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

PAUL HILDEBRANDT,	§	
	§	
Employee-Below/	§	
Appellant,	§	
	§	
	§	
v.	§	**C.A. No. 04A-05-006 (CHT)**
	§	
	§	
DAIMLER CHRYSLER	§	
	§	
Employer-Below/	§	
Appellee.	§	

OPINION AND ORDER

On The Employee's Appeal from the Decision of the Industrial Accident Board

Submitted: December 15, 2005
Decided: March 31, 2006

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Scott L. Silar, Esquire, MARSHALL, DENNEHEY, WARNER, COLEMAN, & GOGGIN, 1220 North Market Street, 5th Floor, P.O. Box 8888, Wilmington, Delaware, 19899, Attorney for the Employer-Below/Appellee.

TOLIVER, Judge

This is the Court's decision on appeal from a decision of the Industrial Accident Board. The Appellant, Paul Hildebrandt, claims he is entitled to additional compensation resulting from a work place injury that left him with an eighteen percent permanent impairment. The Appellee, Daimler Chrysler, insists the Industrial Accident Board correctly decided that Mr. Hildebrandt failed to prove a permanent impairment and subsequently is not entitled to additional compensation pursuant to 19 *Del. C.* § 2324.

FACTS & PROCEDURAL POSTURE

Paul Hildebrandt has been an assembly worker at Daimler Chrysler for over nine and one half years. On May 3, 2005, Mr. Hildebrandt was injured in a work-related accident when he was hit by a forklift and thrown over fifteen feet in the air. Mr. Hildebrandt suffered injury to his mid-back and was sent to Chrysler's medical center where he was seen by Dr. Stephen Serra.

Dr. Serra initially treated Mr. Hildebrandt for back

spasms and initially treated him with ice and a drug known as Ibuprofen. The pain in Mr. Hildebrandt's back did not subside and he again sought treatment from Dr. Serra. Upon examination, Dr. Serra found muscle spasms in Mr. Hildebrandt's back and trigger point injections were initiated. These injections were not beneficial and Dr. Serra suggested Mr. Hildebrandt seek chiropractic treatment. Chiropractic treatment slightly improved Mr. Hildebrandt's condition but he testified that he would still occasionally experience mild episodes of pain in his back which occurred after light activity.

After being so treated for two weeks, Mr. Hildebrandt went back to see Dr. Serra. Dr. Serra recommended he see an orthopedic specialist. Mr. Hildebrandt then sough treatment from Dr. Bruce Rudin, an orthropedist, who ordered an MRI of the thoracic spine which was followed by a referral to Michael Kelman, a chiropractor. That treatment by Dr. Kelman lasted for five weeks. Following this treatment, Mr. Hildebrandt again saw Dr. Serra with complaints of spasms in his mid-back accompanied by sharp pain. Dr. Serra reviewed results of the MRI

previously taken by Dr. Rudin and diagnosed Mr. Hildebrandt as having chronic thoracic herniation.

Dr. Peter B. Bandera examined Mr. Hildebrandt on September 24, 2003, and reviewed the medical records of Dr. Serra, Dr. Rudin, and Dr. Kelman, the MRI taken in April, and the x-rays taken by Dr. Serra. Dr. Bandera concluded that the MRI showed a prominent disk bulging consistent with Dr. Serra's records. He also conducted a physical examination of Mr. Hildebrandt in which he found that the patient had mid-back pain when asked to twist or bend his back. Dr. Bandera diagnosed Mr. Hildebrandt with a disc herniation at level 11-12 of the thoracic region of his spinal column with residual thoracic and lumbar strain and sprain. He found positive findings of muscle guarding and spasm. Dr. Bandera also indicated that Mr. Hildebrandt had "traumatic expression of [a] structural spur formation."[1] According to Dr. Bandera, this formation resulted from an arthritic condition that Mr. Hildebrandt had previous to the work injury, but the arthritic pain process was triggered by

[1] Appellant's Opening Br., D.I. 9, at 5.

the injury.

