IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD COTTMAN,	§	
	§	No. 402, 2006
Claimant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Kent County
	§	
BURRIS FENCE CONSTRUCTION,	§	C. A. No. 05A-07-004
	§	
Employer Below,	§	
Appellee.	§	

Submitted: December 13, 2006
Decided: December 19, 2006

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

O R D E R

This 19th day of December 2006, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1) Donald Cottman ("Cottman"), the claimant-appellant, appeals from a Superior Court judgment affirming a decision by the Industrial Accident Board ("IAB") that denied his petition for additional compensation. Cottman contends that an industrial accident injury he sustained in August 2003 while employed by Burris Fence Construction ("Burris") worsened a pre-existing condition. In this appeal, Cottman contends that the IAB's denial of his petition for additional compensation was erroneous because it was unsupported by substantial evidence. Specifically, Cottman asserts that the IAB erred by rejecting the opinions of his

medical experts and by crediting the opinion of Burris' medical expert, Dr. Lawrence Piccioni ("Dr. Piccioni"). According to Dr. Piccioni, Cottman had recovered from his work-related injury by April 2004. Because the IAB's decision is supported by the record and is free from legal error, we affirm the judgment of the Superior Court.

2) Cottman first injured his back in 1988 while working for Lewis Steel. In 1997, Cottman again hurt his back in a non-work related context. As a result of those two prior injuries, Cottman had a very serious, pre-existing permanent condition at the time of his August 2003 work accident. In 1997 and 1998, physicians found Cottman to be a surgical candidate. From 1988 until 2002 (other than for one month in 1993),[1] Cottman could not work, primarily because of his low back pain.

3) According to Cottman, in August 2003 a dog attacked him while he was installing a fence, causing him to trip and then fall into his truck, hurting his shoulder, back and leg. Thereafter, Cottman and Burris entered into an "Agreement as to Compensation" for the period September 17, 2003 through April 2, 2004. On April 2, 2004, Cottman met with Dr. Piccioni, who determined that there were no residuals from the August 2003 work injury. Based on Dr.

[1] On cross-examination, Cottman testified that from the time of the 1988 work accident in Maryland until June 1993, he did not work because of his low back injury. In June 1993, Cottman worked for Seaford Fence Doors but had to stop because of back pain. He did not work from July 1993 until 2002 because of back pain.

Piccioni's determination, Cottman signed a "Receipt for Compensation Paid" on April 3, 2004. After that date, his worker's compensation benefits ceased.

5) After the termination of his benefits and after another attempt to return to work, Cottman reinjured his back in August 2004 ("2004 back injury"). Cottman filed a petition to determine additional compensation, including: first, ongoing total disability benefits from and after September 20, 2004; second, $4,958 of unpaid medical expenses and authorization for future physical therapy treatment; and third, permanent impairment benefits for a 28% loss of use of his low back.

5) For purposes of the IAB hearing, both parties took deposition testimony from the five physicians who had diagnosed Cottman: Dr. John Woods ("Dr. Woods"), a licensed chiropractor; Dr. Julius Zant ("Dr. Zant"), a neurosurgeon; Dr. Conworth Dayton-Jones ("Dr. Dayton-Jones"), an anesthesiologist and pain specialist; Dr. Stephen Rodgers ("Dr. Rodgers"), an occupational medicine specialist; and Dr. Piccioni, an orthopedic surgeon. Dr. Woods, Dr. Zant, Dr. Dayton-Jones and Dr. Rodgers testified on behalf of Cottman; Dr. Piccioni testified on behalf of Burris.

6) Dr. Woods opined that Cottman's low back condition was related to his 2003 work injury, because Cottman had been unable to work since the August 2003 work accident, and because all of his chiropractic treatment was reasonable,

necessary and related to the 2003 work accident. Dr. Woods had previously treated Cottman in July 2000 and March 2003 for low back and cervical complaints. He saw Cottman again after the August 2003 work injury, on September 17, 2003, at which time Cottman complained of lumbar pain and left leg pain. Dr. Woods testified that although Cottman's degenerative disc disease was a pre-existing condition, the August 2003 work injury had aggravated that underlying condition. Dr. Woods' diagnosis was pre-existing spinal stenosis[2] that was exacerbated by the August 2003 work accident.

7) Dr. Woods referred Cottman to Dr. Zant for a neurosurgical consult, which took place on January 14, 2004. Dr. Zant also opined that the recurrence of back pain was related to the 2003 work injury. Specifically, Dr. Zant found that Cottman's 2003 work injury had aggravated his preexisting condition—his spinal stenosis—rather than causing a new injury.

