SUPERIOR COURT

OF THE

STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0664

J.R. Julian, Esquire
J.R. Julian, P.A.
824 Market Street, Suite 1001
P.O. Box 2171
Wilmington, Delaware 19899
Attorney for Employer–Appellant

Mathew M. Bartkowski, Esquire
Kimmel, Carter, Roman & Peltz, P.A.
200 Biddle Avenue, Suite 101
P.O. Box 1070
Bear, Delaware 19701
Attorney for Employee–Appellee

Re: ***Standard Distributing, Inc. v. Hall***
C.A. No. 03A-12-002 RRC

Submitted: December 22, 2004
Decided: March 18, 2005

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

Dear Counsel:

Standard Distributing, Inc. ("Employer") has filed an appeal of a decision from the Industrial Accident Board ("Board"). In its August 12, 2003 decision, the Board found in favor of Charles J. Hall, Jr. ("Employee")

and awarded payment of outstanding psychiatric bills and attorney's fees. The Board found that Employee "suffered . . . depression as a result of [an] earlier work accident [and] that the treatment offered by [Employee's psychiatrist] was reasonable, necessary, and causally related to the work accident."[1] In a revised decision (not at issue on this appeal), dated November 4, 2003, the Board apparently denied Employer's motion for reargument and revised its August 12 decision by adjusting the amount of attorney's fees.

THE PARTIES' CONTENTIONS

Employer's argument.

Employer argues on appeal that the Board's decision is not supported by substantial evidence and in so finding the Board committed legal error. Employer contends that the testimony of Employee's expert, Dr. Jay Weisberg (taken at a pre-hearing deposition), did not meet the substantial evidence test because Dr. Weisberg did not use the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV"), or, alternatively, that he did not use it properly, in his diagnosis of Employee's depression. Employer argues that because Dr. Weisberg did not use the DSM-IV, his

[1] August 12, 2003 Decision of the Industrial Accident Board at 10.

conclusion that Employee suffered from "major depression"[2] that was due to his work related accident[3] is a "mere speculative hunch[]" and that his testimony does not meet the *Daubert* standard for admitting scientific evidence.[4] Employer also argues that the Board committed various seperate errors of fact and law.

Employee's response.

Employee responds that there was substantial evidence for the Board to have accepted Dr. Weisberg's testimony. Employee also argues that Employer has impermissibly asserted issues on appeal that were not raised below and that any *Daubert* issues or objections to Dr. Weisberg's misuse or non-use of the DSM-IV therefore have been waived by Employer because it did not object to the basis of Dr. Weisberg's expert testimony before the Board. Employee also argues that the instances of factual errors raised by Employer are either inconsequential errors or are merely instances where the Board chose to believe one expert over another.

STANDARD OF REVIEW

The Supreme Court and this Court have repeatedly emphasized the

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[2] Tr. Weisberg. IAB Hearing No. 908223 at 30.

[3] Tr. Weisberg. IAB Hearing No. 908223 at 24.

[4] Employer's Opening Brief at 15.

limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[5] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[6] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[7] The reviewing Court must view the facts in a light most favorable to the party prevailing below;[8] therefore, it merely determines if the evidence is legally adequate to support the agency's factual findings.[9] When factual determinations are at issue, the reviewing Court should defer to the experience and specialized competence of the Board.[10] If the decision is supported by substantial evidence, the Court must affirm the decision of an agency even if the Court might have, in the first instance, reached an

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

[6] *Oceanport Ind. v. Wilmington Stevedores*, 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 (1986).

[7] *Johnson*, 213 A.2d at 66.

[8] *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

[9] 29 *Del. C*. §10142(d).

[10] *Histed v. E.I. DuPont De Nemours & Co*., 621 A.2d 340, 342(Del. 1993); *Julian v. Testerman*, 740 A.2d 514, 519 (Del. Super. Ct. 1999), *aff'd* 737 A.2d 530 (Del. 1999).

opposite conclusion.[11]

THE ISSUE ON APPEAL

The issue before this Court is whether the testimony by Dr. Weisberg, along with all of the other evidence presented to the Board, was sufficient to satisfy the substantial evidence standard required by this Court to affirm a decision of the Board.

