IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSE CRUZ,	)	
	)	
Employee-Below, Appellant,	)	
	)	
v.	)	C.A. No. 02A-07-012 RRC
	)	
RYDER PUBLIC TRANSPORTATION,	)	
	)	
Employer-Below, Appellee.	)	

Submitted: January 8, 2003
Decided: March 20, 2003

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

Upon Appellee's Motion to Strike. GRANTED.

ORDER

This 20th day of March, 2003, upon consideration of the submissions of the parties[1], it appears to this Court that:

1. This is an appeal from a decision rendered by the Industrial Accident Board (the "Board") on the petition of Jose Cruz ("Claimant") to determine additional compensation due from an accident that occurred at

[1] Appellant did not file a Reply Brief.

work on May 8, 2000.[2] Claimant, who was injured while driving a school bus that was rear-ended by another motor vehicle, was then in the employ of Ryder Public Transportation ("Employer"). Claimant sought a Board determination that the accident caused a 12% permanent impairment to his low back, but the Board determined that Claimant had not met his burden of proof; in so determining, the Board accepted the medical testimony of Employer's medical examiner (of zero percent "permanency") over that of Claimant's treating physician.[3] Claimant now seeks an order from this Court remanding this case to the Board for reconsideration of its decision, as well as an award of attorneys' fees pursuant to title 19, section 2350(f) of the Delaware Code.[4] Employer seeks affirmance of the Board's decision, as well as the striking of certain parts of Claimant's brief on appeal that were not presented to the Board below. Because the Court finds the Board's determination to be supported by substantial evidence and otherwise free of legal error, its decision is **AFFIRMED**; because Claimant now seeks to

[2] Claimant had originally filed a Petition to Determine Compensation Due but he and Employer subsequently entered into an Agreement On Compensation thereby converting the filing into a Petition to Determine Additional Compensation Due.

[3] Jose Cruz v. Ryder Public Transportation, IAB Hearing No. 1167546 (June 28, 2002) (hereinafter "IAB Decision at __").

[4] "The Superior Court may at its discretion allow a reasonable fee to [a] claimant's attorney…where the claimant's position in the hearing before the Board is affirmed on appeal." DEL. CODE ANN. tit. 19, § 2350(f) (1995).

have this Court consider evidence not presented to the Board, but has not responded to Employer's motion, Employer's Motion to Strike is **GRANTED**.

2. At the time of the May 8, 2000 accident, Claimant was a 33 year-old male employed as a school bus driver with no previous reported history of problems with his low back. During the accident, Claimant was wearing his seatbelt and has since described the force of impact as "jerking" and "moving" him around in his seat.[5] Although Claimant continued to drive the bus (described on cross-examination as "essentially a Monday through Friday, eight hour job"),[6] he did so (as of the IAB hearing) with the aid of a back brace[7] and pillows.[8]

The day after the accident, Employer sent Claimant to a Concentra Medical Center in Newark, Delaware. Claimant later related to his treating physician, Craig D. Sternberg, M.D. ("Dr. Sternberg"),[9] that Concentra gave

[5] IAB Hr'g Tr. of 6/19/02 at 38.

[6] Id. at 47.

[7] Id. at 41.

[8] Id. at 42.

[9] Dr. Sternberg did not give testimony in person at Claimant's IAB hearing, but rather had his findings introduced there by Claimant through deposition.

him a prescription for medication and sent him to physical therapy.[10] Ten days later, Claimant consulted Dr. Sternberg because he believed that his condition was not improving and because he wanted a "second opinion."[11] An x-ray performed as part of that consultation came back "normal."[12]

Despite the "normal" x-ray returned upon his initial consultation with Dr. Sternberg, Claimant exhibited "marked tenderness with spasm in the lumbar paraspinal musculature on the left side."[13] Claimant also had "some decrease in range of motion" as well as low back pain which did not radiate; "[n]eurologically he was intact."[14] At that time Claimant "indicated subjective pain in the back[ ][,]"[15] as well as "some numbness going to the left leg."[16]

As part of the treatment prescribed by Dr. Sternberg, Claimant underwent rehabilitation therapy in May and June of 2000. An MRI from

[10] Sternberg Dep. at 3 (Ex. "1" to IAB Hr'g Tr. of 6/19/02).