8) Dr. Dayton-Jones opined that the August 2003 work injury was "the straw that broke the camel's back," that caused Cottman's underlying pre-existing spinal stenosis to become symptomatic. According to Dr. Dayton-Jones, Cottman's low back condition continues to be related to the August 2003 work injury.

[2] The record reflects that spinal stenosis is a medical condition where the spinal canal narrows and compresses the spinal cord and nerves. The natural process of spinal degeneration normally occurs with aging. It can also sometimes be caused by spinal disc herniation, osteoporosis, or a tumor. Spinal stenosis may affect the cervical spine, the lumbar spine or both. Lumbar spinal stenosis results in low back pain as well as pain or abnormal sensations in the legs.

9) Dr. Rodgers, who examined Cottman and reviewed his medical records on December 31, 2004, opined that Cottman suffered a 28% permanent impairment to the low back, from assorted causes. Dr. Rodgers acknowledged that Cottman had a significant permanent injury to his low back that pre-existed the August 2003 work accident.

10) Dr. Piccioni, who examined Cottman in January 2004, April 2004 and December 2004, opined that the August 2003 work accident caused a temporary exacerbation of Cottman's underlying condition, from which Cottman had recovered by April 2004. Cottman first saw Dr. Piccioni on January 12, 2004, and complained of shoulder and back pain as well as leg numbness. Dr. Piccioni recommended aggressive treatment, as well as surgical consultation. On April 2, 2004, Dr. Piccioni re-examined Cottman. He found that Cottman's symptoms had significantly improved, and that there were no residuals from the August 2003 work accident.

11) In December 2004, Dr. Piccioni saw Cottman a third and final time, and concluded that Cottman may require treatment for his back pain, but that that condition was unrelated to the August 2003 work accident. In short, Dr. Piccioni concluded there was no observable change, from a physical standpoint, in Cottman's condition between April and December 2004. When asked to explain to the IAB how the examinations of December 2004 and April 2004 compared, Dr.

Piccioni said: "I would tell them that basically the patient is back to his baseline. That's the condition he was in before he was hired. He had a chronic condition with arthritis which would wax and wane with symptoms from time to time. There would be good days and bad days. He might have some back pain and some stiffness, even occasional leg pain, but he was pretty much back to where he was before the work injury of 2003."

12) In summary, Dr. Piccioni testified that the August 2003 work injury caused a temporary exacerbation of symptoms that required treatments, but those symptoms had "returned back to baseline" by April 2004. Thereafter, Dr. Piccioni concluded: first, the August 2003 trauma could not have triggered Cottman's current symptoms; second, that although in January 2004 Cottman was still recovering from the sprain superimposed on the spinal stenosis, by April 2004 he had recovered from that sprain; and third, any further symptoms were the result of his underlying chronic condition, not the work-related accident.

13) The IAB denied Cottman's petition, holding that his 2003 work injury did not endure beyond April 2, 2004. The IAB held that "in order to qualify for any of the requested benefits, Cottman must show his low back condition, after April 2, 2004, was causally related to the August 15, 2003 work injury." The IAB concluded that Cottman had failed to meet that burden. In reaching that conclusion, the IAB found the opinions of Drs. Zant and Piccioni to be more

credible than those of the other physicians who testified on the issue of total disability.

14) The IAB noted that all medical experts agreed that Cottman had a serious permanent condition that pre-existed the August 2003 work accident. The IAB further noted that the circumstances surrounding the August 2003 work injury indicated that it was not severe, and that the injury was a temporary exacerbation. Finally, the IAB found that Dr. Rodgers' testimony did not establish that the August 2003 work accident had caused any permanent impairment. Cottman subsequently appealed to the Superior Court, which affirmed the IAB's decision.

15) "On appeal from a decision of an administrative agency, the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is more than a scintilla but less than a preponderance of the evidence. The appellate inquiry, however, is limited. Weighing the evidence and determining questions of credibility which are implicit in factual findings are functions reserved exclusively for the Board. When, as here, there is contradictory expert testimony

supported by substantial evidence, it is within the Board's discretion to accept the testimony of one physician over another."[3]

16) In this appeal, Cottman presents several inter-related arguments, all related to the claim that the IAB erred in declining to find a causal relationship between the August 2003 work injury and his low back condition after April 2, 2004. We will address those arguments *seriatim*.

