IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JAMES D. STONE,	)	
	)	
Employee-Appellant,	)	C.A. No. 07A-01-010 MMJ
	)	
v.	)	
	)	
VPI, LLC,	)	
	)	
Employer-Appellee.	)	

Submitted: November 14, 2007
Decided: February 13, 2008

UPON APPEAL FROM A DECISION OF
THE INDUSTRIAL ACCIDENT BOARD
REVERSED AND REMANDED

MEMORANDUM OPINION

R. Stokes Nolte, Esquire, Nolte and Associates, Wilmington, Delaware, Attorney for Employee-Appellant.

Sally E. Sobczyk, Esquire, Margolis Edelstein, Wilmington, Delaware, Attorney for Employer-Appellee.

JOHNSTON, J.

The claimant below, James D. Stone ("Employee"), appealed the Industrial Accident Board's ("IAB") January 16, 2007 decision.[1] The IAB opinion granted in part and denied in part VPI, LLC ("Employer")'s Petition for Termination of Benefits. On appeal, Employee argues that the IAB erred in its opinion granting Employer's petition by ordering a reduction of partial disability benefits. Employee asserts that the IAB misconstrued Employer's petition because instead of considering ***total*** disability benefits, the IAB reduced Employee's ***partial*** disability benefits. Employee asserts that it is clear from the record that both parties litigated the payment of total disability benefits, and not partial disability benefits. Employee claims that due to misinterpretation of the procedural posture, the IAB applied the incorrect legal standard. Employee asserts that the IAB's decision is defective as a matter of law and fact and, therefore, the decision should be remanded.

Employer argues that the IAB's opinion is supported by substantial evidence and is free from legal and factual errors.

[1] The IAB hearing was on October 23, 2006.

FACTUAL AND PROCEDURAL CONTEXT

On May 30, 2000, Employee suffered compensable injuries to his right shoulder while working as a mechanic for Employer. Beginning July 2, 2001, by agreement, Employee received $434.68 per week temporary total disability compensation. The compensation rate for total disability was based on Employee's weekly wage of $808.00 at the time of the work-related accident. Pursuant to a subsequent agreement by the parties, Employee began receiving partial disability benefits at the same maximum compensation rate as the total disability benefits.

Employer filed a Petition for Termination of Benefits. Following a hearing on the merits in March 2003, the IAB denied Employer's termination petition and determined that Employee's cervical spine complaints were related to a June 2001 recurrence of injuries that related back to the May 2000 work injury.[2] In 2004, pursuant to subsequent agreements, Employer paid Employee permanent impairment benefits for 28% loss of use of the cervical spine; and 20% loss of use of the upper extremity.

On March 30, 2006, Employer filed another Petition for Termination of Benefits, alleging that Employee was physically able to return to work and that Employee's disability had terminated or diminished. Employee opposed the

[2] The IAB's decision on the merits is dated May 20, 2003.

petition. The IAB's January 16, 2007 opinion granted Employer's petition in part by reducing Employee's partial disability benefits to $239.95 per week.

STANDARD OF REVIEW

On appeal from the IAB, the role of the Superior Court is limited to examining the record for errors of law and determining whether the record contains substantial evidence to support the IAB's findings of fact and conclusions of law.[3] The Superior Court, sitting as an appellate court, is not the trier of fact and does not have the authority to "weigh the evidence, determine questions of credibility and make its own factual findings and conclusions."[4] Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[5] "When conflicting expert opinions are each supported by substantial evidence, the Board is free to accept one opinion over the other opinion."[6] When an expert's opinion relies largely on claimant's own statements, and the trier of fact finds the underlying facts to be in conflict, the trier of fact has the discretion to reject the expert testimony.[7] The Superior Court determines if there is competent,

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

[4] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[5] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[6] *Standard Distrib. v. Hall*, 897 A.2d 155, 158 (Del. 2006).

[7] *Leisure v. BFI Waste Systems*, 2006 WL 1148730, at *5 (Del. Super.).

substantial evidence, *i.e.*, legally sufficient evidence, to support the findings and conclusions of the IAB on the record. However, this Court should defer to the "experience and specialized competence" of the IAB in its findings of fact.[8] If the record lacks competent substantial evidence supporting the finding or decision of the IAB, the Superior Court may overturn the decision of the board.[9]

The Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such disregard does not amount to an abuse of its discretion. Abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice.[10] On appeal, the Superior Court reviews legal issues *de novo*.[11]

DISCUSSION

Employee asserts that the IAB's decision fundamentally mistakes the facts and procedural posture of the case. As a result, the IAB's decision is defective as a matter of fact and law.

