IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RONALD ROMINE, JR., Claimant -Appellant,	)	
v.	)	C.A. 02A-10-005-PLA
CONECTIV COMMUNICATIONS, INC., Employer -Appellee.	)	

Submitted: March 12, 2003
Decided: April 22, 2003

UPON APPEAL FROM A DECISION OF
THE INDUSTRIAL ACCIDENT BOARD
AFFIRMED.

ORDER

Ronald Romine, Jr., Newark, Delaware, *Pro Se*, Claimant-Appellant.

John J. Klusman, Jr., Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, Attorney for Employer -Appellee.

ABLEMAN, JUDGE

Ronald Romine, Jr. ("Appellant"), has appealed from the decision of the Industrial Accident Board of the State of Delaware ("IAB" or "Board") denying Appellant's Petition to Determine Additional Compensation Due, and request for medical expenses/fees and transportation expenses. This is the Court's decision on appeal.

Facts

Appellant was twenty-nine years old and employed by Conectiv Communications, Inc. ("Appellee") as a Transport Tech II at the time of his compensable injury. Appellant's injuries resulted from an automobile accident while in the course and scope of his employment. On January 30, 2001, while driving his employer's minivan through an intersection, Appellant was struck on the side of his minivan by a passenger vehicle that failed to stop for the red traffic signal. Appellant did not strike his head or experience loss of consciousness. Later that evening, he began experiencing some intrascapular region pain on the right side.[1] Within two days of the accident, still complaining of pain, Appellant's employer recommended that he be checked at the local emergency room.[2]

Appellant testified that he sustained lumbar and lumbo-sacral pain and followed up treatment with Dr. Navarro, his primary care doctor, at Glasgow

[1] Deposition of Dr. Stephen M. Beneck, dated August 29, 2002, at 4 (hereinafter "Dep. Dr. Beneck at ___.").
[2] Dep. Dr. Beneck at 4-5.

Medical Center.[3] Dr. Navarro prescribed four weeks of physical therapy which, according to Appellant, was unsuccessful in relieving his back pain and only minimally successful in relieving his neck pain.[4] Dr. Navarro therefore referred appellant to Dr. Stephen M. Beneck for further treatment.

Appellant received his first post-accident exam from Dr. Beneck on March 20, 2001. Dr. Beneck is a doctor licensed to practice medicine in Delaware specializing in physical medicine and rehabilitation. According to Dr. Beneck's testimony, Appellant complained of right intrascapular region back pain. Appellant stated to Dr. Beneck that he would usually wake up in the mornings with pain and soreness that tended to decrease during the day, but worsened in the evenings. Reaching, pulling, pushing, and lifting with his right arm exacerbated his symptoms, including intermittent burning sensations and deep aches. Changing body positions or movements in his neck did not seem to alleviate the pain. Appellant denied any upper extremity symptoms or interior chest pain.[5] Appellant also disclaimed ever having prior problems with pain or related symptoms in his back.[6]

Upon examination, Dr. Beneck diagnosed right upper thoracic, intrascapular region back pain due to thoracic strain and sprain. Appellant's symptoms arose

[3] Board Hearing Transcript, dated September 9, 2002, at 22 (hereinafter "Bd. Hr'g Tr. at ___.").
[4] Bd. Hr'g Tr. at 22.
[5] Dep. Dr. Beneck at 4.
[6] Dep. Dr. Beneck at 5.

from soft tissue injury to the muscles and/or tendons of this intrascapular region.[7] Further, Doctor Beneck determined that Appellant's symptoms did not seem to originate from his neck, and that there was no evidence of radiculopathy or disc extrusion.[8] Dr. Beneck recommended that Appellant resume physical therapy with a more specific stretching therapy and visit a chiropractor two times a week for deep soft tissue manipulation.[9]

Appellant returned for a follow-up examination on April 10, 2001. At that time, he reported that the pain had diminished somewhat, was less regular, but still gave him continued discomfort at times.[10] On May 8, 2001, Appellant returned for his third visit. Dr. Beneck noted that Appellant reported improvement as he was no longer experiencing pain in the intrascapular region of the lower neck. Appellant stated that his remaining symptom was continued soreness in the midline at the cervicothoracic junction. The pain was not constant but did increase as the day progressed.[11]

Appellant visited Dr. Beneck's office on two more occasions, July 10 and October 2, 2001, each time stating that there was no significant change in his condition since his May 8, 2001 visit. It was Dr. Beneck's opinion during this time

[7] Dep. Dr. Beneck at 6.
[8] Dep. Dr. Beneck at 6-7.
[9] Dep. Dr. Beneck at 7.
[10] Dep. Dr. Beneck at 8.
[11] Dep. Dr. Beneck at 9.

period that Appellant continued to suffer from chronic cervical-thoracic neck pain due to the automobile accident.[12]

Appellant next consulted with Dr. Beneck on January 11, 2002, at which time he complained of daily right lower posterolateral neck, upper intrascapular region pain due to the cold weather. Appellant stated that stretching and active movement of his neck alleviated the pain, along with daily doses of Aleve. Dr. Beneck ordered an MRI scan of Appellant's cervical spine region to identify any lower cervical disc injury, which sometimes can refer pain into that region or be the pain generator. Appellant underwent an MRI on January 15, 2002. The radiologist report indicated that there was no disc herniation. Some minimal wear-and-tear type changes were evident at the C4-C5 level, but it was essentially a normal study.[13] It was Dr. Beneck's ongoing diagnosis that Appellant:

> [H]as chronic cervicothoracic region pain due to strain and sprain in this region. He suffered an acceleration/deceleration type injury to his neck, or referred to as whiplash mechanism injury, and that oftentimes can cause chronic symptoms with normal MRIs and X-rays. And I felt that his ongoing complaints were consistent with that.[14]

Dr. Beneck's opinion was that Appellant's complaints and his diagnosis were attributable to the auto accident.[15] Further, Dr. Beneck noted that at no time

[12] *Id*.
[13] Dep. Dr. Beneck at 11.
[14] Dep. Dr. Beneck at 11-12.
[15] Dep. Dr. Beneck at 12.

during his treatment of Appellant, did Appellant show signs of or demonstrate any "guarding" of the injured regions of his body.[16] Appellant also never reported to Dr. Beneck any limitations or restrictions on his activities as a result of the accident.[17] In summary, Dr. Beneck opined that Appellant suffered a permanent injury to his cervical spine as a result of his January 2001 work injury.[18] Dr. Beneck determined a permanent impairment rating of DRE category 2 according to his interpretation of the chart on page 392 of the *AMA's Guide to the Evaluation of Impairment.* [19] Accordingly, he concluded that Appellant has a fourteen percent (14%) impairment of his cervical spine.

In order for the Appellant to be classified with a permanent impairment rating, Dr. Beneck must have determined that Appellant is at least a DRE cervical category 2.[20] Category 2 permanent cervical impairment symptoms may include muscle guarding, spasm, asymmetric loss of range of motion, non-verifiable radicular complaints, alteration in the structural integrity, radiculopathy, positive imaging studies or fractures.[21] Although Appellant did not manifest any of the above-referenced symptoms, Dr. Beneck nevertheless found that Appellant's on-going symptoms were permanent in nature and, therefore, qualified his condition

[16] Dep. Dr. Beneck at 17.
[17] Dep. Dr. Beneck at 18.
[18] Dep. Dr. Beneck at 25-30.
[19] AMERICAN MEDICAL ASSOCIATION'S GUIDE TO THE EVALAUTION OF PERMANENT IMPAIRMENT (Linda Cocchiarella and Gunnar B.J. Anderson eds., 5th ed. 2001).
[20] *Id*.
[21] Dep. Dr. Beneck at 25-28.

as DRE cervical category 2. According to Dr. Beneck, Appellant's symptoms were consistent from visit to visit and were also uniform with the mechanism for this type of injury. Additionally, Appellant's symptoms had persisted for more than one year.

