IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWIGHT W. ABRAHAMS,	)	
	)	No. 519, 2011
Claimant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
CHRYSLER GROUP, LLC.,	)	C.A. No. N10A-10-016
	)	
Employer Below,	)	
Appellee.	)	

Submitted: March 28, 2012
Decided: May 11, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

O R D E R

This 11th day of May 2012, it appears to the Court that:

(1) During closing argument before the Industrial Accident Board, the attorney for the defendant asserted that the claimant's medical expert misunderstood the very treatise upon which he based his opinion testimony. The attorney's argument focused on portions of the treatise that counsel had not explored on direct or cross examination. Defense counsel neither afforded claimant's expert the chance to explain his application of the treatise's methodology to his opinion nor proffered opposing expert testimony explaining the error in claimant's expert's reliance on the treatise. Pursuit of a challenge to claimant's expert's opinion through treatise references alone, without notice,

during closing, deprived claimant of his right to litigate issues of fact. The IAB relied on the argument in its opinion, thereby issuing an opinion without substantial record evidence for support. Consequently, we reverse and remand to the Superior Court for action consistent with this Order.

(2) Dwight Abrahams worked for Chrysler Group, LLC on June 1, 2002, when he was exposed to isocynate fumes. In an earlier proceeding, the Industrial Accident Board awarded Abrahams workers' compensation benefits for 25% impairment to his lungs as a result of his isocynate exposure. This case began, years later, when Abrahams filed a Petition to Determine Additional Compensation Due with the IAB, on December 4, 2008. The second Petition sought compensation for several injuries: an 8% permanent impairment to his lumbar spine; a 14% permanent impairment to his cervical spine; a 20% permanent impairment to each upper extremity; a 10% permanent impairment to each lower extremity; and an 8% permanent impairment to his abdomen.

(3) The IAB first held a hearing on the case on September 30, 2009, but could not reach a decision. Consequently, the IAB held a new, *de novo*, hearing on March 26, 2010. At the later hearing, both sides offered experts discussing whether the impairments Abrahams then claimed even existed, and whether isocynate exposure caused them. Chrysler's expert traced Abrahams' current problems to pre-existing injuries Abrahams had incurred playing sports.

Abrahams' expert testified the impairments flowed from the exposure, and based his assessment of the severity of permanent impairment on a portion of a medical treatise.

(4) During closing argument, after the IAB had announced the record had closed,[1] Chrysler's attorney challenged whether Abrahams' expert properly interpreted the medical treatise upon which he based his testimony. Her argument included references to portions of the treatise not discussed by the expert, in an attempt to criticize whether he properly used the treatise:

> Dr. Bandera [Abrahams' expert] used the DRE categories to rate the back and the neck. Specifically, he said he did that because there were findings of spasm and specific injury. If you look at the chapter that allows us to put permanency ratings on back and neck injuries chapter 15, there is a chart on page 380 that tells you when to use the DRE versus the range of motion model. The DRE category is used in cases of injury. . . . This case involves occupational exposure. This is an illness case. Dr. Bandera for the neck and back used the wrong rating system.[2]

In effect, this argument attempted to impeach the expert's mastery of the treatise by referring to another chapter of the treatise.

[1] IAB Hearing, Mar. 26, 2010, Tr. at 95.

[2] *Id*. at 106-07.

(5) The IAB denied Abrahams' petition for additional compensation.[3] The opinion included holdings that Abrahams' expert misapplied the medical treatise in the manner suggested by Chrysler's counsel during closing argument,[4] that Abrahams' expert was not credible,[5] that Abrahams was not credible,[6] and that other conditions caused the impairments.[7] On appeal, the Superior Court affirmed the IAB's decision.

(6) Abrahams now challenges the Superior Court's decision, claiming that the IAB erred by undermining his due process rights and by rendering a decision that lacked the support of substantial evidence.

(7) On appeal, this Court reviews decisions of the Industrial Accident Board only to determine if the decision is free from legal error, and "whether the

[3] *Abrahams v. Chrysler Group LLC*, No. 1221317, at p. 15 (Del. I.A.B. Aug. 31, 2010) ("For the reasons set forth above, Claimant's Petition to Determine Additional Compensation Due is denied.").

