SUPERIOR COURT
of the
STATE OF DELAWARE

Susan C. Del Pesco
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Submitted: October 20, 2005
Decided: October 26, 2005

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Re: Dana King v. Bardusch Corporation
C.A. No. 04A-12-011 SCD

On Claimant Dana King's Appeal from the Industrial Accident Board
REMANDED.

Dear Counsel:

The claimant was injured as the result of an industrial accident on June 11, 1998. She made a claim for permanent impairment in 2001. The claim was settled for 12% permanent impairment to the lumbar spine. That figure was a compromise between claimant's medical evaluation at 17% and employer's medical evaluation of 7%.

In 2004, claimant filed a Petition to Determine Additional Compensation Due. Two different doctors evaluated the claimant. Claimant's doctor, using the range-of-motion (ROM) method, rated her impairment at 28%. The employer's doctor, using the diagnosis-related-estimates (DRE) method, rated her impairment at 17%.[1]

[1] Both methods are found in the Fifth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*.

The Board concluded that the claimant had not met her burden of establishing an increase in her permanent impairment.[2] The Board relied on *Poor Richard Inn v. Lister*, for the proposition that the claimant must produce credible evidence of a detrimental change of condition since the prior rating was established before she is entitled to an increase in the percentage of impairment.[3]

As to the evidence of a change in condition, the Board analyzed three possible bases in the evidence to support a change in physical condition. It considered the more recent MRI which suggested L4-5 disc involvement; it considered the range of motion evidence in the reports related to the 2001 evaluation, and the updated testimony; and it considered the claimant's subjective complaints. The Board concluded that none of that evidence was sufficient to prove a change in physical condition.

The petition came before the Board with permanency ratings. Both exceeded the amount of the award previously agreed upon. That being so, the employer has conceded "that there was evidence to support an increase in [claimant's] disability benefits."[4] It is true here, as it was in *Poor Richard*.

While the Board is the fact-finder, and must determine a claimant's disability, that analysis is subject to the requirement that the facts be based on substantial competent evidence.[5] The Board has ignored the testimony of both physicians and independently reached medical conclusions not found in the record, nor rationally inferred from the

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[2] The parties stipulated that the case would be heard by Worker's Compensation Hearing Officer, Christopher F. Baum, pursuant to 19 Del. C. § 2301B (a)(4). Such stipulation allowed Mr. Baum to stand in the position of the Industrial Accident Board. For purposes of this Opinion, Mr. Baum will be referred to as the "Board."

[3] *Poor Richard Inn v. Lister*, 420 A. 2d 178 (Del. 1980).

[4] *Id.* at 179.

[5] *State v. Cephas*, 637 A.2d 20, 22-23 (Del. 1994); *Johnson v. Chrysler Corp.*, 2121 A.2d 64, 66 (Del. 1965)

evidence. For example, in rejecting the claimant's testimony of increased pain, the Board asserts that if her pain had increased, her doctors would have changed her medications. Nothing in this record supports that statement, nor is it a common sense inference which can be reached without expert testimony.

This case is remanded to the Board for the sole purpose of determining the claimant's percentage of permanent impairment. Since each physician approached the analysis differently, the Board is directed to determine which approach is more reliable when applied to this claimant. That determination likely will govern the impairment decision. Where the Board's determination is not directly supported by medical testimony, the basis upon which it makes its findings must be set forth.[6]

It appears that the parties' persistent presentation of evidence related to the earlier impairment evaluations was the source of the lost focus in the Board's decision. The methodology which was or was not used earlier is not probative. Those doctors did not testify at a hearing, there was no cross-examination, there is no record. A great deal of the testimony about those earlier evaluations is simply speculation. The Board's focus is on the evidence before it to determine the Claimant's present condition. The earlier rating is merely a credit against any increased evaluation.

The case is REMANDED for a determination of the claimant's permanent impairment as that was the only issue appealed.

IT IS SO ORDERED.

Very truly yours,

Susan C. Del Pesco

Original to Prothonotary

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[6] *Asplundh Tree Expert Co. v. Clark*, 369 A.2d 1084, 1089 (Del. Super. Ct. 1975) (citing *Ellison v. City of Washington*, 301 A.2d 303, 305 (Del. Super. Ct. 1972)).

xc: Industrial Accident Board; attn: Christopher F. Baum.