[11] IAB Hr'g Tr. of 6/19/02 at 39.

[12] Sternberg Dep. at 9.

[13] Id. at 5.

[14] Id.

[15] Id.

[16] Id. at 5-6.

June 7, 2000 "showed some narrowing of the lumber spine[ ][,]"[17] but this narrowing was determined on cross-examination during deposition to be "congenital," *i.e.*, "something that someone is born with."[18] A subsequent MRI (performed on September 15, 2000) showed a "small, tiny [disc protrusion] at L5-S1[ ]"; this protrusion was "without thecal sac or neural impingement."[19] (On cross-examination at deposition, Dr. Sternberg conceded that disc protrusions such as Claimant then had "can be seen" in men in their thirties and that such protrusions can be "asymptomatic.")[20]

Claimant continued to see Dr. Sternberg on an infrequent basis for the remainder of 2000 and part of 2001, culminating in an April 2001 visit at which time the doctor instructed Claimant "to use ibuprofen as needed and [he] would [thereafter] see [Claimant] as symptoms warranted…."[21]

Claimant next saw Dr. Sternberg in April 2002. At that time, Claimant related to Dr. Sternberg that he had "increased pain in the back[ ][,]" which pain Claimant rated as "nine out of ten…."[22] "On [Dr.

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[17] Sternberg Dep. at 9.

[18] Id. at 19.

[19] Id.

[20] Id. at 23.

[21] Id. at 11.

[22] Sternberg Dep. at 12.

Sternberg's] examination there was mainly tenderness in [Claimant's] lumbar spine[ ][,]" and "[n]eurologic examination was negative."[23] This condition apparently continued unabated until the time of Dr. Sternberg's May 24, 2002 deposition in preparation for the IAB hearing.

Although Dr. Sternberg had not consulted with Claimant from April 2001 until April 2002, he rated the "permanency" of Claimant's injury at 12% as of July 7, 2001.[24] Specifically, Dr. Sternberg "used the AMA guidelines, both 4 and 5[ ][,]"[25] (the "AMA Guides") and then "used a conversion factor…to come up with enough of a percentage."[26] Dr. Sternberg determined that Claimant fell into "Category II" of the AMA Guides, a determination consistent with the "muscle spasm…[and] tiny disc herniation that he ha[d]."[27] At that time, and in contrast to his earlier consultation with Dr. Sternberg, Claimant did not have a loss or range of

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[23] Id.

[24] Sternberg Dep. at 18. It is unclear from the record how Dr. Sternberg made this determination as of July 2001 when he testified that he had not seen Claimant from April 2001 until April 2002.

[25] AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1995); AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (5th ed. 2000).

[26] Sternberg Dep. at 14.

[27] Id. at 14-15.

motion "except as [i]t related to pain[ ][,]" *i.e.*, at times "it hurt[ ] [Claimant] to bend."[28] Claimant did not have radiculopathy, but did have asymmetry, *i.e.*, pain on one side greater than the other.[29] Dr. Sternberg did not perceive Claimant as having "exaggerat[ed] his pain or anything like that."[30]

In contrast to Dr. Sternberg, Employer's medical examiner, David C. Stephens, M.D. ("Dr. Stephens") testified in person at the IAB hearing. Dr. Stephens examined Claimant personally on April 15, 2002; the doctor also reviewed Claimant's "diagnostic studies, x-rays, MRI reports, EMGs, the deposition of Dr. Sternberg[,] [and Dr. Sternberg's records pertaining to Claimant]."[31]

After evaluating Claimant's MRI films, Dr. Stephens concluded that they were "normal" and that the disc protrusion at L5-S1 "was there and…was very small and had no clinical correlation [to Claimant's complaints]…."[32] Dr. Stephens also opined that it is very possible to have

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[28] Id. at 15.

[29] Id.

[30] Id. at 16.

[31] IAB Hr'g Tr. of 6/19/02 at 13.

[32] Id. at 16.

an asymptomatic disc herniation in a male in his thirties, and that such a herniation "would be within the range of normal[.]"[33]

With regard to Claimant's physical exam, Dr. Stephens testified that, with the aid of an inclinometer, he had determined that Claimant "demonstrated a full active range of flexion, extensions, side bending and rotation[ ][,]" and that Claimant was observably "walking without support, [had a] normal stance, normal gait, [a] comfortable arrest, [and was] comfortable sitting and standing."[34] Dr. Stephens opined that he and Dr. Sternberg were consistent "as far as clinical examination [wa]s concerned."[35]

However, and in contrast to Dr. Sternberg, Dr. Stephens found that Claimant was "in Category I [of the AMA Guides] and that his…impairment was zero percent."[36] Dr. Stephens apparently determined Claimant to be in "Category I" because that category provides for no significant clinical findings.[37] (Dr. Stephens additionally based his "zero percent" rating on the

[33] Id.

[34] Id. at 17.

[35] Id.

[36] IAB Hr'g Tr. of 6/19/02 at 19.

[37] Id.

range of motion test he conducted via inclinometer "because [Claimant's] motion [as determined by that test] was full.")[38]

Dr. Stephens further disputed Dr. Sternberg's "Category II" determination because Dr. Stephens did not find significant muscle guarding "or anything of that nature"—a symptom that will qualify a claimant as falling within that higher-impairment category.[39] Dr. Stephens additionally testified that he didn't know what factual basis Dr. Sternberg used in determining Claimant's 12% rating,[40] and that, given Claimant's eventual self-described pain rating of "nine out of ten…[,]"[41] something was amiss as "there should [have] be[en] some objective findings present…."[42] Dr. Stephens nonetheless testified that he found Claimant to be a credible person.

When asked on cross-examination if he knew whether the AMA Guides, Fifth Edition "allow for permanency rating based on pain[ ][,]" Dr. Stephens responded that "they take pain into consideration[ ]"; moreover,

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[38] Id. at 20.

[39] Id. at 22.

[40] Id. at 23.

[41] IAB Hr'g Tr. of 6/19/02 at 12.

[42] Id. at 25.

Dr. Stephens emphasized that "pain figures in any permanency rating potentially…at the option of the examiner."[43]

Dr. Stephens concluded that Claimant sustained "a soft tissue injury on May 8, 2000[,] and that it had healed…because [Claimant's] exam was completely normal when [Dr. Stephens] examined him."[44] Dr. Stephens agreed on cross-examination, however, that Claimant had told him about "good and bad days" relative to "pressure and tightening involving his left thigh."[45]

3. The pertinent parts of the Board's June 28, 2002 determination follow in their entirety, excepting internal citations:

> **SUMMARY OF THE EVIDENCE**
>
> Dr. Craig Sternberg testified by deposition on behalf of Claimant. It is the doctor's opinion that Claimant has 12% permanent impairment of the low back as a result of the work accident. Claimant's condition falls under Category II of the Diagnosis Related Estimates Model ("D.R.E.") of the *A.M.A. Guides to the Evaluation of Permanent Impairment* Fifth Edition ("Guides"). Claimant has muscle spasm and a disc herniation but did not have any neurologic deficits or decrease in range of motion.
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> The doctor first saw Claimant on May 18, 2000, for complaints of low back pain and numbness going in to the left leg. Examination of the low back on that date revealed spasm and a decrease in range of motion. Claimant underwent a course of therapy. In the middle of June 2000, the therapy was discontinued and Claimant had full range of motion in the low back. A September 2000 MRI of the low back showed a small disc protrusion at L5-S1, which the doctor believes, is one of the sources of

[43] Id. at 35.

[44] Id. at 18-19.

[45] Id. at 28.

Claimant's pain complaints. By April 2001, Claimant continued to complain of pain but had had some improvement. The doctor released Claimant with instructions to take Ibuprofen as needed.

The next time the doctor saw Claimant was in April 2002. He had increased pain in the back going into the left buttock and leg. The examination showed tenderness in the low back and the doctor recommended chiropractic treatment.

On cross-examination, the doctor agreed that he rated permanent impairment in July 2001. He also agreed that his diagnosis has been low back strain and sprain throughout his treatment of Claimant.

Dr. David Stephens testified on behalf of Ryder. It is Dr. Stephens' opinion that Claimant has no permanent impairment as a result of the work accident. Claimant's condition falls under Category I of the DRE which provides 0% impairment. Category II calls for significant muscle guarding. The doctor found no criteria for Category II present during his exam. His exam on April 15, 2002 showed full range of motion of the low back, no atrophy and no radicular signs.

On cross-examination, the doctor agreed that Claimant had complaints of left thigh pain and tightness but these complaints did not correlate with the MRI findings of a central herniation. He further agreed that the AMA Guides permits pain to be considered in permanent impairment rating.

Claimant testified that on May 8, 2002, he was driving a school bus when he was rear-ended by another vehicle. Since the accident he has experienced low back pain that radiates into his left buttock and leg. His low back pain improves when he wears his back brace.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On his Petition to Determine Additional Compensation Due Claimant has the burden of proving he has 12% permanent impairment to the low back as a result of work accident. The Board finds that he has not met his burden of proof.

When the medical testimony is in conflict, the Board, in its role as finder of fact, must resolve the conflict. [ ]. As long as substantial evidence is found, the Board may accept the testimony of one expert over another. [ ]. The Board accepts the testimony of Dr. Stephens over that of Dr. Sternberg and finds that Claimant has no permanent impairment to the low back as a result of the work accident.

It is Dr. Sternberg's opinion Claimant's low back condition falls under Category II of the DRE. Category II provides "[c]linical history and examination findings are compatible with a specific injury; findings may include significant muscle guarding or spasm observed at the time of examination by a physician, asymmetric loss of range of motion or nonverifiable radicular complaints." [ ]. The Board finds Claimant's condition does not fall under Category II because none of the Category II

> criteria is present. There is no evidence that Claimant has any spasm or loss of range of motion after his initial visit with Dr. Sternberg. In addition, there are no nonverifiable radicular complaints.
>
> The Board finds Dr. Stephens' opinion that Claimant's condition falls under Category I to be persuasive. Category I provides "[n]o significant clinical findings, no observed muscle guarding or spasm, no documentable neurological impairment." [ ].
>
> Based on the foregoing, the Board finds that Claimant has no permanent impairment as a result of the work accident.[46]

4. In this appeal Claimant argues that the Board erred because its decision was not supported by "substantial evidence." Claimant contends that the Board "failed to articulate the appropriate legal standard for determining permanent impairment[,]"[47] chiefly because it "omit[ted] the current AMA Guides standard of using chronic pain to determine permanency from its analysis…."[48] Claimant claims that "[r]ather than making 'clearly articulated findings' required by the Court for proper review,"[[49]] the Board "failed to articulate the significance of [Claimant]'s undisputed pain and how it applies to permanency under the AMA Guides [ ]."[50] Finally, Claimant maintains that the Board erred because it "based its

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[46] IAB Decision at 2-4.

[47] Appellant's Opening Br. at 7.

[48] Id. at 8.

[49] "[W]here there is a wealth of medical evidence and the experts disagree[ ] on all of it, the need for clearly articulated findings [by the Board] is crucial." Lindsay v. Chrysler Corp., C.A. No. 94A-04-005, 1994 WL 750345, at *3 (Del. Super. Dec. 7, 1994).

[50] Appellant's Opening Br. at 10.

decision on Dr. Stephens's rating [of zero percent "permanency"] and ignored the theory of pain assessment [rendered by Dr. Sternberg] when it determined that [Claimant] had no permanent impairment."[51] In support thereof, Claimant attaches to his Opening Brief what appears to be a chapter from the AMA Guides, Fifth Edition that describes the integration of "pain-related impairment" into the "conventional impairment rating system."[52]

Employer responds that the Board correctly articulated the appropriate standard for determining permanent impairment in that, according to Employer, the Board stated "that the [C]laimant must demonstrate a loss of function or loss of use of a specific member of the body as a result of the work accident…."[53] Employer argues that "the Board accepted Dr. Stephens's opinion of zero percent permanent impairment to the lower back which is clearly supported by substantial evidence."[54] Employer contends that Dr. Stephens's diagnosis was "favored" by the Board because his analysis "was much more complete and accurate [in that Dr. Stephens used the AMA Guides and a range of motion assessment]" and that "it is unclear

[51] Id. at 12-13.

[52] Ex. "C" to Appellant's Opening Br.

[53] Appellee's Answering Br. at 6.

[54] Id. at 7.

[from the record] what the basis [wa]s for Dr. Sternberg's permanency rating…in any event."[55] Employer lastly argues that "[C]laimant's attempt to admit evidence to the Superior Court which was not presented to the Industrial Accident Board is inappropriate and should be stricken."[56]

Despite having been directed to do so, Claimant did not file a Reply Brief.[57]

5. The Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency. The function of the reviewing court is to determine whether substantial evidence supports the agency's decision.[58] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[59] On appeal, the court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[60] The reviewing court merely determines if the evidence is legally adequate to support the

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[55] Id. at 10.

[56] Id.

[57] Letter from Donald E. Marston to the Court of 11/13/02 (Dkt. #8).

[58] General Motors Corp. v. Freeman, 164 A.2d 686, 688 (Del. 1960); Johnson v. Chrysler Corp., 213 A.2d 64, 66-67 (Del. 1965).

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

[60] Johnson, 213 A.2d at 66.

agency's factual findings.[61] In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below.[62] If substantial evidence exists and the Board made no error of law,[63] its decision must be affirmed.[64]

6. The Board cannot summarily make its determinations in a conclusory manner; otherwise this Court, upon appellate review, would be unable to determine "whether the Board proceeded upon a correct theory of law…[and] whether its findings are based upon competent evidence…."[65] In Delaware, the "correct theory of law" with regard to permanent injury resulting from workplace accidents is found at title 19, section 2326(g) of the Delaware Code: "The Board shall award proper and equitable compensation for the loss of any member or part of the body or loss of use

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[61] See DEL. CODE ANN. tit. 29, § 10142(d) (1997) (providing that a reviewing court shall take due account of the experience and specialized competence of a fact-finding agency).

[62] General Motors Corp. v. Guy, C.A. No. 90A-JL-5, 1991 WL 190491, at *3 (Del. Super. Aug. 16, 1991).

[63] Questions of law are subject to *de novo* review by the Superior Court. State v. Worsham, 638 A.2d 1104, 1106 (Del. 1994).

[64] Breeding v. Contractors-One-Inc., 549 A.2d 1102, 1104 (Del. 1988).

[65] Lindsay, 1994 WL 750345 at *5 (citation omitted); Walden v. Georgia-Pacific Corp., C.A. No. 95A-04-016, 1995 WL 790955, at *7 (Del. Super. Dec. 21, 1995) (citation omitted).

of any member or part of the body…."[66] Although the Board did not explicitly reference this statutory subsection in its determination of Claimant's zero percent "permanency," it did state that there was "no evidence that Claimant ha[d] any…loss of range of motion after his initial visit with Dr. Sternberg."[67] Although this conclusion may be inartfully written and devoid of statutory reference, it nonetheless describes the core of the "permanency" aspect of Delaware's workers compensation statute, *i.e.*, a "loss of use." The Court therefore agrees with Employer's contention that the Board, although not plainly stating so, had the correct legal standard in mind when hearing Claimant's petition.