[4] *Id*. at p. 13 ("The *AMA Guides* instructs that the Range of Motion method should be used when the injury is a result of an illness. It appears that Dr. Bandera misapplied the *AMA Guides*.").

[5] *Id*. at p. 11 ("The Board accepts the opinions of Dr. Meyers [Chrysler's expert] over the opinions of Dr. Bandera. Dr. Bandera's testimony was not convincing.").

[6] *Id*. ("[T]he Board does not find Claimant credible with respect to his degree of his alleged permanent impairments and with respect to the causal connections to his work injury.").

[7] *Id*. at p. 12 ("The Board finds that Claimant's unrelated degenerative condition contributes to Claimant's current cervical, thoracic and lumbar spine problems.").

agency's decision was supported by substantial evidence on the record before the agency."[8]

(8) The IAB improperly permitted Chrysler's attorney to offer what amounted to expert testimony during her closing argument. This maneuver, defended before this Court as a tactical decision, violated fundamental notions of fairness by depriving Abrahams of the opportunity to dispute the facts material to the outcome of his case. Abrahams lost the chance to engage in an adversarial process. Also, Chrysler's attorney's decision to avoid pointing out the other portions of the treatise until her argument – after the record had closed – assured that her assertions would not be based on substantial evidence to support them. Each of these problems independently justifies our decision to remand this case for a new hearing.

(9) In structure, this decision mirrors the analysis from *Quaker Hill Place v. State Human Relations Comm'n*, authored by Justice Moore sitting on the Superior Court by designation:

> It is well established law in this State that a tribunal may not refer to or rely upon medical treatises that are not in evidence. Those principles apply equally to an administrative tribunal. The mandate in 29 *Del. C.* § 10142(d), that an appellate court determine whether the "agency's decision was supported by *substantial evidence on the*

[8] 29 *Del. C.* §§ 10142, 10161(a)(8). *See also Ins. Comm'r of State of Del. v. Sun Life Assurance Co. of Canada (U.S.)*, 21 A.3d 15, 19 (Del. 2011) (demonstrating this Court's power to review for legal error).

> *record*" (emphasis added), would otherwise be meaningless. Moreover, fairness and due process demand no less than that a party has the right to respond to evidence used against it.[9]

We adopt Justice Moore's description of the law, and extend it to this situation, where one part of a treatise was discussed, and the tribunal referred to a different part of the treatise, not part of the record, to support its decision.

(10) First, fundamental notions of fairness govern proceedings before the IAB.[10] In *Torres v. Allen Family Foods*, this Court stated that the IAB may not "relax rules which are designed to ensure the fairness of the procedure."[11] "Nothing is more repugnant to our traditions of justice than to be at the mercy of witnesses one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted."[12] Judges cannot render a decision when facts to support the basis for that decision do not

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[9] 498 A.2d 175, 180 (Del. Super. 1985) (citations omitted).

[10] The IAB rules grant the IAB an impossibly ambiguous power: "The Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of discretion." IAB R. 14(C). We of course recognize the IAB's statutory authority to write rules, under 19 *Del. C.* § 2121(a) ("The Board may promulgate its own rules of procedure for carrying out its duties consistent with Part II of this title and the provisions of the Administrative Procedures Act."). Accordingly, we find that this case represents an abuse of discretion. We also recommend the rules be revised to provide some content to the notion of what rules of evidence and legal procedure they are intended to free the IAB from following.

[11] *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995).

[12] *Id*. at 32 (citation omitted).

appear in the record. This Court will intervene if the other party did not have a chance to dispute the point.[13]

(11) The IAB erroneously allowed Chrysler's attorney to refer to pages of a medical treatise that had not been addressed during examination of either expert. In effect, this argument permitted Chrysler's attorney to offer expert testimony of her own without providing notice so Abrahams could offer a response. The Administrative Procedures Act clearly contemplates medical testimony will proceed only after notice to the other side.[14] Similarly, the IAB rules demand that a pre-trial memorandum contain the names of medical witnesses.[15]

(12) Second, the record does not contain substantial evidence supporting the IAB's decision because the written opinion relies at least in part on portions of a medical treatise mentioned for the first time during closing argument. The record consists of the evidence offered through testimony and other evidentiary submissions.[16] When attorneys make closing arguments, they discuss the evidence

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[13] *Ruggles v. Riggs*, 477 A.2d 697, 703 (Del. 1984) (finding that a Family Court judge treated an expert's out of court statements as evidence, despite the judge's claim that the information "wouldn't be in evidence or anything like that," because his opinion referenced the statements. On that basis, this Court reversed for failure to provide due process to the other party.).