In his testimony, Dr. Beneck admitted that the permanency rating he assigned to Appellant's injury was not based upon evidence of radiculopathy or restriction in range of motion; *it was based upon Appellant's complaints of soreness or tenderness in the effected region*.[22] Further, Dr. Beneck felt that Appellant's condition did not qualify him for a category 1 classification because he continued to manifest symptoms that intermittently interfered with his activities.[23] When questioned about the disparity between his designation of Appellant's condition as a category 2 impairment and the similarity of Appellant's symptoms to a category 1 categorization, Dr. Beneck noted that there was "not a great deal" of difference between Appellant's condition and that of a patient described in a category 1 example.[24] Moreover, when asked to opine on Appellant's injury, without incorporating or considering the AMA *Guide* in his determination, Dr. Beneck stated that Appellant had a five percent (5%) impairment predicated on the restrictions of his activities related to his continued pain.[25]

[22] Dep. Dr. Beneck at 23 (emphasis added).
[23] Dep. Dr. Beneck at 28-30.
[24] Dep. Dr. Beneck at 29-30.
[25] Dep. Dr. Beneck at 30-32.

Appellant testified that, since his accident, he has "his good days" and "his bad days" with recurring pain affecting his back and shoulders. On a typical day, Appellant arises experiencing pain that worsens as the day progresses. Appellant's occupational duties take him as far south as Salisbury, Maryland, as far east as Atlantic City, New Jersey, and as far north as Bucks County, Pennsylvania When Appellant performs occupational activities such as pulling cables, mounting equipment, holding up objects, lifting heavy articles, or driving, the pain is exacerbated. Upon returning home at the end of the day, Appellant does not feel motivated to do anything because of the pain. After mowing the lawn on one evening, Appellant experienced a major flare-up and was confined to bed the entire following day. Previously, Appellant engaged in athletic activities, including golf and softball, but he stated that he no longer is able to play these sports.[26]

Andrew J. Gelman, D. O., testified for the defense. He reviewed Dr. Beneck's permanency report and examined Appellant on May 24, 2002. During the examination, Appellant complained to Dr. Gelman of experiencing pain in his interscapular region but had no complaints of pain emanating from any other bodily regions.[27] After examining Appellant, and reviewing his medical records and the factual circumstances surrounding his accident, Dr. Gelman opined that Appellant did not have any permanent impairment to the cervical spine as a result

[26] Bd. Hr'g Tr. at 24-30.
[27] Deposition of Andrew J. Gelman, D. O., dated September 3, 2002, at 4 (hereinafter "Dep. Dr. Gelman at ___.").

of his January 2001 work accident.[28] Although Dr. Gelman did not dispute the fact that Appellant reported subjective complaints of discomfort in his interscapular region, "[his] impression was that Mr. Romine had complaints volunteered consistent with a cervical, dorsal sprain and strain."[29]

Several factors contributed to Dr. Gelman's opinion. First, he noted that the results of the examination showed that Appellant's range of motion, strength, and sensory reflexes were all normal. Second, although Appellant subjectively complained of soreness between the scapula when pressure was applied, his diagnostic studies and MRI results proved normal, and revealed no objective findings of injury or objective abnormalities.[30] Third, utilizing the AMA *Guide* found on page 392, it was Dr. Gelman's professional opinion that Appellant fell within the DRE cervical category 1. In view of his findings Dr. Gelman stated, "[I] believe that he fits extremely well into example 15-12 which is cited on page 393. Considering his diagnostic workup and the data within the guides [sic], this translates into a zero percent cervical spinal permanency rating."[31]

Contrary to Dr. Beneck's opinion, Dr. Gelman testified that, Appellant's condition was more properly defined by DRE cervical category 1, rather than

[28] Dep. Dr. Gelman at 6-7.
[29] Dep. Dr. Gelman at 6.
[30] Dep. Dr. Gelman at 5-6.
[31] Dep. Dr. Gelman at 8.

