IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONALD WILSON,	)	
	)	
Employee, Appellant,	)	
	)	
v.	)	C.A. No. 04A-05-002-JRS
	)	
BRESCI CONSTRUCTION,	)	
	)	
Employer, Appellee.	)	

Date Submitted: September 16, 2004
Date Decided: December 3, 2004

Appeal from the Industrial Accident Board. **AFFIRMED.**

ORDER

This 3rd day of December, 2004, upon consideration of the appeal of Donald Wilson from the decision of the Industrial Accident Board (the "Board") granting his Petition to Determine Additional Compensation Due (but assigning a lower percentage of permanent impairment than requested) it appears to the Court that:

1. Mr. Wilson sustained a compensable right wrist injury on March 4, 2002, while he was employed by Bresci Construction ("Bresci").[1] As a result of the injury,

---

[1]D.I. 3, Bd. Decision at 2.

Mr. Wilson received medical treatment and underwent wrist surgery, both of which kept him out of work for approximately eight weeks.[2] On September 24, 2003, he filed a Petition to Determine Additional Compensation Due seeking permanent impairment benefits for his right upper extremity.[3]

2. On April 2, 2004, the Board heard Mr. Wilson's Petition. While the parties agreed as to the compensability of the injury, they disagreed as to the degree (or percentage) of the permanency.[4] Consequently, each party presented expert testimony outlining their respective positions on the degree of impairment to Mr Wilson's right upper extremity.[5]

3. Dr. John Hocutt, a board-certified specialist in family and sports medicine, testified on behalf of Mr. Wilson by deposition.[6] Dr. Hocutt reviewed Mr. Wilson's records and conducted a physical examination.[7] He testified that a functional capacity evaluation was performed on Mr. Wilson and identified a 20%

---

[2] *Id.*; D.I. 3, Crain Dep. at 17.

[3] *See* DEL. CODE ANN. tit. 19, § 2326 (1995).

[4] *Id.* at 1-2.

[5] *Id.* at 12,16.

[6] *Id.* at 12-16.

[7] D.I. 3, Hocutt Dep. at 4,5.

loss of strength in his right hand.[8] Range of motion testing revealed "a 16% loss of right upper extremity impairment from range of motion of the wrist."[9] Dr. Hocutt concluded, based on his physical examination of Mr. Wilson, his medical records review, the functional evaluation, the range of motion testing, and the American Medical Association's Guides to Rating Permanent Impairment (the "Guides"), that Mr. Wilson had a 33% impairment to the right upper extremity.[10]

4. Dr. Evan Crain, a board-certified orthopedic surgeon, testified on behalf or Bresci by deposition.[11] Dr. Crain testified that he also reviewed Mr. Wilson's medical records and performed a physical evaluation.[12] He also considered Mr. Wilson's range of motion measurements and found them to be normal except for a slight decrease as a result of a pre-existing injury.[13] Because of this normal range of motion, Dr. Crain testified that the only way he could rate Mr. Wilson's impairment would be with a strength measurement of the right wrist using the "Strength-Loss

---

[8] *Id.* at 7.

[9] *Id.* at 8.

[10] *Id.* at 9.

[11] D.I. 3, Hr'g Tr. at 16-27.

[12] D.I. 3, Crain Dep. at 5-6.

[13] *Id.* at 19.

Index."[14] He reviewed the strength measurement results along with the Guides, his findings from the physical examination, and Mr. Wilson's level of function since the injury and surgery, and concluded that Mr. Wilson had suffered a 10% right upper extremity permanent impairment.[15] Dr. Crain further testified that he disagreed with Dr. Hocutt's finding of 33% impairment for two reasons. First, he disagreed with the physical performance measurements recorded by Dr. Hocutt.[16] Second, he did not believe that Dr. Hocutt appropriately used the Guides. Specifically, Dr. Crain opined that Dr. Hocutt inappropriately considered both loss of strength and decreased range of motion together to reach his permanency conclusion. According to Dr. Crain, these two measurements may only be combined under the Guides when the impairments measured result from unrelated problems.[17]

5. In its April 23, 2004 decision, the Board granted Mr. Wilson's petition but concluded that his degree of permanent impairment was 10%.[18] The Board found the opinion of Dr. Crain persuasive based upon the decreased strength measurement

---

[14] *Id.*

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

[16] *Id.* at 24-25.

[17] *Id.* at 24-26.

