

**IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STEVEN JUSTICE,	:	
	:	
Appellant,	:	
	:	
v.	:	C.A. No. 03A-08-011 SCD
	:	
	:	
PATHMARK STORES, INC.,	:	
	:	
Appellee.	:	

**OPINION**

*Upon appellant's appeal from the decision of the  
Industrial Accident Board – **AFFIRMED***

Submitted: June 14, 2004  
Decided: August 26, 2004

Gary W. Aber, Esquire, Aber, Goldlust, Baker & Over, Wilmington, Delaware, attorney for the Appellant-Claimant; and

Scott R. Mondell, Esquire, and Christian G. McGarry, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell, Wilmington, Delaware, attorneys for Appellee-Employer.

**Del Pesco, J.**

This is an appeal from the decision of the Industrial Accident Board (“Board”) on Claimant’s Petition to Determine Additional Compensation Due. Steven Justice (“claimant”) had an industrial accident in 1989 while employed with Pathmark Stores/Rickles (the “employer”). He sustained a compensable injury, a ruptured disc at L-4,L-5. Claimant has never returned to work with employer. He sought medical treatment for his injuries for several years, including two surgical procedures to remove portions of the ruptured disc.

In October of 1995, the employer and claimant agreed to commute all workers’ compensation benefits, specifically to include future total disability, future partial disability, future permanent impairment and future disfigurement. The medical portion of the claimant’s claim was left open.

Subsequent to the commutation agreement between the parties, claimant has been involved in six motor vehicle accidents. Claimant has continued treatment for his lower back pain.

On July 8, 2002, claimant filed a petition seeking a determination that his medical expenses for treatment from 1999 through 2003 are causally related to his 1989 compensable injury. After a hearing, the Board concluded that the claimant failed to sustain his burden of proof. Claimant has appealed the Board’s decision.

#### *Summary of Facts*

Claimant sustained low back injuries on October 10, 1989, when he attempted to lift a five-gallon drum of asphalt sealer, weighing between fifty and seventy pounds.<sup>1</sup>

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<sup>1</sup> Transcript of *Justice v. Pathmark Stores, Inc.*, Industrial Accident Board Hearing (“IAB Hearing”) 897445, July 28, 2003, at 1, 22.

Claimant never returned to work with the employer following the work accident. He was treated for several years, primarily by Dr. Magdy Boulous, a board certified neurosurgeon.

Dr. Boulous evaluated claimant after the accident and diagnosed him with a ruptured disc at L-4, L-5, causing severe nerve root depression.<sup>2</sup> On November 15, 1989, Dr. Boulous performed a low back discectomy to remove a piece of the impinging disc.<sup>3</sup> A second surgery was performed on June 1, 1990, a laminectomy at L-4, L-5, to remove another portion of the disc that had come loose.<sup>4</sup>

Dr. Boulous continued to manage the claimant's low back pain, as well as several unrelated conditions that were attributable to the claimant's diabetes until March 21, 1996.<sup>5</sup> In the last office note from Dr. Boulous in 1996, the doctor recommends that the claimant not proceed with any further low back surgery given his physical findings.<sup>6</sup> He recommended claimant continue with conservative care with Dr. Pierre LeRoy, a pain management specialist.

In October of 1995, employer and claimant agreed to commute all workers' compensation benefits, except compensation for medical treatment. Subsequent to the agreement, claimant was involved in a series of accidents, including six motor vehicle

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<sup>2</sup> Deposition of Magdy I Boulous, M.D., July 14, 2003 at 2-3.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 21. Dr. Boulous testified that claimant suffered from peripheral neuropathy in his lower extremities, an inflammation of the peripheral nerves, as a result of his diabetes.

<sup>6</sup> *Id.* at 7.

accidents occurring between 1996 and 2002.<sup>7</sup> During this time period, claimant continued treatment for his low back pain with several physicians, including Dr. LeRoy and Dr. Bruce Rudin, an orthopedic surgeon. In September 1997, Dr. Rudin operated on claimant for intractable radiculopathy which he related to claimant's 1996 auto accident.<sup>8</sup>

On July 8, 2002, claimant petitioned the Board to determine additional compensation due from his 1989 accident. Three people testified at the hearing.