category 2, as he did not meet the criteria for category 2 symptoms.[32] Specifically, Appellant did not exhibit any evidence of disc herniation on his MRI; there was no evidence of a fracture or compression of a vertebrae; none of the examinations performed on Appellant indicated radiculopathy; and, there were no signs of restrictions of the cervical spine range of motion.[33] Notwithstanding Dr. Beneck's diagnostic opinion, Dr. Gelman's interpretation of Chapter 15.6 of the *AMA's Guide to the Evaluation of Impairment* led him to conclude that Appellant has a zero percent (0%) permanent impairment rating of his cervical spine.[34] Dr. Gelman even went one step further in concluding that, based on his interpretations of page 388 and Table 15.4 of the *Guide*, Appellant did not meet the criteria to warrant a permanency impairment rating of his thoracic region as well.[35] According to Dr. Gelman, "[c]iting examples 15-7 and appreciating the subjective nature of Mr. Romine's complaints, he fits nicely into the DRE thoracic category 1, similar to the data recorded in example 15-7 which is [sic] translates into a zero percent permanency."[36] Doctor Gelman recalled that, upon asking Appellant if he was at all restricted in his activities of daily living, he had replied that, "there's nothing I can't do."[37] It was also Dr. Gelman's recollection that Appellant complained to him that some of the activities he performed in his capacity as a

[32] *Id*.
[33] Dep. Dr. Gelman at 8-9.
[34] Dep. Dr. Gelman at 7-10.
[35] Dep. Dr. Gelman at 9-10.

telecommunications worker caused "some aggravation of his interscapular soreness."[38]

Procedural History

On March 1, 2002, the Appellant filed with the Board a Petition to Determine Additional Compensation Due, and request for medical expenses/fees and transportation expenses. Citing to Section 2326 of Title 19 of the Delaware Code, which deals with compensation for certain permanent injuries, Appellant alleged in his petition that he had suffered fourteen percent permanent disability of his cervical spine as a result of his January 30, 2001 work related automobile accident. In accordance with 19 *Del. C*. § 2301B(a)(4), the parties stipulated that the matter could be heard and decided by a Workers' Compensation hearing officer.[39] A hearing before a Workers' Compensation hearing officer was held on September 9, 2002.

On September 12, 2002, the Workers' Compensation hearing officer issued his decision, denying the Appellant's Petition. Appellant filed a timely notice of

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[36] *Id*.
[37] Dep. Dr. Gelman at 13.
[38] Dep. Dr. Gelman at 14.
[39] Pursuant to 19 *Del. C*. § 2301B, a Hearing Officer stands in the position of the Industrial Accident Board. More specifically, 19 *Del. C*. § 2301(B) provides, in pertinent part:

> (a) There is hereby created within the Department of Labor the full-time position of hearing officer. With respect to cases arising under Part II of this title, the hearing officers shall have: (1) All powers and duties conferred or imposed upon such hearing officers by law or by the Rules of Procedure for the Industrial Accident Board; … (4) The power, with consent of the parties, to conduct hearings, including any evidentiary hearings required by Part II of this title, and to issue a final decision determining the outcome of such hearings. In such circumstances, the hearing officer's decision has the same authority as a decision of the Board and is subject to judicial review on the same basis as a decision of the Board.

appeal of the Board's decision to this Court on October 7, 2002. Shortly thereafter, on October 17, 2002, Appellant's counsel filed a Motion to Withdraw as Counsel, citing irreconcilable differences, which was granted by this Court. Appellant has thereafter pursued this appeal *pro se*.

