SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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Re: Francis Bromwell v. Chrysler LLC
C.A. No. 10A-05-002 RRC

Submitted: August 6, 2010
Decided: October 28, 2010

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

Dear Counsel:

INTRODUCTION

This appeal requires a determination of whether Delaware law requires the Industrial Accident Board to reject an expert's opinion if the expert does not account for a claimant's surgical procedure independent of and in addition to the claimant's range of motion deficits when calculating the claimant's impairment percentage. Although this issue has been addressed in selected

decisions of the Industrial Accident Board, this appears to be an issue of first impression in the Superior Court.

FACTS AND PROCEDURAL HISTORY

This case arises from an April 12, 2010 determination of the Industrial Accident Board ("the Board") wherein the Board found that Employee was entitled to 13% permanent impairment of his right upper extremity.[1] Employee sustained the instant injury on January 17, 2006, when he was pulling a cable and "felt a snap" in his right shoulder; he sought treatment for this injury later that day.[2]

In its decision, the Board found the testimony of Dr. Errol Ger, Employer's expert, to be more persuasive than that of Dr. Peter Bandera, Employee's expert.[3] Employee argues that Dr. Ger's methodology was erroneous as a matter of law because Dr. Ger did not assign a statistical value to Employee's surgical procedure independent of Employee's range of motion deficits and subjective complaints when calculating Employee's impairment.[4] In turn, Employer alleges that Dr. Bandera used an incorrect calculation when arriving at his impairment percentage value for the surgery.[5]

Employee argues that the Board erred as a matter of law in accepting Dr. Ger's testimony, notwithstanding the undisputed fact that Dr. Ger did not assign an independent value to the surgery.[6] Employee submits that the Board "failed to grasp that it needed to consider the Claimant's operative procedure as part of its permanency analysis."[7] In support of this contention, Employee cites to prior Board decisions in which the Board stated that a given surgical procedure should be separately considered when calculating an impairment percentage.[8]

Employer responds that it is the Board's prerogative to determine the percentage of disability on a case-by-case basis, and thus any dispute over the

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[1] App. to Employee's Opening Br. at A-12.
[2] *Id.* at A-4.
[3] *Id.* at A-8.
[4] *Id.*
[5] *Id.* at A-9.
[6] Opening Br. at 7.
[7] *Id.* at 8.
[8] *See id.* at 9-15.

relevant guidelines or methodologies employed by experts is superseded by the ultimate determination of the Board.[9] Employer does not directly address Employee's contention that the Board is required, as a matter of law, to reject an impairment percentage that does not assess a claimant's surgical procedure independent of and in addition to any range of motion deficits. However, Employer's generalized contention that the percentage of disability is exclusively to be determined by the Board and that the Board's determination herein was supported by substantial evidence encompasses Employee's contentions on this point.

Dr. Bandera opined that Employee had a 24% impairment.[10] Dr. Bandera's methodology included the assignment of a 10% range of motion impairment, and an additional 14% percent for Employee's acromioplasty procedure.[11] However, the acromioplasty procedure does not appear in the AMA Guides (the *American Medical Association Guides to Evaluation of Permanent Impairment*, hereinafter the "Guides"), thus Dr. Bandera assigned the mid-range value for an arthroplasty procedure, the procedure which Dr. Bandera believed to be the nearest enumerated analogue to Employee's acromioplasty.[12] He noted that both he and Dr. Ger agreed that Employee's range of motion deficits warranted a baseline rating of 10%, but Dr. Bandera testified that physicians are "directed by the guide to give an impairment number based on the extent and scope of surgery."[13] He stated that he believed that Dr. Ger was "simply just missing that extra assessment for the scope of surgery. . . ."[14]

In contrast, Dr. Ger assigned a 10% impairment based on Employee's range of motion deficits, and exercised the maximum amount of discretion set forth in the Fifth Edition AMA Guides to add an additional 3% based on Employee's subjective complaints; Dr. Ger described his methodology as follows:

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[9] Answ. Br. at 11.
[10] App. to Answ. Br. Ex. D at 9.
[11] *Id.* at 12. An acromioplasty involves the cutting away of the "shelving" or "curved piece" of the acromion, which is a shelf of bone at the top of the shoulder bone that can "get in the way of the muscles and tendons on top of the humerus." App. to Answ. Br. Ex. C at 23-24.
[12] Opening Br. at 3.
[13] App. to Answ. Br. Ex. D at 17.
[14] *Id.*

> . . .[I]n my conclusion I said he has sustained a permanent impairment relating to the right upper extremity. And I use the Fifth Edition of the guides, and then I also used the Sixth Edition of the guides. And if we use the Fifth Edition of the guides, I would estimate that he has a 13 percent impairment, and that was obtained looking at the range of motion of his shoulder. And, doing that, I came up with a 10 percent impairment. And because of his symptoms and the other findings, I added another 3 percent, because the guides say that we have the leeway of adding another 3 percent on the ratings that we get. So I added another 3 percent, and I came up with a13 percent impairment.[15]

On cross-examination, Dr. Ger added that "we can accept 10 percent" and that 10 percent "would be fine," but that he "thought that 10 percent was inappropriate and. . .that a rating greater than 10 percent would be appropriate. . . ."[16]

Dr. Ger acknowledged that he assigned "zero percent for the surgical event."[17] He testified that the Employee's acromioplasty was not listed in the Guides, but stated that it was not reasonable for the acromioplasty to be compared to an arthroplasty.[18] He stated that the Guides do not provide for an impairment rating to be added for the procedures undergone by Employee in this case.[19] Further, Dr. Ger maintained that the surgical procedure was completely irrelevant herein and would not factor into the impairment rating.[20]

This Court holds that, although the medical experts have proffered different interpretations of the correct way to apply the Guides to Employee's injury, the ultimate decision on the Employee's level of impairment is vested

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[15] App. to Answ. Br. Ex. C at 11. Dr. Ger also testified that that his methodology would yield slightly different impairment ratings when using the Sixth Edition of the Guides, rather than the Fifth Edition, the edition Dr. Ger used in reaching his 13% impairment rating. *Id.* at 18. Specifically, the Sixth Edition of the Guides would yield 16% impairment, while the Fifth Edition yielded 13% impairment; Dr. Ger stated that the figures reached under the Fifth Edition and the Sixth Edition of the Guides are "both fair." *Id.* at 19.

[16] *Id.* at 20-21.

[17] *Id.* at 21.

[18] *Id.* at 26. An arthroplasty is a procedure which creates a new joint "either by putting in a new joint made of artificial material or creating a new joint made with the body material." App. to Answ. Br. Ex. C at 22.

[19] *Id.* at 28.

[20] *Id.* at 30.

with the Board, provided that the Board's decision is supported by substantial evidence and free from legal error. The inherently fact-sensitive nature of an individual's level of impairment is reflected by the Industrial Accident Board's freedom to accept or reject a medical expert's testimony, in whole or in part, and to accept the opinion of one medical expert over another.[21] Here, Drs. Ger and Bandera reached different levels of impairment based on their differing opinions regarding the necessity of assigning a value to Employee's surgical procedure, and the Board accepted Dr. Ger's opinion over Dr. Bandera's opinion.

Although the medical experts may differ in their interpretation of the Guides, there is nothing in the statutory or decisional law of Delaware that requires the Board to categorically reject the opinion of a medical expert who has not assigned an independent and additional value to a claimant's surgical procedure. This Court also rejects Employee's urging to impose such a novel and rigid standard of review to the Industrial Accident Board body of law.

After a full and fair opportunity to develop Dr. Bandera's opinion testimony and to cross-examine Dr. Ger before the Board, the Board nonetheless found Dr. Ger's methodology, as specifically applied to Employee, to be more appropriate. Thus, the Board's decision is supported by substantial evidence and this Court will not substitute its judgment for that of the Board.

Upon review of the facts, the law, and the parties' submissions, Dr. Ger's testimony provides substantial evidence for the Board to issue its decision finding a 13% permanent impairment of Employee's right upper extremity, and the Board's decision is free from legal error. Therefore, the decision of the Industrial Accident Board is **AFFIRMED**.

