

**SUPERIOR COURT  
of the  
STATE OF DELAWARE**

**Susan C. Del Pesco**  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
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Submitted: April 20, 2005

Decided: June 3, 2005

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Re: *Linda Adams, Appellant-Claimant Below v. F. Schumacher & Co., Inc., Appellee-Employer  
Below and the Industrial Accident Board* - Civil Action No. 05A-03-001 SCD

Upon appeal from the decision of the Industrial Accident Board denying a petition for additional compensation due—**AFFIRMED**

Dear Counsel:

This is an appeal from the decision of the Industrial Accident Board (“Board”) denying appellant - claimant Linda Adams’ (“appellant”) petition for additional compensation due.

Summary of the Facts

Appellant was injured in a work-related accident on January 23, 2001. Appellant slipped and fell while exiting her vehicle, injuring her back and neck. Appellant returned to work approximately 7 weeks later. Appellant continued to experience headaches and dizziness for which she sought further treatment.

On October 1, 2002, appellant consulted with Dr. Rodgers. Dr. Rodgers found a 10% permanent impairment of the brain. Dr. Rodgers did not base the permanency rating on the AMA Guides, as he claimed they offered little guidance as to numerical quantification of the severity of post-traumatic headaches. He used his clinical judgment as well as referencing the AMA Pain guides.

On March 27, 2003, appellant filed a petition to determine additional compensation due. Appellant sought permanent impairment benefits for a 20% loss of use to the cervical spine, a 10% loss of use to the lumbar spine, a 7% loss of use to the left upper extremity, and a 10% loss of use to the brain. Appellant subsequently withdrew the request for permanent impairment benefits related to the left upper extremity. On June 9, 2003, Dr. Fink examined appellant and determined appellant had no permanent impairment to the brain. Dr. Fink found appellant did not exhibit the specific inabilities stated in the AMA Guides to judge permanent brain impairment. Dr. Fink did concede that appellant may continue to have headaches indefinitely.

A hearing was held October 24, 2003, before a Hearing Officer. Dr. Rodgers testified for appellant. In addressing the permanent impairment to the brain, Dr. Rodgers testified that the AMA Guides provided little assistance, as appellant did not have an organic injury to the brain. Dr. Rodgers noted a 1997 newsletter to the AMA Guides that provided a numerical quantification for pain headaches. Dr. Rodgers noted he disagreed with Dr. Fink's use of Chapter 13 of the Guides which is for neurological injuries. Dr. Rodgers agreed that appellant did not have neurological cognitive defects, such as seizures, mood disorders or an inability to speak. He conceded that appellant's headache complaints were independent of any brain injury.

Dr. Fink testified on behalf of F. Schumacher and Company, Inc. ("appellee"). Dr. Fink testified that the objective findings of appellant's cervical spine were consistent with degenerative disease in someone with arthritis. Dr. Fink testified that appellant has fully recovered from her concussion and her mental status was normal. He noted that appellant initially had difficulty with her memory after the accident, but that it improved. He noted that appellant is working full time and carrying on with activities of daily living. He opined that appellant's headaches were mostly of the "rebound" variety, and that once she stopped taking pain medication, the symptoms would improve.

Dr. Gelman testified by deposition also on behalf of appellee. Dr. Gelman testified that appellant had sustained a 5% permanent impairment to her cervical spine and 0% permanent impairment to her lumbar spine related to the work accident. He testified that he believed appellant had soft tissue injuries in the lumbar and cervical spine areas.

On November 7, 2003, the Hearing Officer issued her determination that appellant had sustained a 20% permanent impairment to the cervical spine, but no permanent impairment to the lumbar spine or brain. The Hearing Officer found the opinion of Dr. Rodgers more persuasive than that of Dr. Gelman as to the cervical spine. The Officer noted that appellant was credible regarding neck complaints that limit her activities of daily living. Appellant was awarded 60 weeks of benefits at the stipulated rate for the cervical spine permanent impairment.

The Officer relied on the opinion of Dr. Gelman in concluding that appellant did not have any permanent impairment of her lumbar spine. The Officer noted that appellant had only a mild decrease of range of motion and all diagnostic studies for the lumbar region were negative. The Officer found appellant not credible that her back complaints caused her to limp. The Officer noted that even Dr. Rodgers conceded that there was no objective basis to correlate those symptoms with the lumbar injury related to the work accident.

The Officer found the testimony of Dr. Fink more persuasive than that of Dr. Rodgers in denying any award for permanent impairment of the brain. The Officer noted Dr. Fink did not attribute any permanency rating to appellant's headaches, as she has not demonstrated any specific disabilities related to the brain as referenced in the AMA Guides. The Officer rejected Dr. Rodgers assessment because his estimate was based on vague references to the AMA Guides as well as other standards not customarily utilized in the worker's compensation area. The Officer noted that a mere mention of the Guides, without any discussion of what procedure or tables were followed, did not provide sufficient information from which the reasonableness of the assessment could be evaluated. The Officer also found that appellant's generalized subjective complaints did not provide objective support for what would be a significant award, had Dr. Rodgers opinion been accepted.

Appellant was awarded attorney's fees in the amount of \$5,000 or 30% of the award, whichever is less. Appellant was also awarded medical witness fees as she received an award.

Appellant filed a motion for reargument on November 26, 2003, requesting that the Hearing Officer reconsider her decision denying permanent impairment benefits for loss of use of the lumbar spine and brain. The motion was denied.

On May 27, 2004, appellant appealed the decision to this Court.

#### Appellant's Position

Appellant argues that the Board's decision is not supported by substantial, credible evidence. Appellant argues that the board erred as a matter of law in failing to consider the testimony of Dr. Rodgers, simply because he failed to use the AMA Guides or other commonly used methods in determining the permanency rating for her brain injury.

Appellant argues the Board failed to fulfill its function of considering all testimony and evidence presented when it failed to consider Dr. Rodgers testimony concerning the permanent impairment of her brain simply because he did not utilize the AMA Guides. Appellant argues the Board may not wholly disregard the testimony of a witness merely because it does not comport with the principles normally utilized by the Board in determining a permanency rating.

Appellant also argues the Board erred by failing to recognize that physicians may employ a variety of methods other than those commonly used in determining a permanency rating.

#### Appellee's Position

Appellee counters that the only issue is whether the Board's decision is supported by substantial, credible evidence where the Hearing Officer accepted the testimony of Dr. Fink as more persuasive than Dr. Rodgers in denying any award for permanent impairment to the brain. Appellee notes that the Board is free to choose between conflicting medical opinions and either opinion will constitute substantial evidence for purposes of an appeal.

Appellee argues that appellant misconstrues the Board's decision in arguing that in

failing to consider Dr. Rodgers' testimony, it failed to consider all testimony and evidence presented. Appellee argues that the Board clearly considered Dr. Rodgers' assessment, but dismissed it as unreliable.

Appellee concludes there was substantial, credible evidence to support the Board's decision which should be affirmed.

### Standard of Review

This Court has limited appellate review of a decision from an administrative agency. On appeal, this Court determines whether the agency's decision is supported by substantial evidence and is free from legal error.<sup>1</sup> Substantial evidence is such relevant evidence that a reasonable mind would accept it as adequate to support a conclusion.<sup>2</sup> This Court does not act as the trier of fact nor does it have authority to weigh the evidence, weigh issues of credibility, or make factual conclusions.<sup>3</sup> Therefore, given an agency's specialized competence, this Court merely reviews whether the findings made by that agency are adequately supported by the evidence.<sup>4</sup> This Court's review of conclusions of law made by the IAB is *de novo*.<sup>5</sup>

### Discussion

This is a classic battle of the experts case. When there are conflicting expert opinions, the Board is free to accept one and reject the other(s).<sup>6</sup> Appellant reads more into the Board's reasoning behind its rejection of Dr. Rodgers' opinion regarding the brain permanency rating than is warranted. The Board clearly did consider Dr. Rodgers' opinion, but rejected it because it found there was no way to evaluate its reliability, as Dr. Rodgers had not relied upon the usual AMA Guides for permanency ratings. When determining the reliability of an expert's opinion, the Board must also make a determination of the reliability of the sources the expert relied upon.<sup>7</sup> If the Board determines there is no indicia of reliability, the Board may reject the

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<sup>1</sup>*Devine v. Advanced Power Control, Inc.*, 663 A.2d 1205, 1209 (Del. Super. 1995) (citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985)).

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

<sup>3</sup>*Johnson*, 213 A.2d at 66.

<sup>4</sup>DEL. CODE ANN. Tit. 29 §10142(d) (1997).

<sup>5</sup>*Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002) (citing *State of Delaware v. Worsham*, 638 A.2d 1104, 1106 (Del. 1994)).

<sup>6</sup>*Johnson*, 213 A.2d at 66; *see also Syed v. Hercules, Inc.*, 2001 WL 985046 at \*8 (Del. Super.); *aff'd*, 793 A.2d 311 (Del. 2002).

<sup>7</sup>*See e.g. Wells v. Howe Heating & Plumbing, Inc.*, 677 N.W.2d 586, 592 (S.D. 2004) (worker's compensation case holding that the Daubert standard requirement applied and required that there had been adequate proof of the validity of the theory or method relied upon by the expert); for the general proposition regarding expert testimony *see M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 523 (Del. 1999) ("the trial judge must decide if the expert's testimony has a reliable basis in the knowledge and experience of the relevant discipline" (internal quotation marks omitted));

expert's opinion.<sup>8</sup>

It is clear the Board did give a reason for rejecting Dr. Rodgers' opinion regarding brain permanency: that it was not based on the AMA Guides. This is sufficient reason for finding it less reliable than Dr. Fink's opinion. Such a weighing of the evidence is within the discretion of the Board. There is no evidence the Board abused its discretion.

I note that the Board did not totally disregard Dr. Rodgers testimony concerning appellant's impairment(s) – the Board accepted his conclusions about the degree of permanent impairment to appellant's cervical spine. Dr. Rodgers' conclusion in this regard was supported by his reliance on the AMA Guides.

I conclude there was substantial evidence to support the rejection of Dr. Rodgers' opinion.

#### Conclusion

There is substantial, credible evidence to support the Board's decision to rely upon Dr. Fink's opinion regarding any permanent impairment to appellant's brain. The decision of the Board is supported by substantial, credible evidence and is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,  
Susan C. Del Pesco  
Susan C. Del Pesco

Original to Prothonotary  
xc: Industrial Accident Board

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*see also Fensterer v. State*, 509 A.2d 1106, 1110 (Del. 1986) (“an expert's inability to establish a sufficient basis for his opinion clearly renders the opinion inadmissible”).

<sup>8</sup> *Id.*; *see also Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621-22 (Ky. 2004).