Dr. Bandera classified Mr. Hildebrandt's injury as a Category II pursuant to the AMA's Guide to Permanent Impairment. "Category II acknowledges a history and examination findings compatible with a specific injury."[2] While Dr. Bandera noted that Category II allowed up to a forty percent impairment rating, he determined Mr. Hildebrandt had an eighteen percent permanent impairment and that this impairment to his thoracic spine resulted from Mr. Hildebrandt's May 3, 2002 work-related injury. Mr. Hildebrandt subsequently filed a Petition to Determine Additional Compensation Due on October 29, 2003.

Shortly thereafter, and apparently in response to that petition, Mr. Hildebrandt was seen by Chrysler's doctor, Dr. Donald I. Saltzman. Dr. Saltzman examined Mr. Hildebrandt in December and placed Mr. Hildebrandt in a Category I of the Diagnosis Related Estimates Model.[3]

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[2] *AMA Guides to the Evaluation of Permanent Impairment 5th ed.*, Table 15-4, 389.

[3] Saltzman Dep. 11, April 20, 2004.

Dr. Saltzman found that while Mr. Hildebrandt had some tenderness between levels 6 and 8 of the thoracic region of the spine, he had no tenderness in the upper or lower spine. He also noted that the patient had no muscle guarding or spasm in his thoracic area. According to Dr. Saltzman, Mr. Hildebrandt had full range of motion, although he complained of pain when he reached motion range extremes. Dr. Saltzman also reviewed the MRI and noted the disc bulging in the lowest margin of the thoracic area, but diagnosed this problem as developmental and having no relation to Mr. Hildebrandt's work accident. Considering the above, along with the information that Mr. Hildebrandt had been able to work full time and required no medication, Dr. Saltzman found the patient had a thoracic contusion with a zero percent impairment rating.

A hearing on Mr. Hildebrandt's Petition for Additional Compensation was held on April 29, 2004, before the Industrial Accident Board. Drs. Bandera and Saltzman testified by deposition along with Mr. Hildebrandt who appeared in person. The Board denied Mr.

Hildebrandt's petition and held that Mr. Hildebrandt did not meet his burden in order to show he had indeed suffered an eighteen percent permanent impairment of the affected area of the body. Mr. Hildebrandt has filed a timely appeal from the Board's decision.

Mr. Hildebrandt argues that the Industrial Accident Board as a matter of law erred in holding that he did not prove the extent of his disability and how it should be classified. Nor was it supported by substantial evidence in the record. Rather, he insists the Board simply reviewed the opinions of the conflicting doctors and then stated that the claimant had not met his burden of proof. Without more. Mr. Hildebrandt argues that the Court will not be able to determine the basis of the Court's decision on appeal and consequently the Board's decision was not based on substantial evidence.

More specifically, he argues that while the Board held that in order for Mr. Hildebrandt's injury to fall within a Category II designation, his muscle spasms and guarding had to be *significant*, the AMA guidelines do not require such findings in order for an individual to be

placed within that category. He further argues that even if the spasms are required to be significant, the testimony from Dr. Bandera supplied the required proof. Lastly, Mr. Hildebrandt asserts that the AMA Guide is merely a helpful tool in rating a claimant's impairments and in no way is this type of designation statutorily required.

Chrysler insists the Board found Dr. Saltzman's opinion more convincing. Chrysler also claims there was no finding of significant muscle guarding and spasm and therefore a designation of Mr. Hildebrandt's injury as a Category II would have been incorrect. The Board's decision was therefore legally correct and based on substantial evidence.

The matter having been fully briefed and argued, that which follows is the Court's response to the issues so presented.

DISCUSSION

This Court is bound by the Board's findings if they

are supported by substantial evidence and absent abuse of discretion or error of law.[4] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[5] The Court does not sit as a trier of fact.[6] It does not weigh evidence, determine questions of credibility, or make its own factual findings.[7] The Court's job is to determine if the evidence is legally adequate to support the Board's findings.[8] It will not substitute its own judgment for that of the Board.[9] The Court must review the entire record to insure that the conclusion was fairly and reasonably reached[10] and the record must be reviewed in a light most favorable to the prevailing party.[11]

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[4] *Ohrt v. Kentmere Home*, 1996 WL 527213, at *3 (Del. Super.).

[5] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986).

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

[7] *Id.*

[8] 29 *Del. C.* § 10142(d).

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

[10] *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980).

[11] *General Motors, Corp. v. Guy*, Del. Super., C.A. No. 90A-JL-5, Gebelien, J. (August 19, 1991).

An employee may claim compensation for certain permanent injuries, pursuant to 19 *Del. C.* § 2326. According to the statute, the Board is permitted to award compensation based on the loss or loss of use of any part of the claimant's body.[12] When a claimant petitions the Board for additional compensation, he or she has the burden of proof to show the percentage of permanent impairment.[13]

First, Mr. Hildebrandt's attack on the Board's decision by declaring the decision is not supported by substantial evidence wrongly assumes that Dr. Saltzman's testimony is not substantial evidence because it is at odds with Dr. Bandera's testimony. While the Board may not make determinations in a conclusory manner, they did not do so here.[14] The IAB opinion referenced Dr. Saltzman's deposition which stated Mr. Hildebrandt fell within Category I and his injuries were not permanent in

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[12] Loss of use is determined by the ability of the person to use the part in question. *Wilmington Fibre Specialty Co. v. Rynders*, 316 A.2d 229 (1975), aff'd 336 A.2d 580 (Del. 1975).

[13] *Hildebrandt v. Daimler Chrysler,* IAB 1235512 (May 10, 2004) at 5.

[14] *Cruz v. Ryder Public Transportation*, 2003 LEXIS 107, at *21 (Del. Super.).

nature, hence the zero percent impairment rating. Although the Board's conclusions may not been clearly written, they nonetheless were based on ample evidence for the Board to deny the claimant's petition and this evidence was competent and substantial.

Secondly, the IAB is free to find one witness more credible than another.[15] When there is conflicting medical testimony, the Board must resolve the conflict.[16] Stated differently, when the Board is presented with opposing medical testimony, it may reject the testimony of one of the experts based on "its experience in gauging testimony of witnesses who give conflicting testimony."[17]

Here, the Board accepted Dr. Saltzman's testimony over the testimony provided by Dr. Bandera. It was Dr. Saltzman's opinion that Mr. Hildebrandt suffered a zero percent impairment. The Board, as the finder of fact, concluded that Dr. Saltzman's opinion was correct. Nothing more was required.

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[15] *Id.* at 14.

[16] *Id.*

[17] *Lewis v. Formosa Plastics Corp.*, 1999 LEXIS 39, *8 (Del. Super. Ct.).

Mr. Hildebrandt's alternative argument that his injury was consistent with a Category II injury and the Board' s decision was incorrect as a matter of law in declaring his muscle spasms and guarding had to be significant in order to fall within Category II, also falls short.

A description of a Category II impairment of the thoracic spine states:

> [H]istory and examination findings are compatible with a specific injury or illness; findings *may* include significant muscle guarding or spasm observed at the time of the examination. . . .[18]

It is clear from the foregoing language that muscle guarding and spasm are not required before an injury is placed within Category II. Those findings are simply illustrative of the type of injury in question. It logically follows that if muscle guarding and spasm are not required for a Category II classification, then certainly *significant* muscle spasm and guarding is not necessary. However, this does not help Mr. Hildebrandt's

[18] *AMA Guides 5th ed.* at 389 (emphasis added).

cause.

In fact, as Mr. Hildebrandt argued, the AMA guidelines are merely that, guidelines, to be used as helpful tools in deciding a claimant's impairment levels. The Court is not the correct party to determine whether or not the alleged muscle guarding is significant. That is the role of the physicians involved with the case. The doctors in the instant situation gave their opinions and the Board decided the controversy based on those opinions.

Again, though it is not a model of clarity, the Board's decision is not premised upon the lack of a finding or findings under the AMA guidelines or the guidelines themselves. It decision rested on the fact that the Board found Dr. Saltzman's testimony to be more credible than that proffered by Dr. Bandera. It did not, therefore, err as a matter of law by concluding that Mr. Hildebrandt did not suffer from an eighteen percent impairment consistent with a Category II injury.

CONCLUSION

Based upon the foregoing, the Court must concluded that decision of the Industrial Accident Board is free of legal error and supported by substantial evidence in the record. It must therefore be, and hereby is, **affirmed.**

IT IS SO ORDERED.

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Toliver, Judge

CHT,IV/lat
oc: Prothonotary