7. This Court has previously held that "pain" can be considered in making a determination of permanent impairment under section 2326(g); specifically, in Wilmington Fibre Specialty Company v. Rynders,[68] this Court stated that "[l]oss of use should be determined based upon the ability of the employee to use the member or part,"[69] and that "[o]ne element which properly may be considered in determining…[whether the employee could

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[66] DEL. CODE ANN. tit. 19, § 2326(g) (1995).

[67] IAB Opinion at 4.

[68] 316 A.2d 229 (Del. Super. Ct. 1974), aff'd, 336 A.2d 580 (Del. 1975).

[69] Rynders, 316 A.2d at 231.

make use of a 'member or part'] is whether a function can be performed only by undergoing considerable pain."[70] Thus "[p]ain which is not associated with loss of use is not compensable" but "pain of movement may constitute an inhibitory force which prevents…use."[71] Accordingly, there was "ample competent evidence" to support a permanent impairment award in that case because "[i]t was undisputed that it [wa]s not within the capability of th[e] employee to use her back, leg or neck to some degree [without experiencing the 'inhibitory force' of pain]."[72] The Supreme Court affirmed the Rynders case on appeal and added that "[l]oss of use resulting from pain…is compensable…whether such pain is attributable to organic or psychogenic [*i.e.*, originating in the mind] factors."[73]

Here, both Dr. Sternberg (Claimant's treating physician) and Dr. Stephens agreed that, as of the date of the IAB hearing, Claimant did not have a loss or range of motion; Dr. Sternberg qualified this finding by stating that Claimant related that at times "it hurt[ ] [him] to bend."[74] The

[70] Id. at 232.

[71] Id.

[72] Id.

[73] Wilmington Fibre Specialty Co. v. Rynders, 336 A.2d 580, 581 (Del. 1975).

[74] Sternberg Dep. at 15.

Board recorded this confluence of opinion in its "Summary of the Evidence" wherein it stated that Dr. Sternberg had found that Claimant "did not have any neurologic deficits or decrease in range of motion[ ]"[75] and wherein it stated that Dr. Stephens's April 15, 2002 examination "showed full range of motion of the low back, no atrophy and no radicular signs."[76] The Board articulated in its "Findings of Fact and Conclusions of Law" that one of the reasons it denied Claimant's petition was because "[t]here [wa]s no evidence that Claimant ha[d] any…loss of range of motion after his initial visit with Dr. Sternberg."[77] This particular factual determination and conclusion of law, *i.e.*, the Board's determination of the evidence of the doctors' confluence of opinion coupled with a finding of no "loss of range of motion," appears to this Court to have complied with the criteria of section 2326(g) and Rynders insofar as "[l]oss of use should be determined based upon the ability of the employee to use the member or part[ ][.]"[78] Therefore, Claimant's arguments regarding articulation of a proper legal standard supported by competent medical evidence are refuted.

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[75] IAB Decision at 2.

[76] Id. at 3.

[77] Id. at 4.

[78] Rynders, 316 A.2d at 231.

8. With regard to the additional evidence introduced below, *i.e.*, evidence other than that of Claimant's full range of motion, the Board essentially chose the competing testimony of one expert over that of another; it is properly the role of the Board to resolve conflicts in testimony and issues of credibility and to determine what weight is to be given to the evidence presented.[79]

Dr. Stephens (the medical examiner chosen by Employer) contended that Claimant did not exhibit any of the symptoms necessary for a diagnosis consistent with Dr. Sternberg's 12% "permanency" rating. In addition to the "objective" examination utilizing the inclinometer that Dr. Stephens performed, the doctor testified (in contrast to Claimant's argument on appeal that the Board did not consider such evidence) that he additionally evaluated Claimant pursuant to a "pain" assessment; Dr. Stephens testified that MRI findings of disc herniation do not automatically lead to symptoms such that Claimant had been experiencing. This contention was unrefuted by Dr. Sternberg.