Claimant testified that following the 1989 accident he couldn't walk, his back was swollen, and he was in excruciating pain.<sup>9</sup> Claimant sought treatment from Dr. Boulos who performed a discectomy, which improved his condition. However, he did continue to have pain and subsequently underwent a second lower back operation.<sup>10</sup>

In 1994, Dr. Boulos recommended that he see Dr. Rudin, who suggested he undergo another fusion surgery on his back. Claimant delayed the surgery until 1997 because he understood that a person diagnosed with osteomyelitis should wait five years.<sup>11</sup> Prior to the 1997 surgery, claimant was involved in two auto accidents which caused soreness.<sup>12</sup>

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<sup>7</sup> On November 7, 1996, claimant was involved in his first auto accident when a tractor-trailer entered his lane and contacted his car. On August 20, 1997, he was involved in a second auto accident when his vehicle was struck by a woman who ran through a stop sign. A third accident occurred on April 25, 1998, in which claimant's vehicle was struck in the middle of an intersection by a car that ran through a stop sign. On November 28, 1998, claimant's vehicle collided with another vehicle in an intersection as he attempted to make a left turn. On September 11, 2001, claimant had a fifth traffic accident when a woman ran through a stop light and struck his vehicle. Finally, on November 22, 2002, claimant was involved in a sixth auto accident when a sixteen year old ran through a stop sign and struck his vehicle. IAB Hearing at 41-44.

<sup>8</sup> Boulos Deposition at 7.

<sup>9</sup> IAB Hearing at 23.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 27.

<sup>12</sup> *Id.* at 28.

Claimant testified that he was treated by Dr. LeRoy, followed by Dr. Uthaman, both pain management specialists, who prescribed pain medications for him.<sup>13</sup> He has been treating with pain management specialists for several years.

Claimant continues to have back pain, although he has taken less pain medication.<sup>14</sup> He doesn't sleep very well because of his pain; his neuropathy causes numbness in his legs.<sup>15</sup> When questioned about a slip and fall accident in 1996 documented by medical records, the claimant said he could not recall.

Dr. Boulos testified by deposition on claimant's behalf. He diagnosed him with a L-4, L-5 disc protrusion causing severed nerve root decompression which he operated on two separate occasions.<sup>16</sup>

Although Dr. Boulos had not examined claimant since 1996, he testified that he reviewed an MRI taken on July 17, 1997, which showed a stable disc herniation at L-5, S-1, noting no change from previous studies.<sup>17</sup> He further opined that the 1997 surgery was due to the 1989 accident, describing the auto accidents as mere aggravations of symptoms.<sup>18</sup>

Although aware that the claimant has been involved in several auto accidents, Dr. Boulos testified that he had not reviewed any medical records from physicians treating

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<sup>13</sup> *Id.* at 30.

<sup>14</sup> *Id.* at 38.

<sup>15</sup> *Id.* at 47.

<sup>16</sup> Boulos Deposition at 2, 4.

<sup>17</sup> *Id.* at 16-17.

<sup>18</sup> *Id.* at 18-19.

claimant after his first auto accident, although he acknowledged that such accidents can cause traumatic injuries.<sup>19</sup>

Dr. Peter B. Bandera testified by deposition on behalf of the employer. Dr. Bandera is a board certified physiatrist who evaluated claimant on September 24, 2002.<sup>20</sup> Additionally, he had reviewed claimant's medical records from the past twelve years and was aware of claimant's compensable injury, as well as his condition related to diabetes.<sup>21</sup>

Dr. Bandera testified regarding Dr. Boulos' treatment of claimant in 1989 and 1990. He stated that the normal window of recovery for such a procedure would be six to twelve months.<sup>22</sup>

Dr. Bandera noted that Dr. LeRoy's notes reflect increased symptoms following the first automobile accident, which necessitated a referral to Dr. Rudin for surgery.<sup>23</sup> Prior to the surgery, he noted that claimant's symptoms had increased yet again due to second auto accident.<sup>24</sup> Dr. Rudin's office notes also stated that the auto accidents were the etiology of claimant's problems and the need for the microdiskectomy to relieve intractable lower extremity radiculopathy.<sup>25</sup>

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<sup>19</sup> *Id.* at 22-25.