STANDARD OF REVIEW

The Superior Court may only set aside the findings of the Industrial Accident Board if "the records contain no substantial evidence that would reasonably support the findings."[22] "The function of the reviewing Court is

[21] *See, e.g. Collins v. Giant Food, Inc.*, 1999 WL 1442024, *3 (Del. Super. 1999) ("The Board is free to accept or reject in whole or in part testimony offered before it and to fix its verdict upon testimony accepted.")
[22] 7 Del. C. § 6009(b); *see also Craig v. Synvar Corp*., 233 A.2d 161 (Del. Super. 1967).

limited to determining whether substantial evidence supports the Board's decision regarding findings of fact and conclusions of law and is free from legal error."[23] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[24]

Further, "[w]hen reviewing a decision on appeal from an agency, the Superior Court does not weigh the evidence, determine questions of credibility, or make its own factual findings."[25] The Court must "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."[26] The Board is entitled to "resolve conflicts in testimony and issues of credibility."[27]

In cases where medical evidence is in conflict, the Board must resolve the conflict; if the Board adopts one medical opinion over another, the opinion adopted by the Board is substantial evidence for the purpose of appellate review.[28] Although the Board is guided by medical evidence and testimony, "it is the function of the Board, and not that of a physician, to determine a claimant's disability-subject to the requirement that the Board's findings be based on substantial competent evidence."[29]

In reviewing a decision of the Board, this Court must look at the record in a light most favorable to the prevailing party.[30] Even if this Court might have reached a different conclusion than the Board in the first

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[23] *Holowka v. New Castle County Bd. of Adjustment*, 2003 WL 21001026, at *3 (Del. Super. 2003).
[24] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n.*, 383 U.S. 607, 620 (1966)); *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).
[25] *Holowka*, 2003 WL 21001026, at *3.
[26] 29 Del. C. § 10142(d).
[27] *Id*.
[28] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).
[29] *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980) (citation omitted); *Cf. Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1216 (Del. 1998) (noting that, even in the distinguishable context of a single medical evaluation properly before the Board, "the Board may set a permanency rating different from that established by a physician, provided that the Board articulates a factual basis for so doing.")
[30] *E.I. DuPont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1046-47 (Del. Super. 2004).

instance, a decision of the Board must be affirmed if it is supported by substantial evidence and is free from legal error.[31] As explained by the Supreme Court of Delaware, "[a]n administrative board abuses its discretion in admitting or excluding evidence where its decision exceeds the bounds of reason given the circumstances, or where rules of law or practice have been ignored so as to produce injustice."[32]

DISCUSSION

At bottom, this appeal presents a straightforward question of law: whether the Industrial Accident Board is legally required to reject the opinion of a medical expert who does not assign an impairment value for a surgical procedure that is independent of and in addition to any value assigned for range of motion deficits. If no such legal requirement exists, then the Board's acceptance of Dr. Ger's opinion over Dr. Bandera's opinion satisfies the "substantial evidence" standard.[33] Given that there is no statutory law or court precedent to support the existence of such an exacting methodological requirement; this is an issue of apparent first impression in the Superior Court.

Employee has offered a number of prior decisions of the Board to support the existence of this alleged legal requirement. For example, in *Santiago v. Sodexho*, the Board confronted this precise question, in the context of the same procedure, arthroscopy, as set forth in Section 16.7b of the Guides.[34] Therein, the Board concluded that "[t]he subsection that specifically applies to arthroplasty, 16.7b, instructs the evaluator to take the percentage value for the applicable surgery from Table 16-27 and combine it with the range of motion impairment."[35]

However, prior decisions of the Board are not precedential statements of Delaware law regarding Industrial Accident Board standards of review. The

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[31] *Brogan v. Value City Furniture*, 2002 WL 499721, at *2 (Del. Super. 2002).
[32] *Bolden v. Kraft Foods,* 2005 WL 3526324, at *3 (Del. Supr. 2005).
[33] *See Munyan*, 909 A.2d at 136.
[34] Hearing No. 1252043 (Aug. 28, 2007). Notably, the Board's decision found that the calculation of a separate percentage for the claimant's surgery was "a proper method" for arriving at a permanency rating; the Board did not label this methodology as "the" proper method. *Id.* at 16. The *Santiago* decision neither held nor implied that calculating a separate, additional percentage for a surgical procedure was the only proper methodology.
[35] *Id.* at 15.