[14] 19 *Del. C.* § 2348(i) ("If either party or the Board seeks to utilize the medical testimony of an expert, it may do so; provided, that prompt and adequate notice to the opposing party or parties is given.").

[15] IAB Rules 9(B)(5)(a) ("The Pre-Trial Memorandum shall contain: (a) names (and, if requested, the addresses) of prospective medical and lay witnesses . . . .").

and provide a perspective on it. Attorneys' comments in closings do not constitute evidence.

(13) Both of these justifications depend on the idea that only portions of a treatise that have been discussed enter the record. This rule ensures that expert witnesses will have the chance to clarify and explain, as best they can to the laypersons judging the case, why the body of knowledge they have mastered supports the conclusion they have reached. Delaware has long considered medical publications inadmissible as evidence on their own, and restricted their use to cross examination.[17] Our decision, in *Chavin v. Cope*, to allow all of an article into evidence is not comparable to this situation because it was premised on a decision by the trial judge to admit the article into evidence for impeachment purposes after the expert, on direct examination, read part of the article into the record.[18] Here, defense counsel never confronted the expert with alternative portions of the treatise on which the expert relied in an attempt to impeach him.

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[16] 6 Del. Admin. C. § 249(a) (listing the materials that comprise the record; the list does not include materials discussed during closing argument).

[17] *Barks v. Herzberg*, 58 Del. 162, 165 (Del. 1965) ("In his opinion, the trial judge cited and quoted from excerpts from various medical periodicals and treatises which were not in evidence, and had not been used in cross-examination of the medical experts. We think this an improper use by the court of such publications, for in this State at least medical publications are not admissible as such in evidence, but may be used only as a basis for cross-examination of such witness." (citation omitted));

[18] *Chavin v. Cope*, 243 A.2d 694, 698 (Del. 1968).

(14) The IAB defended its decision to look at the AMA Guides on the basis that ignoring the evidence would require it to be subservient to doctors, even if treatises plainly carry some other meaning.[19] The IAB misunderstands its place in the system. As a judicial decisionmaker, the IAB must make decisions on the factual record before it, as presented through the adversarial process. Part of the rationale for using expert witnesses is to present the opinion of someone able to understand and explain treatises to non-experts. The IAB may not undertake its own review of treatises, in the absence of expert testimony on the disputed portion of the treatise, to decide if an expert correctly explained a subject within that witness' area of expertise.

(15) An attorney who wishes to criticize an expert's fidelity to the methodology announced in a treatise may approach the matter in two ways. First, the attorney may call an expert to discuss the point in question. Second, the attorney may cross examine an expert using other portions of the treatise. But an attorney may not create factual issues about the expert's testimony during closing arguments by introducing portions of a treatise that were never before discussed.

[19] *Abrahams v. Chrysler Group LLC*, at p. 13 n. 2 ("[T]he Board is permitted to check the doctor's references to the *AMA Guides* to gauge the credibility of a doctor's testimony. To hold otherwise, would invite doctors to misrepresent application of the *AMA Guides* because it would force the Board to blindly accept all medical representations as true, as representative, and as appropriately applied.").

(16) Nor can we consider this error harmless. This case, at its heart, was about dueling experts,[20] and an attempted impeachment of an expert without notice and an opportunity for the party offering the expert to respond might well have determined the outcome.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED and this matter is REMANDED to the Superior Court for action consistent with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[20] *Abrahams v. Chrysler Group LLC* , No. 1221317, at p. 12 (The IAB's opinion reflects the importance of resolving the disagreement between the experts. After an introductory paragraph, the IAB began the section of the opinion entitled "Findings of Fact and Conclusions of Law" as follows: "The Board accepts the opinions of Dr. Meyers over the opinions of Dr. Bandera. Dr. Bandera's testimony was not convincing.").