17) Cottman's first contention is that both the IAB and the Superior Court erred in finding that Dr. Piccioni's testimony was more credible than the testimony of his medical experts. Cottman argues that Dr. Piccioni's opinion must be rejected because he had not treated Cottman before the August 2003 work accident. That argument disregards the fact that Dr. Piccioni had knowledge of Cottman's prior medical history and condition. When Dr. Piccioni first examined Cottman, he had the records supplied by Dr. Woods, the Peninsula Medical Center, and William More. Dr. Piccioni also had the disability determinations from Drs. Proper and MsGinnis and records from the Veterans Affairs clinic. Cottman also personally gave Dr. Piccioni his medical history. Thus, Dr. Piccioni was fully aware of Cottman's extensive record of previous low back problems. Therefore, the IAB could properly find Dr. Piccioni's testimony more credible than the other

[3] *State Dep't of Lab. v. Medical Placement Serv., Inc.*, 457 A.2d 382, 383 (Del. 1982). *Downes v. State*, 1993 Del. LEXIS 144, *4 (Del. Supr.) (internal quotation and citations omitted) (quoting *Stoltz Management Co., Inc. v. Consumer Affairs Board*, 616 A.2d 1205, 1208 (Del. 1992); *Butler v. Speakman Company*, 1992 Del. LEXIS 351, *4 (Del. Supr.)).

medical testimony, even though Dr. Piccioni did not treat Cottman before the August 2003 accident.

18) Cottman's second claim is that the IAB erroneously failed to take into account a critical fact, *viz*., that Cottman had the ability to work "in the physically demanding job of fence installer up to the time of his August 2003 work injury," yet thereafter he could not return to that demanding work. That argument is not supported by the record. Cottman testified that from 1988 to 2002, he worked only one month because of his longstanding back problems, and that he worked for Burris only three weeks before the August 2003 work accident. Consistent with those facts, Dr. Rodgers testified that Cottman could not have been "doing fine" before the August 2003 accident, because he had a significant permanent injury at that time.[4]

[4] When asked if he knew whether that was correct, Dr. Rodgers replied:

> "[n]o. you can't do fine. I mean, whatever, he had a permanent impairment previously. He had a significant injury previously. These things do quiet down over the years, partially a function of altered lifestyle and sort of intrinsic lessening of the level of activity, but they don't become totally asymptomatic."

Alternatively, Cottman argues that Dr. Piccioni's testimony in May 2004 was inconsistent with his opinion that Cottman had recovered from the August 2003 work injury. Cottman asserts that in May 2004 Dr. Piccioni testified that "Cottman should try physical therapy and epidural injections around the areas of the sprain, and where his previous degenerative condition was, which treatment would be related to the work accident." Again, Cottman mischaracterizes the record. Dr. Piccioni actually testified that physical therapy would not be necessary, and that any further epidurals would only treat Cottman's underlying condition—not the sprain from the August 2003 work injury, which had healed.

19) Cottman's third claim is that the Superior Court erred by failing to ascertain whether Dr. Piccioni's opinion was grounded in fact or consistent with the other evidence. However, Cottman failed to show any factors that would discredit Dr. Piccioni's testimony. The IAB is free to accept one expert's opinion over another, and neither this Court nor the Superior Court will second-guess such credibility determinations if they are supported by substantial evidence.[5] The IAB's "acceptance of expert testimony, even when contradicted by another expert, qualifies as substantial evidence for purposes of appeal."[6]

20) Predicated on *Reese v. Home Budget Center*,[7] Cottman's fourth claim is that the IAB erred in concluding his prior work injuries should not disqualify him from receiving benefits for his August 2003 work injury. The record does not reflect that the IAB so concluded. Under *Reese*, the analysis focuses upon whether the August 2003 accident provided the "setting" or "trigger" for a period of

[5] *Hernandez v. Boston Mkt., Inc*., 2005 Del. LEXIS 244, at *5-6 (Del. Supr.).

[6] *Coicuria v. Kauffman's Furniture*, 1998 Del. LEXIS 45, at *4-5 (Del. Supr.).