<sup>20</sup> Deposition of Peter B. Bandera, M.D., Apr. 10, 2003 at 6-7.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> *Id.* at 11-12.

<sup>23</sup> *Id.* at 14.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 15-16, 20.

Dr. Bandera testified regarding various medical conditions that claimant has suffered from since Dr. Rudin's surgery, such as problems associated with his diabetes and a shoulder injury, none of which are related to his 1989 accident.<sup>26</sup>

Dr. Bandera concluded that the multiple motor vehicle accidents were the cause of claimant's new injuries based on the findings identified by each surgeon, claimant's subjective complaints, and the increased pain management treatment required after the auto accidents.<sup>27</sup> He also concluded that claimant's bowel and bladder problems were associated with his diabetes.<sup>28</sup>

After hearing the testimony, the Board concluded that claimant had not satisfied his burden of proving that his medical treatment was related to the 1989 work accident.<sup>29</sup> The Board accepted the testimony of Dr. Bandera, noting his comprehensive review of all medical records and his own examination of the claimant, which was consistent with the findings of Dr. Rudin.<sup>30</sup> The Board rejected the testimony of Dr. Boulos as unreliable and unpersuasive, his opinions having been made without review of any medical records regarding the claimant's post-auto-accident treatment.<sup>31</sup> The Board also found claimant's testimony to lack credibility.<sup>32</sup> The petition for medical expenses and transportation was Denied.

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<sup>26</sup> *Id.* at 18-20.

<sup>27</sup> *Id.* at 27.

<sup>28</sup> *Id.* at 30.

<sup>29</sup> *Justice v. Pathmark Stores, Inc.*, Decision of the Industrial Accident Board Hearing No. 897445, Aug. 8, 2003, at 5.

<sup>30</sup> *Id.* at 6.

<sup>31</sup> *Id.* at 5-6.

<sup>32</sup> *Id.* at 6.

### *Standard of Review*

The Delaware Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from a decision of the Board, the Court is limited to determining whether substantial evidence in the record supports the Board's findings, and that such findings are free from legal error.<sup>33</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>34</sup> If this Court finds substantial evidence and the Board has not committed an error of law, the Board's decision must be affirmed.<sup>35</sup>

This Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>36</sup> When factual determinations are at issue, the Court “shall take due account of the experience and specialized competence of the agency.”<sup>37</sup>

### *Analysis*

The claimant’s petition seeks additional compensation for medical and transportation expenses allegedly resulting from a compensable work accident on October 10, 1989.<sup>38</sup>

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<sup>33</sup> See *Employment Ins. Appeals Bd. of the Dep’t of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975); *Longobardi v. Unemployment Ins. Appeals Bd.*, 287 A.2d 690, 692 (Del. Super. 1972), *aff’d*, 293 A.2d 295 (Del. 1972).

<sup>34</sup> See *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

<sup>35</sup> *Windsor v. Bell Shades and Floor Coverings*, 403 A.2d 1127, 1129 (Del. 1979).

<sup>36</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>37</sup> 29 DEL. C. ANN. 10142 (d) (2002).



The Board was presented with a conflict in expert testimony. In cases where substantial competent evidence may have been introduced by both sides and such evidence may be in direct conflict, the Board remains free to accept the expert testimony of one side over the contrary opinion of the other side.<sup>39</sup>

There exists substantial evidence in the record to support the Board's reliance on the opinion of Dr. Bandera. Dr. Bandera testified that his examination of claimant showed injuries unrelated to the 1989 accident. He also concluded that the reasonable period of management related to that accident had expired.<sup>40</sup> Dr. Bandera's opinions were also based on the findings of the physicians who treated him after his various motor vehicle accidents.<sup>41</sup> Finally, he associated claimant's other medical ailments to his ongoing diabetic condition which was linked to much of his pain management treatment.<sup>42</sup>

Therefore, the decision of the Board is AFFIRMED.

IT IS SO ORDERED.

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Susan C. Del Pesco

xc: Original to Prothonotary  
Industrial Accident Board  
Counsel of Record

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<sup>38</sup> IAB Hearing at 1.

<sup>39</sup> *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992); *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 105-06 (Del. 1982).

<sup>40</sup> Bandera Deposition at 26.

<sup>41</sup> *Id.* at 27.

<sup>42</sup> *Id.* at 32-33.