DISCUSSION

A. Employer has waived the right to now challenge certain of Dr. Weisberg's testimony before the Board.

This Court has held that "when the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record, and will not consider issues not raised before that agency."[12] This Court has also held that "[i]t is settled Delaware law that an issue is waived for appeal if it was not raised [at the Industrial Accident Board hearing] below."[13] Employer never objected before the Board to Dr. Weisberg's supposed non-reliance upon or any misapplication of the DSM-IV in his diagnosis of Employee. Employer's counsel did not cross examine Dr. Weisberg on this

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[11] *Brogan v. Value City Furniture*, 2002 Del. Super. LEXIS 88 at 6 (Del. Super. Ct.)

[12] *Potts Welding & Boiler Repair Co., Inc. v. Zakrewski*, 2002 Del. Super. LEXIS 32 *15.

[13] *Potts Welding, Inc.*, 2002 Del. Super. LEXIS 32 *15.

issue. In fact, there is nothing in the record to indicate whether Dr. Weisberg (or Employer's expert, Dr. Daniel J. Freedenburg, for that matter) used the DSM-IV or not.[14] Because Employer's argument that Dr. Weisberg's testimony was not based on the DMV-IV was raised for the first time on appeal, this Court will not consider this argument as it has been waived.[15]

As to Employer's related argument that Dr. Weisberg's testimony did not satisfy the requirements of *Daubert*, this Court has held in another Board appeal, *State v. Stevens*, that "[t]he proper time to make objections to an expert's qualifications or proffered testimony is at [an IBA hearing]; not on appeal."[16] Prior to Dr. Weisberg giving testimony at his deposition, Employee's counsel began to lay the foundation for the testimony by establishing Dr. Weisberg's credentials as an expert in psychiatry when

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[14] The only time the DSM-IV was referred to during Dr. Weisberg's testimony was when Dr. Weisberg himself referred to the DSM-IV in connection with the Global Assessment Functioning ("GAF") test and it significance.

[15] *Potts Welding Inc.*, 2002 Del. Super. LEXIS 32 *15.

[16] *State v. Stevens*, 2001 Del. Super. LEXIS 167 *9 (holding that "the Board was empowered to accept the opinion of [Employee's expert], in whole or in part, and reject the testimony of the other testifying experts to the extent it deemed appropriate.; *see also Feralloy Industries v. Wilson*, 1998 Del. Super. LEXIS 214 *9 (holding that "[w]hile administrative agencies operate less strictly than courts, the orderly administration of justice requires that agencies are still subject to some semblance of an affirmative defense waiver rule").

Employer's counsel "stipulated" to Dr. Weisberg's qualifications.[17] In addition, before Employee's counsel introduced Dr. Weisberg's deposition into evidence before the Board, Employer had another opportunity to object to Dr. Weisberg's qualifications or to testimony itself, but it did not object.[18]

This Court in *Christiana Care Health System, VNA v. Taggart* recently held that "[w]hile it is true that IAB hearings are less formal than Court proceedings and the Board is not forced to follow a 'hyper-technical' interpretation of the rules, the parties must still preserve their arguments for appellate review."[19] That case held that an appellant "cannot object on *Daubert* grounds *after* the claimant's expert has already testified before the Board."[20] Employer, however, asserts that *Daubert* objections are "properly

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[17] The following exchange took place at Dr. Weisberg's deposition.

> Q. Are you a medical doctor licensed to practice medicine in the state of Delaware?
> A. Yes, I am.
> Q. Do you have a specialty, Doctor?
> A. Yes. I am a psychiatrist.
> MR. JULIAN: I will stipulate to the Doctor's qualifications as stated. Record, IAB Hearing No. 908223 Claimant's Exhibit 1 at 2.

[18] Tr. IAB Hearing No. 908223 at 22.

