IN THE SUPREME COURT OF THE STATE OF DELAWARE

HENRY WENKE,	§	
	§	No. 446, 2005
Appellant,	§	
Claimant-Appellee Below,	§	Court Below: Superior Court of the
	§	State of Delaware in and for
v.	§	New Castle County
	§	
GAICO,	§	C.A. No. 04A-09-006
	§	
Appellee,	§	
Employers-Appellant Below,	§	
	§	
BLUE HEN INSULATION,	§	
	§	
Employers- Appellee Below.	§	

Submitted: March 27, 2006
Decided: May 23, 2006

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

O R D E R

This 23rd day of May 2006, upon consideration of the briefs of the parties, it appears to the Court that:

(1) This is an appeal from the Superior Court's reversal of a decision of the Industrial Accident Board, which ordered Employer GAICO to pay Claimant-Appellant Henry Wenke for injuries arising from his exposure to asbestos and his subsequent diagnosis of terminal lung cancer. On appeal, Claimant makes three arguments: first, that there was substantial evidence for all elements of his claim

against GAICO; second, that GAICO and Blue Hen waived their right to object to their expert testimony; and third, that the Superior Court's decision is inconsistent with the Workers' Compensation Act. The Superior Court shifted the burden to Claimant to prove exposure to asbestos through expert testimony because GAICO took preventative measures to prevent exposure. Because the decision of the Board was supported by substantial evidence showing that Claimant was exposed to asbestos after he removed his protective suite and mask, we uphold the decision of the Board and reverse the judgment of the Superior Court.

(2) Claimant began working as an insulator in 1945 with the International Association of Heat, Frost, and Asbestos Workers Union Local 42. He retired in 1985 after 40 years of continuous service. During that time, he did no other work than as an asbestos insulator. He worked mostly at industrial plants throughout Delaware. When he first started working as an insulator, "everything was asbestos." Claimant had worked for several employers throughout his career as an asbestos insulator. Claimant's final employment was between 1984 and 1985 with Employer GAICO at the Indian River power plant where he worked with asbestos while wearing a protective suit and mask and working in a polyurethane tent. He removed asbestos insulation from pipes. Following any task of removing asbestos, Claimant would leave the tent, wet his suit and mask, then remove them. Claimant testified that asbestos remained in the air outside the tent after removing his suit

and mask, and he would breathe it. A co-worker at the Indian River power plant, Randall Meadows, also testified that after removing his own suit and mask outside the tent, he would breathe asbestos that remained in the air.

(3) In September 2003, Claimant was diagnosed with asbestos-related lung cancer. Employee brought an action before the IAB seeking benefits arising from his exposure to asbestos and subsequent development of lung cancer.

(4) When assigning liability among several employers, all of whom have exposed an employee to asbestos, Delaware courts follow the "last injurious exposure" rule. The Superior Court first described this rule in *Lake Forest School Dist. v. De Long*[1] when it assigned total liability to the employer with the misfortune to have been the final employer to expose an employee to asbestos.[2]

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[1] *Lake Forest School Dist. v. De Long*, 1988 Del. Super. LEXIS 265 at *4-5 (Del. Super. Ct. 1988)

> In order to prove exposure to asbestos, the Board must find that [an employee] and the asbestos were in the same place at the same time. To support a finding that the asbestos was 'harmful', the Board must determine that the asbestos was friable, i.e., easily crumbled.

[2] *Id.* at *9-11.

> The last injurious exposure rule provides, generally, that where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the most recent employer where the worker was exposed is liable for the entire award.
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> The Delaware Supreme Court has adopted the "last insurer" or "last carrier" rule which is based on the same principal, as the last injurious exposure rule. See Cicamore, supra. The last carrier rule provides that, in the case of an occupational disease resulting from exposure over a lengthy period, the last insurer must pay the compensation if the employment was of a kind contributing to the disease.
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> The purpose of each of these rules is to set a definite time for liability to attach with an occupational disease developing over a long period of time thus avoiding the difficult, if

(5) The Board found that Claimant was last exposed to asbestos while working for Defendant-Employer GAICO ("Employer" or "GAICO") while employed at its Indian River facility. Another employer, Blue Hen Insulation, had previously employed Claimant.[3] Thus, the question presented to the Board was choosing liability between Blue Hen or GAICO. The Board ruled in favor of Claimant, rejected GAICO's argument that the claim was barred by the applicable statute of limitations, and ordered GAICO to pay benefits.

