. at 3.
[48] *Gonzalez v. Allen Family Foods, Inc*., Industrial Accident Board ORDER, Hearing No. 1365037 (Feb. 2, 2012).
[49] *Standard Distributing, Inc v. Hall*, 987 A.2d 155, 158 (Del. 2006); *Smith v. R.A.M. Construction Co.*, 2010 WL 3946283, at *8 (Del. Super. Sept. 29, 2010).
[50] *Histed,* 621 A.2d at 342. *See also* 29 *Del. C.* § 10142(d).
[51] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965).
[52] *Sewell,* 796 A.2d at 660.
[53] *Standard Distrib. Co.,* 630 A.2d at 646.

favored Dr. Curtis over Employee's experts, as legally permitted. The Court must uphold a Board's decision that is supported by substantial evidence even if, in the first instance, the reviewing Judge might have decided the case differently.[54]

For all the reasons stated in this Opinion, the Decision of the Industrial Accident Board is **AFFIRMED**.[55]

IT IS SO ORDERED.

_____
Richard R. Cooch, R.J.

cc: Prothonotary
Industrial Accident Board

[54] *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 653 (Del. 1973).
[55] Employee's present counsel did not represent Employee before the Board, and entered her appearance in this Court on July 18, 2012, after briefing had been completed.