Discussion

The Delaware Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency.[40] The function of the reviewing Court is 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.[41] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[42] Moreover, substantial evidence is that evidence from which an agency fairly and reasonably could reach the conclusion it did.[43] It is more than a scintilla but less than a preponderance.[44] When reviewing a decision on appeal from an agency, the

[40] *Industrial Rentals, Inc. v. New Castle County Board of Adjustment*, 2000 WL 710087 (Del. Super. Ct.), *rev'd on other grounds*, 776 A.2d 528 (Del. 2001); *Public Water Supply Company v. DiPasquale*, 735 A.2d 378, 382 (Del. 1998).
[41] DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002); *See also Soltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Mellow v. Board of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1988), *aff'd*, 567 A.2d 422 (Del. 1989); *Janaman v. New Castle County Board of Adjustment*, 364 A.2d 1241 (Del. Super. Ct. 1976), *aff'd*, 379 A.2d 1118 (Del. 1977); *M. A. Harnett, Inc. v. Coleman*, 226 A.2d 910 (Del. 1967); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).
[42] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995); *accord Oceanport Ind. v. Wilmington Stevedores*, *Inc.*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. Ct. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[43] *Mellow v. Board of Adjustment*, 565 A.2d at 954 (citing *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct. 1980)).
[44] *Id*. at 954 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)); *Downes v. State*, 1993 WL 102547, at *2 (Del. Supr.) (quoting *Breeding v. Contractors-One-Inc*., 549 A.2d 1102, 1104 (Del. Super. Ct. 1988)).

Superior Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[45] It is well established that it is the role of the Board, not this Court, to resolve conflicts in testimony and issues of credibility.[46] Whenever the factual issues are fairly debatable, it is the duty of the Board to formulate decisions about the weight and credibility of various evidence or testimony presented to the Board.[47] The Court's responsibility is merely to determine if the evidence is legally adequate to support the agency's factual findings.[48] If the agency or Board's decision is supported by *substantial evidence*, the Court must sustain the decision of the Board, even though it would have decided otherwise had it come before it in the first instance.[49]

In essence, the Court does not sit as trier of fact, nor should the Court replace its judgment for that of the Board.[50] Specifically, when considering questions of fact, due deference shall be given to the experience and specialized competence of the Board.[51] It is the exclusive function of the IAB to evaluate the credibility of witnesses before it,[52] as evidenced by the weight and reasonable

[45] *Johnson*, 213 A.2d at 66.
[46] *See Mooney v. Benson Management Co.*, 451 A.2d 839, 841 (Del. Super. Ct. 1982), *rev'd on other grounds*, 466 A.2d 1209 (Del. 1983).
[47] *Mettler v. Board of Adjustment*, 1991 WL 190488, at *2 (Del. Super. Ct.).
[48] DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002).
[49] *Mellow*, 565 A.2d at 954 (citing *Kreshtool v. Delmarva Power & Light Co*., 310 A.2d 649, 653 (Del. Super. Ct. 1973); *Searles v. Darling*, 83 A.2d 96, 99 (Del. 1951) (emphasis added to original).
[50] *Johnson*, 213 A.2d at 66.
[51] DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002); *Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).
[52] *See, e.g*., V*asquez v. Abex Corp.*, 1992 WL 397454, at *2 (Del. Supr.).

inferences to be drawn therefrom.[53] The Court determines if the evidence is legally adequate to support the agency's factual findings.[54] Application of this standard "[r]equires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."[55] In this process, "[t]he Court will consider the record in the light most favorable to the prevailing party below."[56] Only where there is no satisfactory proof in support of the factual findings of the Board, may the Superior Court or the Supreme Court overturn it.[57]

In his brief, consisting entirely of one paragraph, Appellant contends the following:

> I Ronald Romine believe the Industrial Accident Board was wrong in their judgment. They took the side of a Doctor who spent at most a total of five minutes with me. They ignored the view of the doctor in which has been seeing me for my injury. I am unaware how they can say that I have no permanent injury when I am in some sort of pain every day some days are worse than others. So I believe you should find Conectiv Communications liable for my 14% permanency that Dr. Beneck rated. I would like to thank the court for finding this in my favor and awarding me the permanency rating.