Board did not discuss its 2007 decision in *Santiago* in its decision in this case. Further, the Board is given broad deference in reaching its conclusions precisely because the degree of impairment for a given injury on any one claimant is inherently fact-sensitive and unique; the circumstances of any one decision may be so dissimilar from another that applying an identical rationale might lead to an inappropriate result.

Significantly, this Court has previously held that the Board is free to accept an expert's conclusion and reasoning when that expert has used a modified version of the Guide's "Diagnosis Related Estimates" ("DRE") methodology, tailored to the specifics that particular claimant's injury and limitations.[36] The Board is best positioned to make such fact sensitive determinations, and its conclusions will not be disturbed unless its decision is not supported by substantial evidence.

Separate and apart from the question of whether or not a surgical procedure requires an independent value, there is also a significant dispute over whether Employee's procedure was properly compared to an arthroscopy for purposes of assigning a statistical impairment value. This is again an inquiry that the Board is uniquely qualified to address, guided by the opinions and testimony of the respective medical experts. In this case, Employer's medical expert opined that Employee's procedure was not properly analogized to an arthroscopy, and the correct impairment percentage could be calculated without independently and additionally assigning a value for Employee's acromioplasty. Employee's expert disagreed with this methodology, but these disputes are the type of conflicts that are to be resolved by the Board and reviewed pursuant to the "substantial evidence" standard.[37]

The Board was presented with the differing opinions of the parties' medical experts; the differences centered on the application of the Guides to an unlisted surgical procedure and an alleged requirement that Employee's surgical procedure be calculated in addition to any range of motion deficits. The Board reviewed the available evidence and testimony and adopted the opinion of Employer's expert over Employee's expert; this constitutes substantial evidence for the purposes of appellate review.[38] Although this Court recognizes that some prior decisions of the Board have endorsed

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[36] *Collins v. Giant Food, Inc.*, 1999 WL 1442024 (Del. Super. 1999).
[37] *See* 29 Del. C. § 10142(d); *Munyan*, 909 A.2d at 136.
[38] *Munyan*, 909 A.2d at 136.

Employee's proffered methodology in light of the evidence available to that particular panel regarding that particular claimant, there is no legal requirement that the reasoning of any one Board decision be applied universally to all Board decisions. Further, this Court has held that the Board is free to accept an expert's conclusions even when the expert modifies the methodology prescribed the Guides.[39] Therefore, this Court declines Employee's invitation to impose Employee's suggested legal standard. Indeed, such a requirement would run contrary to the general rationale of vesting the Board with broad discretion to decide claims on a case-by-case basis; the Board is guided by the testimony of the parties' medical experts, but "it is the function of the Board, and not that of a physician, to determine a claimant's disability. . . ."[40]

Even if, *arguendo*, this Court might have found differently in the first instance, a decision of the Board must be affirmed if it is supported by substantial evidence and is free from legal error.[41] The Board's acceptance of one medical opinion over another, as occurred herein, constitutes substantial evidence for purposes of appellate review.[42] Similarly, there is no evidence to suggest that the "rules of law or practice have been ignored so as to produce injustice."[43] Consequently, the decision was both supported by substantial evidence and free from legal error. Therefore, the Board's decision must be affirmed.[44]

Accordingly, for all the reasons stated above, the decision of the Industrial Accident Board is **AFFIRMED**.

Richard R. Cooch

oc: Prothonotary
Industrial Accident Board

[39] *Collins*, 1999 WL 1442024.
[40] *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980) (citation omitted).
[41] *Brogan v. Value City Furniture*, 2002 WL 499721, at *2 (Del. Super. 2002).
[42] *Munyan*, 909 A.2d at 136 (Del. 2006).
[43] *Bolden v. Kraft Foods,* 2005 WL 3526324, at *3 (Del. Supr. 2005).
[44] *Holowka*, 2003 WL at *3.