

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	§	
	§	No.246, 2004
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of Delaware in and for New
v.	§	Castle County
	§	
REBECCA THOMPSON,	§	C.A. No. 03A-07-003
	§	
Plaintiff Below,	§	
Appellees.	§	

Submitted: October 29, 2004

Decided: December 2, 2004

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

ORDER

This 2nd day of December, 2004, on consideration of the briefs of the parties, it appears to the Court that:

(1) This is an appeal by the State of Delaware from a decision of the Industrial Accident Board (the “Board”), granting the petition of the employee/Appellee, Rebecca Thompson, to determine compensation due, denying the State’s petition to terminate benefits, and awarding Thompson ongoing total disability at the rate of \$318.24 per week. The State contends that the Superior Court erred by: (i) failing to critically assess evidence that

Thompson's medical expert was unaware of Thompson's long history of preexisting back conditions; (ii) failing to critically assess evidence of a medically-unexplained, substantial gap in Thompson's treatment between the date of the industrial accident and the date of the alleged onset of Thompson's back pain after the industrial accident; and (iii) affirming the Board's decision that Thompson was totally disabled from returning to work. We find the Board's decision to be supported by substantial evidence and free of legal error. Accordingly, we affirm.

(2) On December 18, 2001, Thompson was involved in an automobile accident while driving a bus for the State. Thompson was employed by the State as a bus driver in the Christiana School District. As a result of this industrial accident, Thompson injured her neck and back, for which she was initially treated by Dr. Hsu, her primary physician. Dr. Hsu subsequently referred Thompson to Dr. Rastogi, a board-certified neurosurgeon. On January 8, 2002, Dr. Rastogi performed surgery on Thompson's neck. In July 2002, Thompson began to experience pain in her back along with numbness in her legs. Thompson noticed the pain in her back after an automobile trip to Florida in which she was a passenger.

(3) Thompson has a long history of back problems. Before the industrial accident, Thompson had undergone two surgeries on her lower back and continued being treated by a physician, Dr. Boulos, approximately once a year for pain injections. Thompson's most recent pain injection occurred in October 2001, two months before the industrial accident.

(4) On November 26, 2002, Thompson filed a petition to determine compensation due, seeking temporary total disability benefits. On December 19, 2002, the State filed a petition to terminate Thompson's disability benefits, alleging that Thompson was capable of returning to work. The parties resolved the issue of compensability of Thompson's neck injury, leaving the compensability of her back injury and the State's petition to terminate disability benefits as the sole issues for the Board's consideration. On June 3, 2003, the Board determined that Thompson's back injury was compensable and denied the State's petition to terminate Thompson's disability benefits. In reaching its decision, the Board accepted the testimony of Dr. Rastogi, Thompson's medical expert, and rejected the testimony of Dr. Hogan, the State's medical expert.

(5) "This Court, replicating the role of the Superior Court, reviews *de novo* legal issues decided by the Board and reviews factual findings to

determine whether they are supported by substantial evidence.”¹ Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”² It is ““more than a scintilla but less than a preponderance”³ Further, the Board is free to choose between conflicting medical expert opinions, and either opinion constitutes substantial evidence for purposes of appeal.⁴

(6) The State’s first argument on appeal is that the Superior Court erred by failing to critically assess evidence that Dr. Rastogi was unaware of Thompson’s long history of preexisting back conditions. In essence, the State contends that there was not substantial evidence in the present record to support the Board’s decision to accept Dr. Rastogi’s opinion concerning the causation of Thompson’s back injury. We disagree and find that there was substantial evidence in the present record to support the Board’s decision. The record shows that the Board clearly explained its reasons for accepting Dr. Rastogi’s

¹ *Keeler v. Metal Masters Foodservice Equip. Co., Inc.*, 712 A.2d 1004, 1005 (Del. 1998) (citing *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994)).

² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (citing *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966)).

³ *Id.* (citing *Cross v. Calfano*, 475 F.Supp. 896, 898 (M.D.Fla. 1979)).

⁴ *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992) (citing *DiSabatino Brothers, Inc. v. Wortman*, 453 A.2d 102, 105-06 (Del. 1982)).

opinion and rejecting Dr. Hogan's opinion. The Board noted that Dr. Rastogi stood in a better position to assess Thompson's condition because he performed Thompson's prior neck surgery and followed up with Thompson on two occasions. The Board also found that Dr. Hogan examined Thompson only once. In addition, Dr. Rastogi testified that his causation opinion remained unchanged even considering Thompson's prior back problem. (7) The State's second argument on appeal is that the Superior Court erred by failing to critically assess evidence of a medically-unexplained, substantial gap in Thompson's treatment between the date of the industrial accident on December 18, 2001 and the date of the alleged outset of Thompson's back pain in July 2002 after her automobile trip from Delaware to Florida and back. The State is essentially arguing that because of the gap in Thompson's treatment, Thompson's back condition was therefore attributable to her prior back conditions and not the industrial accident. We disagree and find that there is substantial evidence in the present record to explain the gap in treatment for Thompson's back injury. First, as the record shows, Dr. Rastogi testified that he initially focused on Thompson's neck injury, rather than her back injury, because Thompson's neck injury appeared to be a more urgent problem. Second, Dr. Rastogi testified that Thompson's neck injury masked her lower

back symptoms, thereby making her back injury appear to be not as significant as it was in actuality. Finally, Thompson discussed the back pain initially with Dr. Hsu and Dr. Rastogi was under the impression that Dr. Hsu had discussed the back injury with Thompson.

(8) Thompson's third argument on appeal is that the Superior Court erred by affirming the Board's decision that Thompson was totally disabled from returning to work. Because we find substantial evidence in the present record to support the Board's finding that the accident exacerbated Thompson's underlying back condition, it logically follows, and we therefore hold, that the Board did not err in denying the State's petition to terminate benefits. The record shows that Thompson was totally disabled from returning to work. It is well settled in Delaware that the Board's acceptance of Dr. Rastogi's testimony, even though contradicted by the testimony of Dr. Hogan, qualifies as substantial evidence for purposes of this appeal.⁵ After a careful review of the record, we find that the decisions of the Board are supported by substantial evidence and are free of legal error. The Superior Court was correct in its judgment that the decisions must be affirmed.

NOW THEREFORE, IT IS SO ORDERED that the judgment of the

⁵ *Id.*

Superior Court is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely

Justice