[8] 29 *Del. C.* § 10142 (2007).

[9] *Johnson*, 213 A.2d at 66-67.

[10] *Id.* at *5, citing *Pitts v. White*, 109 A.2d 786, 788 (Del. Super. Ct. 1954).

[11] *Ostrowski v. Yellow Transp.*, 2003 Del. Super. LEXIS 358, at *9.

The IAB denied in part Employer's petition to terminate benefits, and granted in part by reducing the amount of partial disability benefits to $239.95 per week. Employer claims that this finding is supported by substantial evidence and is free from factual and legal error. The dispositive issue on appeal is whether the IAB misapprehended that Employer was seeking to terminate Employee's total disability benefits.

During the hearing, Employer's counsel's opening remarks on the record clearly state that Employee was receiving total disability benefits at the time. Counsel stated: "We're here today on a petition to terminate [Employee's] temporary total disability benefits. He's currently receiving $434.68 per week in total disability." Similarly, Employee's counsel's opening statement concludes: "We'd ask that after you hear the testimony today you deny the employer's petition for review and that you allow [Employee] to continue on temporary total disability benefits." In closing, Employer argued: "In this incident the claimant is clearly no longer entitled to total disability benefits." Employee countered that "based on the testimony,...employer's petition should be denied and that [Employee] should continue to be receiving temporary total disability." The parties' oral and written statements indicate agreement that Employee was receiving **total disability benefits**. Neither party addressed the issue of termination or reduction of partial disability benefits.

The IAB clearly based its consideration on the erroneous impression that Employee was not receiving total disability benefits, and solely was receiving partial disability. In a footnote to the section entitled "Nature and Stage of the Proceedings" the IAB "notes that pursuant to the 2003 agreement of compensation, Claimant is receiving only partial disability benefits."

In the section entitled "Findings of Fact and Conclusions of Law," the IAB repeats the misconception, stating: "Based on the current procedural posture of the case, Claimant is presently receiving partial disability benefits…. Claimant has not filed any separate petition alleging a recurrence of total disability, and the parties have not stipulated to a recurrence of total disability. As a result, the issue of the hearing is limited to the termination or reduction of partial disability benefits. [Employer] has failed to meet its burden to terminate Claimant's partial disability benefits."

The IAB erred in reviewing the evidence in the context of entitlement to partial disability benefits. The IAB itself recognized that an entirely different standard of review applies when considering total disability benefits:

> Had Claimant been entitled to receive total disability benefits at the time that VPI filed its termination petition in March 2006, the employer would have been required to show that that Claimant was no longer totally disabled and did not suffer a loss of earning capacity. To show that total disability has ended, an employer must first prove

> that a claimant is not totally incapacitated or, in other words, that the claimant is medically employable.[12]

In determining partial disability benefits, as the IAB stated, Employer "must prove, by a preponderance of the evidence, that Claimant is not partially disabled if there is evidence of some continuing disability that could affect his earning capacity."[13]

By using the incorrect standard for reviewing the evidence, the IAB erred as a matter of law. This error resulted from the IAB's misapprehension of the facts, *i.e*., that Employee was not receiving total disability benefits. Therefore, the Court finds that the IAB erred as a matter of fact and law.

As a result, the Court need not address the validity of the methods the IAB employed for reducing Employee's partial disability benefits, the credibility of expert witnesses, attorneys fees, or expert witness costs.

CONCLUSION

The IAB erred as a matter of fact and law by applying the standard for reviewing partial disability benefits. The parties agreed that the issue before the IAB was termination of total disability benefits.

[12] *Howell v. Supermarkets General Corporation*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918, n. 1 (Del. 1973).

[13] *Waddell v. Chrysler Corp.*, Del. Super, C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983).

THEREFORE, the decision of the Industrial Accident Board is hereby **REVERSED AND REMANDED.**

IT IS SO ORDERED.

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The Honorable Mary M. Johnston