[19] *Christiana Care Health Systems, VNA v. Taggart*, 2004 Del. Super. LEXIS 78 *63 (holding that "the Board did not abuse its discretion in accepting [the employee's expert's] testimony as persuasive even though he was "only" an expert in occupational medicine. . . [i]n the absence of a timely *Daubert* objection, the difference in professional experience between [the employee's expert] and [the employer's expert] goes to the weight of their testimony, not its admissibility').

[20] *Christiana Care Health Systems*, 2004 Del. Super. LEXIS 78 *64.

raised post-hearing"[21] (presumably, as here, for the first time on appeal), but this Court declines to endorse such a procedure. If this Court "[a]llow[ed] such a belated motion, [it] would defeat the purpose of a *Daubert* challenge, that is to prevent the trier of fact from considering unreliable or irrelevant expert testimony."[22] A specific *Daubert* objection should have been raised before the hearing commenced, or at least before Dr. Weisberg testified.[23] Employer's opening brief on appeal is in large part devoted to very fact-specific arguments as to why Dr. Weisberg's testimony contravenes the DSM-IV, but none of this was presented to the Board. This Court cannot, on appeal, undertake to evaluate such claims in the first instance where the Board was never presented with those claims. Employer has waived the right to raise this issue for the first time on appeal.[24]

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[21] Employer's Reply Brief at 6.

[22] *Christiana Care Health Systems*, 2004 Del. Super. LEXIS 78 *64.

[23] *Christiana Care Health Systems*, 2004 Del. Super. LEXIS 78 *64. Employer argues that there is "very little pre-trial discovery at the Board." Employer's Reply Brief at 14. Even if that is true, a party may still raise *Daubert* objections to proffered testimony before the Board. The Court notes that Dr. Weisberg did not testify before the Board in person but rather his deposition testimony was admitted into evidence; the gap in time between the deposition and the hearing would allow for an objection to be raised before the testimony is presented to the Board.

[24] *Stevens*, 2001 Del. Super. LEXIS 167 *9.

B. The Board's decision is supported by substantial evidence.

In addition, as this Court has held, "*Daubert* is not the standard to which the substance of the Board's decision must be measured . . . [T]hat standard is substantial evidence."[25] The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[26] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[27] "The Board [may] accept the opinion testimony of one expert and disregard the opinion testimony of another expert."[28] Where "the evidence [is] definitely in conflict and, the substantial evidence requirement being satisfied either way, the Board [is] free to accept the testimony of [one expert] over contrary opinion testimony."[29]

In the case at bar, the evidence of whether Employee was suffering

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[25] *Stevens*, 2001 Del. Super. LEXIS 167 *10.

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

[27] *Oceanport Ind. v. Wilmington Stevedores*, 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 (1986).

[28] *Downes v. State*, 1992 WL 423935 *2 (Del.Super.).

[29] *DiSabatino Bros. Inc. v. Wortman*, 453 A.2d 102, 106 (Del. Super. 1982) (holding that "[t]he Board members accepted [the employer's expert's] testimony, as enhanced by the employer's other medical testimony and by their evaluation of the claimant's credibility. . . . [a]s the triers of fact, they were entitled to do just that").

depression from a work related injury was "definitely in conflict" (as there were two conflicting experts) and the Board decided the claim by accepting the evidence presented by Employee over the evidence presented by Employer. It is undisputed that Employee was injured in May 1990 while working for Employer. Employee underwent three operations on his lower back, two in 1991 and one in 1999. Dr. Irene Fisher treated Employee in 1993 for depression related to two of his surgeries. Employee began treating with Dr. Jay Weisberg in 2000 for panic attacks. Dr. Weisberg diagnosed Employee with major depression in partial remission. Both Dr. Weisberg and Employer's witness Dr. Freedenburg were stipulated to as being experts in the field of psychiatry. Both experts gave conflicting evidence in their opinions of Employee's condition and the Board was free to choose the testimony of one expert over the testimony of another expert.