In contrast, Appellee argues that Appellant did not properly argue or address the hearing officer's findings in legal terms. Specifically, the Appellant did not allege

[53] *Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. Super. Ct. 1972); *Downes v. State*, 1993 WL 102547, at *2 (Del. Supr.).
[54] *Id.*
[55] *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct. 1980).
[56] *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Ct.).
[57] *Johnson*, 213 A.2d at 64.

at any time that the hearing officer's findings were not supported by substantial evidence. Appellee submits that Appellant's claim fails because the hearing officer's conclusion was supported by substantial evidence documented by the record.

Applying the applicable legal standard, the Court finds the deposition testimony of Dr. Andrew J. Gelman, based upon his examination of the Appellant and his review of Appellant's medical records and medical test results, as constituting substantial, competent evidence to support the hearing officer's findings. Review of the Board hearing transcript and the hearing officer's decision indicate that the hearing officer gave full consideration to the testimony of both Dr. Beneck and Dr. Gelman, in addition to Appellant's testimony. In the hearing officer's estimation, Dr. Gelman's medical opinion constituted a more persuasive and cogent determination of Appellant's alleged injury and the related issue of causation.

It is well established that when parties provide testimony from expert witnesses, the Board is free to choose between conflicting medical opinions, and either opinion will constitute *substantial evidence* for purposes of an appeal.[58] In that same light, it is within the Board's discretion to accept the testimony of one expert over another when their opinions are conflicting and supported by

[58] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 105-106 (Del. 1982) (emphasis added).

substantial evidence.[59] Additionally, it is within the purview of the Board, and not this Court, to weigh the credibility of the witnesses, and to accept or reject the Appellant's subjective complaints.[60] In the instant case, the Board rejected the Appellant's subjective complaints.

It is also within the discretion of the Board to reject a physician's opinion of causality when that opinion is predicated upon the Appellant's recital of subjective complaints and when the Board believes the underlying facts to be different.[61] In justifying its findings, the hearing officer considered that, while Dr. Beneck had an established treatment relationship with Appellant, both he and Dr. Gelman relied upon established medical records and reports, as well as upon Appellant's own recitation of the events of his accident and symptoms. The hearing officer heard the testimony of both doctors as well as Appellant's own presentation of the facts and circumstances surrounding his accident and subsequent medical treatment. Dr. Beneck predicated his finding of permanent impairment upon Appellant's continual symptoms of pain that Dr. Beneck testified were consistent from visit to visit. However, Dr. Beneck's medical records contravene his testimony by indicating that Appellant described improvement in the periods of April and May of 2001.

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[59] *Downes v. State*, 1993 WL 102547, at *2 (Del. Supr.); *Reese*, 619 A.2d at 910.
[60] *See, e.g*., *Oakes v. Triple C. Railcar*, 1994 WL 680094, at *4 (Del. Super. Ct.) ;V*asquez v. Abex Corp.*, 1992 WL 397454, at *2 (Del. Supr.).
[61] *Breeding v. Contractors-One-Inc*., 549 A.2d 1102, 1104 (Del. 1988).

The hearing officer accepted Dr. Gelman's opinion because it was well supported. Dr. Gelman found that: 1) Appellant had a zero cervical and thoracic permanency rating; 2) Appellant had no permanent impairment because he manifested DRE category 1 symptoms, not category 2 symptoms; and, 3) Appellant's MRI test results revealed a normal condition, i.e., there was no evidence of any radiculopathy, fractures or compression of the vertebrae, and no restriction of the cervical spine range of motion.

Moreover, the hearing officer found, "[D]r. Gelman's interpretation more credible than Dr. Bernick's [sic], that Claimant falls within DRE category 1, not category 2."[62] A significant basis for the hearing officer's decision to accept Dr. Gelman's medical expert opinion regarding zero permanent impairment over that of Dr. Beneck's suggesting permanent impairment, was the abundance of Appellant's subjective complaints and the absence of any objective, medical substantiation. In this respect, the hearing officer took note that, "[C]laimant has no significant clinical findings, no muscle guarding, no documented neurological impairment, no significant loss of motion, no fracture, and no other indication of impairment related to injury or illness."[63]