(6) GAICO appealed to the Superior Court. The Superior Court reversed the Board's decision, holding that the burden of proving Claimant's exposure switched to Claimant because Employer took preventative measures to prevent exposure. The Superior Court held that Claimant failed to meet his burden.[4]

(7) We review questions of law and the legal conclusions of the Board *de novo*.[5] This Court is not the trier of fact and does not have authority to weigh

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> not impossible, task of determining which, in a series of exposures, caused the disease. Although the result may seem harsh, eventually there will be a spreading of the risk when the rule is applied nationwide. Since the policy reasoning is the same for each rule, it is reasonable to infer that in adopting the "last insurer" rule the court in *Cicamore* intended to have this rule apply to the employer as well as to the insurer. (citations omitted).

[3] Had the Board not found GAICO exposed Claimant to the last injurious exposure to asbestos, presumably, it would have decided that Blue Hen Insulation was liable for his asbestos-related injuries. On appeal to this Court, Blue Hen has taken no position and has stated that it would not file any answering brief.

[4] *GAICO v. Wenke*, C.A. No. 04A-09-006, at *3. The Superior Court specifically held that "there was not substantial evidence from which the Board could have found that Employee was last exposed to asbestos while working for Employer because Employee did not present expert testimony that he could have been exposed to asbestos while wearing protective clothing."

[5] *Scheers v. Independent Newspapers*, 832 A.2d 1244, 1246 (Del. 2003); *State v. Cephas*, 637 A.2d 20, 23 (Del. 1993).

evidence, determine the credibility of witnesses, or make independent factual findings.[6] Determinations of credibility are reserved exclusively to the Board.[7] We review factual findings and conclusions of the Board to ensure they are free from legal error and supported by substantial evidence in the record.[8]

(8) Substantial evidence is more than a mere scintilla, but less than a preponderance of the evidence.[9] "Substantial evidence means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion."[10] When conflicting expert opinions are each supported by substantial evidence, the Board is free to accept one opinion over the other opinion.[11]

(9) Regardless of whether or not Claimant has the burden to prove exposure when an Employer takes protective measures, we conclude that there was substantial evidence that Claimant was exposed to asbestos while employed by GAICO because both he and another former employee testified that when they took off their masks, there was still asbestos in the air and they breathed it.[12] This

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[6] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[7] *Standard Distributing v. Hall*, Del. Supr., No. 157, 2005, Ridgely, J. (Jan. 9, 2006); *Summons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1994).
[8] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965); *A. Mazzatti & Sons, Inc. v. Ruffin*, 437 A.2d 1120 (Del. 1981).
[9] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[10] *Standard Distributing v. Hall*, Del. Supr., No. 157, 2005, Ridgely, J. (Jan. 9, 2006); *Oceanport Inc. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[11] *Standard Distributing v. Hall*, Del. Supr., No. 157, 2005, Ridgely, J. (Jan. 9, 2006); *DiSabatino Bros. v. Wortman*, 453 A.2d 102, 106 (1982).
[12] Tr:Wenke at n.1 *supra*; Tr:Meadows at n.2 *supra*. *See* Opening Brief, p.15:lines 16-19.

testimony, which the Board accepted, provides substantial evidence for the Board's finding that Claimant was last exposed to asbestos while working for GAICO despite the protective measures. With substantial evidence before it of exposure to asbestos while working for GAICO, the Board did not err when it applied the last injurious exposure rule.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED. This matter is REMANDED for further proceedings consistent with this Order.

BY THE COURT:

/s/Henry duPont Ridgely
Justice