The Board explained that it accepted Dr. Weisberg's testimony over Dr. Freedenburg's testimony based on several factors. The Board took into account that Dr. Weisberg had treated Employee fifteen times over a three-year period and as Employee's treating psychiatrist, Dr. Weisberg could have monitored the changes in Employee's mental condition. The Board found that Employee had been treated in 1993 for depression related to two

of his surgeries. The Board noted that even Dr. Freedenburg, Employer's expert, did not contradict the testimony that Employee was diagnosed with depression in 1993. The Board also accepted Employee's testimony about his mental condition.

The Board was entitled to give "substantial weight" to the opinion of Employee's treating physician Dr. Weisberg. Employer, however, argues that according to this Court's holding in *City of Wilmington Board of Education v. DiGiacomo* the Board erred as a matter of law in giving greater weight to Dr. Weisberg's testimony because he was Employee's treating physician.[30] However, this Court's holding in *DiGiacomo* does not support Employer's argument. This Court's decision in *DiGiacomo* is a narrower holding than the holding Employer argues. *DiGiacomo* does not stand for the proposition that the Board cannot give "substantial weight" to an employee's treating physician. The *DiGiacomo* court held only that the Board's decision (that thermograms are presumptively reasonable and necessary when ordered by a claimant's treating physician) was in error.[31] Additionally, this Court held in *Jepsen v. University of Delaware-Newark* that "[t]reating physicians have great familiarity with a patient's condition

[30] Employer's Reply Brief at 17.

[31] *City of Wilmington Board of Education v. DiGiacomo*, 1985 Del. Super. LEXIS 1142 *8.

and their opinion should be given "substantial weight."[32]

The Board also relied on Employee's testimony about his own condition to support the Board's decision. This Court held in *Sunrise Assisted Living v. Milewski* "that the Board [is] entitled to give appropriate weight to . . . lay testimony when it [is] supported by medical evidence and/or when it contradicts the expert testimony."[33] In *General Metalcraft, Inc. v. Hayes* where "causation" was at issue, this Court held that "medical testimony in combination with lay testimony is sufficient evidence to support the finding of causation."[34] Not only was there medical evidence from Dr. Weisberg to support Employee's testimony about his condition, but there was also evidence that Employee had been diagnosed in 1993 with depression related to his injury.

The Board was entitled to accept the testimony of Dr. Weisberg as legally sufficient because that testimony satisfied the substantial evidence

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[32] *Jepsen v. University of Delaware-Newark*, 2003 WL 22139774 *2 (Del. Super.); *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1065 (Del. 1998) (citing with approval *Appeal of Kehoe*, 686 A.2d 749, 752 (N.H. 1996), which held that the testimony of treating physicians in workers compensation claims should be accorded "substantial weight").

[33] *Sunrise Assisted Living, Inc. v. Milewski*, 2004 Del. Super. LEXIS 344 *26 (holding that the Board could accept the lay testimony from an employee about the employee's condition as part of the employee's medical evidence).

[34] *General Metalcraft, Inc. v. Hayes*, 1982 Del. Super. LEXIS 864 *3.

test. Dr. Weisberg was Employee's treating physician. As part of his treatment Dr. Weisberg testified that, (i) he took a history from Employee,[35] (ii) he gave Employee a Global Assessment Functioning test,[36] (iii) that he saw him several times to establish a "base line" for Employee's mental state,[37] as well as proscribing antidepressant medication for Employee. In addition, Dr. Weisberg also explained why he disagreed with Dr. Freedenburg's opinion.[38]

Taking into account all of the testimony presented by Employee, including the testimony of Dr. Weisberg and Employee's own testimony, the Board had substantial evidence from which to make its decision. The Delaware Supreme Court in *Jepsen* held that

> since 1960 the Delaware Supreme Court has consistently held that expert medical testimony in terms of "possibility" supplemented by other creditable testimony is sufficient to meet the claimant's burden of proof in worker's compensation cases. Although opinions couched in terms of "probability" are preferable to opinions based on "possibility," the Court has specifically held that medical expert testimony that an injury is "consistent with" claimant's statements or "could have" resulted therefrom, when considered in light of all of the evidence, is "sufficient to establish the requisite causal connection" to sustain an award of worker's compensation benefits.[39]

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[35] Record, IAB Hearing No. 908223, Deposition of Eric Johnson, M.D. at 3.