The Board articulated its rationale for crediting Dr. Stephens's testimony over that of Dr. Sternberg when it stated "Claimant's condition

[79] Mooney v. Benson Mgt. Co., 451 A.2d 839 (Del. Super. Ct. 1982), rev'd on other grounds, 466 A.2d 1209 (Del. 1983).

does not fall under…[Dr. Sternberg's conlusion] because none of the…criteria [for that conclusion] [wa]s present."[80] This determination was made after receiving evidence and detailing the criteria necessary for such a conclusion, *e.g.*, muscle guarding, muscle atrophy, and radicularopathy.[81] This is not a case where the Board's "permanency" decision rested solely on witness "persuasiveness" such that the Board substituted "credibility…for factual findings on unresolved matters."[82] As such, this Court finds that the Board properly articulated the evidence upon which its conclusions were founded.

As was expressed by this Court in Johnson v. E.I. DuPont de Nemours & Company,[83] so long as the evidentiary summations and legal conclusions of a Board decision "make it clear" that the Board evaluated the competing medical testimony, personally observed the claimant, and thereafter made a conclusion, "this Court will not overturn the [IAB's] decision…."[84]

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[80] IAB Decision at 4.

[81] Id. at 3.

[82] Lindsay, 1994 WL 750345 at *3.

[83] C.A. No. 00A-05-006, 2000 WL 33115805 (Del. Super. Oct. 4, 2000), aff'd, No. 515, 2000, 2001 WL 213410 (Del. Feb. 27, 2001).

[84] Johnson, 2000 WL 33115805 at *4.

9. The Board noted additional facts in its "Summary of Evidence" section of its determination which were not cited as bases for the Board's legal conclusion. Chief among these is the fact that Dr. Sternberg had opined that the disc protrusion at L5-S1 was "one of the sources of Claimant's pain complaints"[85] (which theory was thereafter discredited by Dr. Stephens) and the fact that Dr. Sternberg "agreed [on cross-examination] that he rated [Claimant's] permanent impairment in July 2001[,]"[86] despite Dr. Sternberg's not having seen Claimant between April 2001 and April 2002. Nonetheless, and since (in an appropriate case, as here) this Court is permitted to infer from the Board's conclusions what the Board's unexpressed but underlying factual findings "must have been,"[87] the Court can also infer that expressed factual findings not mentioned in the Board's conclusions nonetheless were part of the Board's deliberations. As the Keith Court stated in such context, "remand for further proceedings would simply be an unnecessary formality."[88]

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[85] Id. at 2.

[86] Id. at 3.

[87] Keith v. Dover City Cab Co., 427 A.2d 896, 899 (Del. Super. Ct. 1981) (holding that "[w]hen a Board decides not to expressly state certain [factual] findings, the courts are capable of inferring from the Board's conclusions what the underlying findings must have been").

[88] Id.

9. Because Claimant chose not to file a Reply Brief after Employer moved in its Answering Brief to strike portions of Claimant's Opening Brief which were not part of the record below, Employer's Motion to Strike what appears to be a chapter from the AMA Guides, Fifth Edition (and which is attached as Exhibit "C" to Claimant's brief) is **GRANTED**.

10. For the reasons stated above, and viewing the record in a light most favorable to Employer, this Court finds there was substantial evidence introduced at Claimant's Board hearing to support the Board's decision. The Board otherwise committed no error of law. Accordingly, the Board's June 28, 2002 determination that Claimant failed to meet his burden in proving permanent impairment is **AFFIRMED**.

IT IS SO ORDERED.

_____
Richard R. Cooch, J.

oc: Prothonotary
xc: Industrial Accident Board
Eric M. Doroshow, Esquire and Donald E. Marston, Esquire,
Attorneys for Claimant
William D. Rimmer, Esquire, Attorney for Employer