Appellant's inconsistent reports of his persistent symptoms and pain led the hearing officer to determine that Appellant lacked credibility. Appellant testified

[62] Industrial Accident Board Decision, dated September 12, 2002, at 6 (hereinafter "Bd. Dec. at ___.").
[63] Bd. Dec. at 6.

that: 1) Dr. Beneck's notes were incorrect in reporting that his neck had improved: 2) he could not remember if he had told Dr. Gelman that his activities were limited as a result of the accident; and 3) Dr. Beneck had suggested surgery as a possible solution to his condition but was unable to explain why this was not recorded in Dr. Beneck's treatment notes.

Further, the hearing officer found Appellant's claim of permanent impairment to be disingenuous and improbable because both doctors stated that Appellant had not demonstrated any manifestations of guarding nor did either doctor find significant limitations upon Appellant's abilities to function. Appellant had never reported any limitations in his activities to Dr. Beneck. He continued to work and endured his symptoms even though he did not feel like partaking in any activity at the conclusion of the workday. Appellant claims that Dr. Gelman "at most spent a total of five minutes with me." Notwithstanding this argument, Dr. Gelman's recitation of the activities that exacerbated Appellant's pain, i.e., carrying, lifting and bending, closely mirrored Appellant's testimony of the exact activities that produced his pain.

In conclusion, the hearing officer weighed the credibility of all the offered medical testimony, and as is required, accepted the testimony of one medical expert over that of another.[64] Simply stated, the hearing officer found that

[64] *DiSabatino v. Wortman*, 453 A.2d 102, 106 (Del. Super. Ct. 1982).

Appellant did not meet his burden of establishing permanent impairment.[65] If an employee fails to bear the burden of proof in demonstrating a condition of permanent impairment, the IAB can accept one expert's opinion as to permanency over that of another expert.[66] In assessing the evidence presented and formulating his decision, the hearing officer considered both the medical evidence and the credibility of the Appellant. The hearing officer, in reaching his conclusion, chose not to rely upon either the Appellant's subjective complaints or his expert treating physician's testimony. Instead, the hearing officer found the Appellee's expert, Dr. Gelman, to be more credible. The Board is "free to choose between the conflicting diagnoses of examination physicians and either diagnosis constituted substantial evidence on appeal."[67] As previously noted, substantial evidence is evidence that a reasonable mind might accept as suitable to support a conclusion.[68]

The hearing officer performed his exclusive function, in his capacity as a representative on behalf of the Board, and reconciled the inconsistent testimony and determined the credibility of witnesses.[69] Absent an abuse of discretion, a reviewing court may not disturb the Board's decision.[70] Since the record does not

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[65] Bd. Dec. at 6.
[66] *Syed v. Hercules, Inc*., 2001 WL 985046, at *8 (Del. Super. Ct.) (holding that when an employee failed to carry his burden of proof to show an increased permanent impairment or that when an expert's testimony was devoid of probative weight and was otherwise unreliable; the Industrial Accident Board could accept one expert's opinion as to permanency over that of another expert), *aff'd*, 793 A.2d 311 (Del. 2002).
[67] *Branch v. Kraft General Foods*, 1994 WL 637315, at *4 (Del. Super. Ct.); *see also Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); and *DiSabatino Bros., Inc*., 453 A.2d at 102.
[68] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[69] *Simmons v. Delaware State Hospital*, 660 A.2d 384, 388 (Del. 1995); *Breeding*, 549 A.2d at 1105-1106.
[70] *Id.*

reflect that the Board abused its discretion when assessing the credibility of witnesses, this court will not disturb its findings.

Accordingly, this Court must conclude that the decision of the Industrial Accident Board denying Appellant's petition for additional compensation due is based upon substantial evidence and free of legal error.

Conclusion

For the foregoing reasons, the decision of the Industrial Accident Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Ronald Romine, Jr.
John J. Klusman, Jr., Esquire
Industrial Accident Board
Gary W. Alderson,
Workers' Compensation Hearing Officer
Prothonotary