[36] Record, IAB Hearing No. 908223, Deposition of Eric Johnson, M.D. at 17.

[37] *Id.* at 25.

[38] *Id.* at 28-33.

[39] *Jepsen*, 2003 WL 22139774 *2 (Del. Super.)

In terms of a workers' compensation claim, the evidence presented by Employee was legally sufficient such that it constituted substantial evidence.

C. The Board otherwise committed no errors of law.

Employer argues, almost perfunctorily, that the Board made numerous errors of fact and law in issuing its decision and listed the following "examples":[40] First, that the Board erred in stating that "[b]y agreement of the parties, [Employee] receives a disability pension from [Employer] for the back injury" because there is nothing in the record that substantiates this finding.[41] Second, that the Board erred in stating that Dr. Glassman was a psychiatrist because Dr. Glassman is actually a physiatrist.[42] Third, that the Board erred by accepted Dr. Weisberg's interpretation of the GAF ratings of Employee's condition.[43] Fourth, that the Board erred in accepting Dr. Weisberg's opinion that Employee did not have opiate dependence because the opiates were prescribed by a physician.[44] Fifth, that the Board erred by

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[40] Employer's Opening Brief at 29-32.

[41] *Id.* at 29, 31.

[42] *Id.* at 29, 31.

[43] *Id.* at 29, 31.

[44] Employer's Opening Brief at 29, 31.

"considering incidents or episodes that could conceivably cause mental stress on [Employee when] none of the events described by the Board are related to [Employee's] industrial accident."[45] Sixth, that the Board erred by accepting Dr. Weisberg's description of Employee's depression as being mild to support a diagnosis of major depression.[46] Seventh, that the Board erred in accepting Dr. Weisberg's opinion that Employee's depression arose out of his physical problems because the DSM-IV states that it is not a major depressive episode if the mood disturbance is the physiological consequence of a specific general medical condition.[47] Eighth, that the Board erred in finding that Employee was diagnosed with major depression in 1993 and "remained uncured from that date forward."[48] Ninth, that the Board erred by giving greater weight to Dr. Weisberg's testimony because he was the treating physician.[49] Tenth, that the Board erred by holding that it accepted Dr. Weisberg's testimony over Dr. Freedenburg because Dr. Weisberg was a

[45] Employer's Opening Brief at 30, 31.

[46] *Id.* at 30, 32.

[47] *Id.* at 30, 32.

[48] *Id.* at 30, 32.

[49] *Id.* at 30, 32.

Delaware physician.[50] The Board stated that it "accepted the testimony of Dr. Weisberg as to treatment offered based on his status as a Delaware physician [because] Dr. Freedenburg's, a licensed physician in Maryland, presented no testimony that his opinion as to reasonable costs for treatment in Maryland correlated to that in Delaware. [Citation omitted]. Thus, the Board finds that the testimony of Dr. Weisberg adequately represented the costs and extent of treatment."[51]

This Court holds that the errors complained of by Employer were either harmless errors or factual findings by the Board in which the Board chose the testimony of Dr. Weisberg over Dr. Freedenburg. Items one and two are harmless errors. The Board simply misspoke when it said that Employee was receiving a pension from Employer when in fact he was receiving temporary disability.[52] The Board's misidentification of Dr. Glassman does not affect the Board's final decision. Items three through eight appear to this Court as instances where the Board chose the testimony of one expert over the testimony of another expert. The Court in this opinion previously addressed item nine. Item ten appears to only explain

[50] Employer's Opening Brief at 30-31, 32.

[51] Industrial Accident Board's Decision at 10.

[52] Hearing Transcript at 5.

why the Board accepted Dr. Weisberg's testimony as to the reasonableness of the amount of the psychiatric costs, based on a Delaware based practice. It does not appear to be an the foundation for the Board's decision. This Court does not find reversible errors in the factual finds of the Board.

CONCLUSION

The decision below was supported by substantial evidence and the Board committed no error of law. For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

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oc: Prothonotary
xc: Industrial Accident Board