[18] D.I. 3, Bd. Decision at 7,8.

in his right wrist and the corresponding impairment rating in the Guides.[19] In making this finding, the Board rejected Dr. Hocutt's testimony that Mr. Wilson suffered a 33% impairment.[20] Specifically, the Board concluded that Dr. Hocutt had improperly combined the values for reduced range of motion and loss of strength contrary to the express mandate of the Guides.[21] Mr. Wilson now appeals the Board's findings to this Court.

6. In this appeal, Mr. Wilson argues that the Board erred as a matter of fact because it did not follow the Guides for rating permanent impairment. Specifically, he contends that the Board ignored the Guides when it accepted Dr. Crain's opinion on permanency because, contrary to the Board's conclusion, the Guides expressly *require* the physician to combine the percentage of the loss of strength in the hand with the loss of range of motion of the wrist when determining the total percentage of upper extremity impairment. Thus, according to Mr. Wilson, the Guides expressly support the evaluative approach taken by Dr. Hocutt and expressly reject the approach taken by Dr. Crain. He further contends that the Board's misuse of the Guides constitutes "plain error" that requires reversal and remand to the Board to apply the

[19] *Id.* at 7.

[20] *Id.*

[21] *Id.*

Guides' directives properly.

7. In reviewing a decision of the Board, the Court must determine whether it is supported by substantial evidence and free from legal error.[22] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[23] It is "more than a scintilla but less than a preponderance of the evidence."[24] On appeal from the Board's decision, the moving party bears the burden of establishing that the Board's findings were not supported by substantial evidence.[25] When deciding whether the appellant has met its burden, this Court does not sit as the trier of fact to weigh the evidence and determine witness credibility.[26] Determinations of credibility and the weight of evidence are exclusively within the province of the Board.[27] Moreover, where there is conflicting medical testimony, it is well established under Delaware law that the Board may rely upon the opinion of either expert (rejecting the opinion of the other) and that such evidence

---

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

[23] *Breeding v. Contractors-One, Inc.*, 549 A.2d 1102, 1104 (Del. 1998).

[24] *Id.*

[25] *A.H. Angerstein, Inc. v. Jankowski*, 187 A.2d 81, 86 (Del. Super. Ct. 1962).

[26] *Playtex Prod., Inc. v. Harris*, 2004 WL 1965985, at *1-2 (Del. Super.)("The [Board], not the Court [on appeal], must resolve conflicts in testimony, issues of credibility and decide what weight to give evidence presented.").

[27] *See Playtex*, 2004 WL 1965985, at *2.

can constitute substantial evidence in support of the Board's decision.[28]

8. Here, the Board properly performed its function under Delaware law; it evaluated the credibility of the witnesses and weighed the evidence. The Board heard the conflicting testimony from Dr. Hocutt and Dr. Crain and accepted Dr. Crain's testimony over that of Dr. Hocutt regarding the appropriate use of the Guides and the resulting degree of permanent impairment to Mr. Wilson's right upper extremity. This determination - - made after evaluating each expert's credibility and weighing the evidence presented - - is one exclusively reserved for the Board. It is a determination that will not be disturbed by this Court. The Board's acceptance of Dr. Crain's opinion over Dr. Hocutt's satisfies the substantial evidence requirement and, consequently, Mr. Wilson is unable to meet his burden on appeal.[29]

9. Moreover, Mr. Wilson's claim that Dr. Crain's opinion was not sufficiently reliable because it did not follow the Guides comes too late. Any objection to Dr. Crain's testimony or the methods he used to form his opinions should

---

[28] *Id. citing State v. Steen,* 1999 WL 743326, at *3 (Del. Super.). *See also DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982)(finding substantial evidence where the Board accepted one expert's testimony over another's).

[29] *See DiSabatino*, 453 A.2d at 106("[T]he evidence was definitely in conflict and, the substantial evidence requirement being satisfied either way, the Board was free to accept [the testimony of the employer's expert], over contrary opinion testimony.").

have been made when the testimony was offered.[30] Mr. Wilson did not object to Dr. Crain's testimony or his methods either at deposition or at the hearing. Raising the objection for the first time on appeal is improper and will not be countenanced.[31]

10. Based on the foregoing, the decision of the Board granting Mr. Wilson's Petition to Determine Additional Compensation Due, and its finding of 10% permanent impairment for his right upper extremity, is **AFFIRMED**.

IT IS SO ORDERED.

____
Judge Joseph R. Slights, III

Original to Prothonotary

cc: Clifford B. Hearn, Jr., Esquire
Robert H. Richter, Esquire
Industrial Accident Board

[30] *See id*("Any objections to an expert's testimony must be made at the time the testimony is offered and not on appeal.").

[31] *See id*("[A party] cannot object to a medical expert's testimony after [that] expert has testified before the [Board].").