[7] *Reese v. Home Budget Center*, 619 A.2d 907 (Del. 1992). In *Reese*, this Court held that "[a] preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Id.* at 910. This Court also pointed out that "[t]he 'but for' definition of proximate cause in the substantive law of torts finds equal application in fixing the relationship between an acknowledged industrial accident and its aftermath. If the worker had a preexisting disposition to a certain physical or emotional injury which had not manifested itself prior to the time of the accident, an injury attributable to the accident is compensable if the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger,' causation is satisfied for purposes of compensability." *Id.*

disability. The IAB stated in its opinion that "the Board recognizes that a preexisting condition, even one is very serious, certainly does not preclude a work injury to the same body part."[8] The IAB, however, did credit the testimony of Dr. Zant that the more recent August 2004 back injury—not the August 2003 work accident—was the cause of Cottman's disability, and that the preexisting spinal stenosis—and not the 2003 accident—is what made Cottman more susceptible to injury. Dr. Piccioni agreed with Dr. Zant that the August 2003 work accident was not the "trigger" for Cottman's later problems. After comparing the 1997 and 2003 MRI films, Drs. Zank and Piccioni both agreed that Cottman's injury was a progression of a pre-existing degenerative condition, not an injury specifically related to the August 2003 work injury. Therefore, the IAB found Burris not responsible for Cottman's post-April 2004 condition, because "there is no longer any causal relationship between the work accident and the ongoing injury."

21) Cottman's fifth argument is that there is no record evidence to support Dr. Piccioni's conclusion that "[Cottman's] work injury was a temporary exacerbation of his underlying condition, which has resolved by April 2004. . . ." Once again, Cottman's argument is inconsistent with the record, which reflects that, because of his pre-existing condition both before and after the August 2003 work injury, Cottman had very limited ability to undertake fence work.

[8] *Cottman v. Burris Fence Constr.*, IAB Hearing No. 1240319, at *23 (June 30, 2005).

Accordingly, the IAB found that the August 2003 accident did not substantially diminish Cottman's already limited work ability. That finding is supported by the MRI films that showed no significant new injury during the period in which they were taken.

22) Relying on *Standard Distrib. Co. v. Nally*,[9] Cottman's sixth contention is that Burris bears responsibility for the recurrence of Cottman's exacerbated injury in August 2004, because the exacerbation was unaccompanied by any intervening event that could be deemed the proximate cause of his new condition. *Nally* is inapplicable to Cottman's case, however, because the record supports the IAB's conclusion that by April 2004, the August 2003 work injury no longer existed.

23) Cottman's final argument is that the IAB erred by determining that Dr. Rodgers' testimony (that Cottman had a 28% permanent impairment rating) did not establish that the August 2003 work accident had caused a permanent impairment. Relying on the "last injurious exposure" rule,[10] Cottman argues that Burris is not

[9] *Standard Distrib. Co. v. Nally*, 630 A.2d 640 (Del. 1993). In *Nally*, this Court held that, "in the case of a claimant with continuing symptoms and disability from an initial injury, the carrier at the time of that initial injury has responsibility when the claimant has a further injury for which there was no intervening causative event. However, when such a claimant has sustained a subsequent work-related accident that aggravates the condition, then the second carrier is responsible for the additional compensation. The burden of proof as to the causative effect of the second event is on the initial carrier." *Id*. at 646.

[10] "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

entitled to a credit for any prior permanency rating given to Cottman from a previous injury. Therefore, Cottman claims that Burris, the most recent employer, must pay the entire current permanent disability benefits. The IAB properly rejected that argument.

24) Burris never contended that it should receive a credit for any of Cottman's previous impairments. What Burris contended, and established, was that the impairments rated by Dr. Rodgers at 28% predated the August 2003 work injury. Dr. Rodgers based that impairment rating upon the MRI medical evidence of problems at three different levels of the lumbar spine, all of which predated the August 2003 accident. When asked whether any of the levels were impacted by the August 2003 work accident, Dr. Rodgers responded that he could not tell. Accordingly, the IAB correctly found that Dr. Rodgers "could not say, to a reasonable degree of medical probability, that his rating now would be higher than Cottman's rating before the August 2003 work accident."[11] Therefore, the IAB correctly concluded that Dr. Rodgers' testimony "does not establish that the August 2003 work accident caused any permanent impairment."[12]

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successive employments, the most recent employer where the worker was exposed is liable for the entire award. *Wenke v. GAICO*, 2006 Del. LEXIS 265, at *4 (Del. Supr.).

[11] *Cottman v. Burris Fence Constr.*, IAB Hearing No. 1240319, at *25 (June 30, 2005).

[12] *Id.*

25) The record supports the Superior Court's determination that the IAB's decision to deny Cottman's petition for an increase in benefits was grounded in substantial evidence and is free of legal error.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is affirmed.

BY THE COURT:

/s/ Randy J. Holland
Justice