

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON A. WHITE,	§	
	§	No. 298 , 2011
Claimant Below,	§	
Appellant,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
VOLT SERVICES,	§	
	§	C. A. No. 10A-04-012 JRJ
Employer Below,	§	
Appellee.	§	

Submitted: October 12, 2011

Decided: December 22, 2011

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 22nd day of December, 2011, on consideration of the briefs of the parties, it appears to the Court that:

1) Brandon A. White appeals from a Superior Court decision affirming an Industrial Accident Board decision that denied, in part, his Petition for Additional Compensation Due. White argues that the Board erred in rejecting his “unrebutted” evidence that he sustained a permanent low back injury. We find no merit to this argument and affirm.

2) In September 2005, while working for Volt Services, White slipped and fell. He suffered injuries to his right shoulder, left knee and lower back. White received

total disability compensation for a limited time. In April 2009, White petitioned for additional compensation, claiming that he suffered a permanent partial impairment to his lower back and his upper right extremity. Volt did not oppose the upper right extremity claim, and the IAB awarded compensation for that injury.

3) White's evidence in support of the claimed lower back injury was the testimony of Dr. Stephen Rodgers, who examined White once in October 2008. Rodgers opined that White suffered "increased muscle tone in the lumbar paravertebral musculature."¹ Based on the American Medical Association's Diagnostic Related Estimate (DRE), Rodgers concluded that White suffered a nine percent impairment to his lower back.

4) On cross-examination, Rodgers acknowledged that White's two treating physicians did not place any work restrictions relating to White's lower back. In addition, Rodgers conceded that the term "muscle tone" is not found in the DRE description of the claimed injury. Finally, Rodgers agreed that he found no muscle guarding or spasm when he examined White, and that no diagnostic studies showed any injury to White's back.

5) The IAB was not persuaded by Rodgers' opinion that White suffered a permanent lower back injury. The IAB noted that Rodgers only examined White

¹*White v. Volt Services*, IAB Hearing No. 1275235, at 2 (March 18, 2010).

once, almost a year before White filed his petition. Diagnostic studies of White's lower back were unremarkable, and White's symptoms, as described by Rodgers, were mild and somewhat subjective. The IAB found no evidence that White was under any work restrictions related to the claimed impairment, and it rejected Rodgers' reliance on the DRE because it does not include increased muscle tone as a basis for permanent impairment. Accordingly, the IAB denied White's petition. The Superior Court affirmed.

6) White argues that the IAB erred because it rejected his unrebutted medical testimony. But he ignores the contrary medical evidence that Rodgers, himself, provided during cross-examination. The Board is not required to accept medical evidence that it deems unreliable, and in this case the Board explained why it rejected Rodgers' conclusion. In short, this was not a case of the IAB ignoring unrebutted medical evidence.²

7) White had the burden to prove that he suffered a permanent partial disability.³ There was evidence from both of White's treating physicians that he was not suffering any permanent impairment to his lower back. Rodgers' medical opinion

²*Cf. Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214 (Del. 1998); *Pusey v. Natkin & Co.*, 428 A.2d 1155 (Del. 1981).

³*Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

was rebutted – by Rodgers’ admissions on cross-examination and by White’s treating physicians. Thus, the IAB was not required to accept Rodgers’ opinion. Considering all of the remaining evidence, the IAB correctly determined that White failed to establish any permanency with respect to his lower back injury.

NOW, THEREFORE, IT IS ORDERED that the decision of the Superior Court be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice