SUPERIOR COURT OF THE STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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RE: Bruce Drainer v. Heating Oil Partners, C.A. No. N12A-06-004 RRC

Submitted: April 30, 2013 Decided: June 27, 2013

On Appeal from a Decision of the Industrial Accident Board. **AFFIRMED.**

On Appellee's Motion to Strike. **GRANTED.**

Dear Counsel:

The Industrial Accident Board denied Claimant Bruce Drainer's petition for additional benefits under the Workers' Compensation Act because he did not prove that, but for his accident, his ailment would be better. He claims that the Board erred because

- 1. insufficient evidence supports its finding that any "enhanced" harm had healed, and
- 2. before the hearing, Employer Heating Oil Partners, L.P. had implicitly agreed that, but for his accident, his ailment would be better.

Because he did not raise the second claim before the Board and the interests of justice do not require the Court to consider the claim, the motion to strike is **GRANTED**. And because the Board credited one expert's opinion over another and the credited opinion is substantial evidence, the Board's decision is **AFFIRMED**.

FACTS

On April 26, 2005, Claimant Bruce Drainer suffered back injuries in the course and scope of his employment. As of September 15, 2005, the date of the hearing before the Industrial Accident Board, Employer Heating Oil Partners, L.P. has paid benefits to him for

- 1. his total disability from April 30, 2005 to October 26, 2005,
- 2. the permanent impairment of his cervical spine, and
- 3. the permanent impairment of his lumbar spine.²

Drainer returned to work on October 26, 2005, but his symptoms persisted.³ And on February 1, 2006, Peter B. Bandera, M.D., a physiatrist, referred Drainer to Bruce J. Rudin, M.D., an orthopedic surgeon.⁴ Dr. Rudin concluded that Drainer had degenerative disc disease.⁵ The surgeon did not recommend surgery;⁶ however, to treat the condition's symptoms, Jay Downing, M.D., an anesthesiologist, injected pain relievers into Drainer's back.⁷ Drainer testified that his symptoms then improved.⁸

¹ Hr'g Tr. 5:21–24, 7:10–12.

² Hr'g Tr. 5:24–6:1, 7:10–12.

³ Hr'g Tr. 30:25–31:4, 39:11–16.

⁴ Hr'g Tr. 40:6–12.

⁵ Employer's Ex. 1 at 16:1–9, 77:8–20.

⁶ Hr'g Tr. 32:22–33:6, 41:3–4.

⁷ Hr'g Tr. 32:13–21, 40:13–18, 52:6–8.

⁸ Hr'g Tr. 32:9–12, 40:19–41:2, 49:10–12, 52:15–53:12.

On June 19, 2006, Dr. Bandera cleared Drainer to return to full duty and noted that he needed no more treatment. Employer's expert, Ali Kalamchi, M.D., testified that, by this time, Drainer had reached maximum medical improvement. Drainer's expert, Hapog L. DerKrikorian, M.D., later testified that any improvement was temporary because injected pain relievers lose effect over time. Drainer returned to full duty, although he testified that he still had pain.

In 2008, Drainer had two knee replacements—one in January and one in August. Before Drainer's right knee was replaced, Dr. Bandera referred him to Dr. DerKrikorian, a neurosurgeon. On July 22, 2008, Dr. DerKrikorian concluded that Drainer still had symptoms because part of an inter-vertebral disc had bulged outside the disc's confines and pinched a nerve. Because his symptoms had persisted for over three years, the doctor recommended surgery. But Drainer chose to delay back surgery until after his right knee was replaced.

From July 22, 2008 until October 20, 2009, Drainer received conservative treatment and saw Dr. DerKrikorian often. ¹⁹ Drainer's symptoms improved, ²⁰ and by July 7, 2009, the doctor no longer recommended surgery. ²¹

Drainer next saw Dr. DerKrikorian on February 22, 2011—about 16 months after their last appointment. 22 Drainer complained about severe pain and

⁹ Hr'g Tr. 41:5–42:1.

¹⁰ Employer's Ex. 1 at 19:1–16.

¹¹ Claimant's Ex. 1 at 36:20–38:3.

¹² Hr'g Tr. 41:5–9.

¹³ Hr'g Tr. 50:7–23, 53:9–12.

¹⁴ Hr'g Tr. 42:14–18, 43:9–12.

¹⁵ Hr'g Tr. 33:11–15, 44:23–45:1, 54:25–55:10; Claimant's Ex. 1 at 2:17–18, 3:22–4:3.

¹⁶ Claimant's Ex. 1 at 6:3–5, 7:21–9:11, 22:23–23:1.

¹⁷ Hr'g Tr. 34:21–24, 45:2–3; Claimant's Ex. 1 at 9:17–23.

¹⁸ Hr'g Tr. 34:25–35:1, 45:4–6; Claimant's Ex. 1 at 9:24–10:2, 26:21–27:6.

¹⁹ Hr'g Tr. 35:22–24, 36:7–9; Claimant's Ex. 1 at 10:6–11:2, 11:10–14.

²⁰ Hr'g Tr. 35:25–36:6, 45:7–11, 16–19; Claimant's Ex. 1 at 42:9–24.

²¹ Hr'g Tr. 45:12–13; Claimant's Ex. 1 at 43:1–4, 43:24–44:3.

worsening symptoms.²³ The doctor recommended surgery,²⁴ and by July 26, 2011, Drainer agreed.²⁵

On March 25, 2011, Drainer asked the Industrial Accident Board to determine whether Employer owed additional benefits to him under Title 19, Section 2347 of the Delaware Code.²⁶ That is, Drainer wanted Employer to pay for the surgery that Dr. DerKrikorian proposed.²⁷ Drainer claimed that

- 1. the inner part of an inter-vertebral disc bulged outside the disc's confines,
- 2. the disc pinched a nerve, which caused his pain and other symptoms, and
- 3. but for the accident, the injury would not have happened either at all or yet.²⁸

Drainer also asked the Board to conclude that the proposed surgery was reasonable and necessary to treat his injury.²⁹ In opposition, Employer argued that

- 1. the accident did not cause or accelerate the disc's bulging,
- 2. only a degenerative back condition that predates the accident was causing Drainer's symptoms.³⁰

²² Hr'g Tr. 36:10–13, 45:20–23, 50:24–51:2, 55:11–13; Claimant's Ex. 1 at 11:15–12:4, 45:14–16.

²³ Hr'g Tr. 36:14–19, 45:25–46:9, 51:3–17; Claimant's Ex. 1 at 12:5–13:5, 46:5–9.

²⁴ Hr'g Tr. 36:23–37:1, 47:11–14; Claimant's Ex. 1 at 16:2–6, 17:16–24, 46:5–9.

²⁵ Hr'g Tr. 37:8–9.

²⁶ Claimant's Pet. 1.

²⁷ Claimant's Pet. 1; Hr'g Tr. 5:14–19.

²⁸ Hr'g Tr. 6:18–25.

²⁹ Hr'g Tr. 6:9–11.

³⁰ Hr'g Tr. 7:20–8:3, 8:7–11.

Further, Employer contended that the proposed surgery was not reasonable or necessary to treat his injury.³¹

The Board held a hearing to resolve the dispute on September 15, 2011.³² Three witnesses testified:

- 1. Drainer testified live;³³
- 2. Drainer's expert, Hapog L. DerKrikorian, M.D., testified by deposition;³⁴ and
- 3. Employer's expert, Ali Kalamchi, M.D., testified by deposition.³⁵

Drainer testified about his symptoms and how they and their degree changed over time.³⁶ But the dueling experts provided the important evidence.³⁷

Both experts agreed that

- 1. Drainer had degenerative disc disease before the accident, 38 and
- 2. the accident inflicted an acute injury to his back.³⁹

³¹ Hr'g Tr. 8:7–12.

³² Hr'g Tr. 5:1–3.

³³ Hr'g Tr. 30:1–57:10.

³⁴ Hr'g Tr. 8:18–29:24; Claimant's Ex. 1.

³⁵ Hr'g Tr. 57:16–81:11; Employer's Ex. 1.

³⁶ Hr'g Tr. 30:1–57:10.

³⁷ Hr'g Tr. 8:18–29:24, 57:16–81:11; Claimant's Ex. 1; Employer's Ex. 1.

³⁸ Compare Claimant's Ex. 1 at 4:12–17, 29:2–16, 32:13–33:11, 34:12–21 (testifying that scans of Drainer's spine revealed disc disease and an acute disc herniation) with Employer's Ex. 1 at 9:7–13:15 (testifying that scans of Drainer's lumbar spine revealed disc disease and a related disc herniation).

³⁹ Compare Claimant's Ex. 1 at 18:1–20, 21:16–22:8, 28:9–31:1, 31:20–32:12 (testifying that the accident caused herniated a disc in Drainer's lumbar spine) with Employer's Ex. 1 at

But the experts disagreed about

- 1. the nature of Drainer's acute injury, 40
- 2. whether the injury had healed, 41 and
- 3. the injury was causing Drainer's most recent symptoms. 42

Dr. DerKrikorian opined that

- 1. the accident caused an inter-vertebral disc to bulge and eventually tear,
- 2. once the disc tore, the inner part of the disc bulged outside the disc's confines,
- 3. the inner part pinched a nerve, which caused his most recent symptoms, and
- 4. but for the accident, those symptoms would not exist either at all or yet. 43

In contrast, Dr. Kalamchi opined that

1. the accident did not cause an inter-vertebral disc to bulge,

^{13:16–14:10, 69:22–70:10 (}testifying that the accident sprained or strained Drainer's lumbar spine).

⁴⁰ Compare Claimant's Ex. 1 at 18:1–20, 28:9–30:13 (testifying that Drainer's acute injury was a herniated disc) with Employer's Ex. 1 at 13:16–14:10 (testifying that Drainer's acute injury was a sprain or strain).

⁴¹ Compare Claimant's Ex. 1 at 12:5–19:8, 52:9–53:15 (testifying that Drainer's herniated disc had worsened since his accident occurred) with Employer's Ex. 1 at 19:1–16, 43:21–44:19, 50:3–51:4, 71:16–72:11 (testifying that Drainer's condition and symptoms were as if his accident did not occur).

⁴² Compare Claimant's Ex. 1 at 18:1–19:8 (testifying that Drainer's acute injury was causing his most recent symptoms) with Employer's Ex. 1 at 43:21–44:19 (testifying that Drainer's chronic condition was causing his most recent symptoms).

⁴³ Claimant's Ex. 1 at 4:8–5:5, 8:8–9:16, 14:5–15:21, 18:1–19:8, 29:2–30:13.

- 2. the accident only sprained or strained Drainer's lumbar spine,
- 3. this injury healed by June 19, 2006, when Dr. Bandera cleared him to return to full duty, and
- 4. thus the chronic condition was causing his most recent symptoms. 44

Finally, the experts disagreed about whether the proposed surgery—which would cost about \$50,000⁴⁵—was reasonable and necessary. 46

On September 27, 2011, the Board denied Drainer's petition because "[he] failed to meet his burden of proof that his current lumbar spine condition is causally related to [his] work accident." In the decision, the Board favored Employer's expert, Dr. Kalamchi, over Drainer's expert, Dr. DerKrikorian. Based on Dr. Kalamchi's testimony, the Board found that

- 1. Drainer has a history of lumbar spine degeneration, ⁴⁹
- 2. no acute disc herniations were documented. 50
- 3. the accident might have aggravated Drainer's existing, chronic condition, but it returned to "baseline," 51

⁴⁴ Employer's Ex. 1 at 8:22–14:10, 19:1–20:4, 43:21–19.

⁴⁵ Claimant's Ex. 1 at 19:13–20:7, 21:2–10.

⁴⁶ Compare Claimant's Ex. 1 at 19:9–12 (testifying that the proposed surgery is reasonable and necessary) with Employer's Ex. 1 at 38:13–42:10 (testifying that the proposed surgery is not likely to improve Drainer's condition or symptoms, at least significantly).

⁴⁷ Drainer v. Heating Oil Partners, No. 1268120, at 15 (Del. I.A.B. Sept. 27, 2011).

 $^{^{48}}$ *Id.* at 14 ("The Board accepts the medical opinions of Dr. Kalamchi over the medical opinions of Dr. DerKrikorian.").

⁴⁹ *Id*.

⁵⁰ *Id*.

⁵¹ *Id.* ("The evidence is clear that [Drainer] had a 'baseline' of chronic, degenerative changes. [His] symptoms may have been exasperated by the work injury but as Dr. Kalamchi opined [Drainer] [had] returned to baseline.").

- 4. Drainer could aggravate his condition by performing basic activities, 52 and
- 5. Drainer somehow aggravated his condition and caused his most recent symptoms.⁵³

The Board did not cite to the record in its decision.⁵⁴

On October 13, 2011, Drainer asked the Board for reargument under Title 19, Regulation 1331 of the Delaware Administrative Code. 55 According to Drainer, the Board misapprehended the facts in two ways:

- 1. The Board stated that his most recent symptoms started when he lifted a child on July 12, 2010, but he lifted the child on July 12, 2011—after the symptoms started, ⁵⁶ and
- 2. The Board found that any "enhanced" injury had healed, but tests showed that his condition had worsened.⁵⁷

Employer argued that the Board should deny the motion as untimely;⁵⁸ the Board agreed.⁵⁹ It also noted that it would have denied his motion on the merits because

⁵² *Id.* at 15 ("The Board accepts Dr. Kalamchi's opinion that [Drainer]'s degenerative condition was so severe that [he] will continue to experience flare-ups with even basic activities such as bending, lifting, showering, and driving.").

⁵³ *Id.* ("Since a spine with these degenerative conditions can flare up at any time the current conditions cannot be attributed to the work accident as Dr. DerKrikorian contends. In other words, [Drainer]'s condition is yet another flare up that is causally related to the condition of his back prior to the work accident.").

⁵⁴ However, Employer has stated otherwise, "The Board provided specific and detailed reasons for accepting the opinions of Dr. Kalamchi and cited appropriately to the evidentiary record." Employer's Ans. Br. 26.

⁵⁵ Claimant's Mot. 1, *Drainer v. Heating Oil Partners*, No. 1268120 (Del. I.A.B. Oct. 13, 2011).

 $^{^{56}}$ Claimant's Mot. ¶¶ 2–4, *Drainer v. Heating Oil Partners*, No. 1268120 (Del. I.A.B. Oct. 13, 2011).

⁵⁷ Claimant's Mot. ¶¶ 5–7, *Drainer v. Heating Oil Partners*, No. 1268120 (Del. I.A.B. Oct. 13, 2011).

- 1. the Board merely made a typographical mistake as to the date, ⁶⁰ and
- 2. the Board has found that his chronic condition could worsen, although his acute injury had resolved.⁶¹

The Board reaffirmed its original decision. 62

Drainer now appeals the Board's decisions to Superior Court under Title 19, Section 2349 and Title 29, Section 10142 of the Delaware Code. 63 Drainer claims that the Board erred because

- 1. insufficient evidence supports its finding that his "enhanced" injury had healed, 64
- 2. he filed his motion for reargument on time, ⁶⁵ and
- 3. Employer had agreed that, but for his accident, his back condition would be better.⁶⁶

In general, Drainer contends that the Board overlooked evidence that supported his position and improperly credited Mr. Kalamchi's opinion.⁶⁷ Employer argues that the Court should affirm the Board's rulings because

 $^{^{58}}$ Employer's Resp. ¶¶ 1–2, Drainer v. Heating Oil Partners, No. 1268120 (Del. I.A.B. Oct. 19, 2011).

⁵⁹ *Drainer v. Heating Oil Partners*, No. 1268120, at 1–2 (Del. I.A.B. May 22, 2012).

 $^{^{60}}$ *Id.* at 2.

⁶¹ *Id.* at 2–3.

⁶² *Id.* at 3.

⁶³ Notice of Appeal 1–2.

⁶⁴ Appellant's Opening Br. 22–28.

⁶⁵ Appellant's Opening Br. 29–30.

⁶⁶ Appellant's Reply Br. 7–8.

⁶⁷ Appellant's Opening Br. 22–30.

- 1. substantial evidence supports the Board's findings, ⁶⁸ and
- 2. the Board did not misapprehend the facts, as it has noted,⁶⁹ although it erred when it denied the motion for re-argument as untimely.⁷⁰

Employer also asks the Court to strike the parts of Drainer's Reply Brief—the last paragraph on page 7 and the whole of page 8—in which he argues that Employer had agreed that, but for his accident, his back condition would be better because he did not raise the claim before the Board.⁷¹

STANDARD OF REVIEW

When reviewing a decision of the Industrial Accident Board, the Court must affirm the decision if

- 1. substantial evidence supports the Board's findings of fact, ⁷²
- 2. the decision is free from errors of law, ⁷³ and
- 3. the Board did not abuse its discretion.⁷⁴

Evidence is "substantial" if a reasonable person could accept it as adequate to support a finding of fact. The Court does not weigh evidence, assess its

⁶⁸ Appellee's Answering Br. 19–31.

⁶⁹ Appellee's Answering Br. 31–33.

⁷⁰ Appellee's Answering Br. 32.

⁷¹ Appellee's Mot. to Strike 1–3.

⁷² Munyan v. Daimler Chrysler Corp., 909 A.2d 133, 136 (Del. 2006) (citing Johnson v. Chrysler Corp., 213 A.2d 64, 66 (Del. 1965)); see also 29 Del. C. § 10142 ("The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.").

⁷³ Munyan, 909 A.2d at 136 (citing Johnson, 213 A.2d at 66).

⁷⁴ Straley v. Advance Staffing, Inc., 984 A.2d 124, 2009 WL 3451913, at *2 (Del. Oct. 27, 2009) (citing Funk v. Unemployment Ins. Appeal Bd., 591 A.2d 222, 225 (Del. 1991)).

⁷⁵ Standard Distrib., Inc. v. Hall, 897 A.2d 155, 158 (Del. 2006) (citing Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981)). Because "the search for substantial evidence is . . . a qualitative

credibility, or find facts⁷⁶ because the Court must respect the Board's "experience and specialized competence." The Court only considers whether evidence is legally sufficient to support the Board's findings; the Court reviews the Board's conclusions of law *de novo* and its discretionary rulings for abuse. 80

DISCUSSION

The Court must affirm the Board's decision because

- 1. substantial evidence supports the Board's conclusion that Drainer did not prove by a preponderance of the evidence that his accident legally caused the harm that his doctor recommends surgery to fix,
- 2. although Drainer filed his motion for reargument on time, the Board did not abuse its discretion when it denied the motion, and
- 3. the Court may not consider Drainer's claim that Employer agreed that, but for his accident, his ailment would be better.

exercise," *Damiano v. State Drywall, Inc.*, 1993 WL 1626506, at *1 (Del. Super. Apr. 6, 1993) (quoting *Kent v. Schweiker*, 710 F.2d 110, 114 (3d Cir. 1983)), *aff'd*, 628 A.2d 83, 1993 WL 245383 (Del. June 22, 1993), there is no minimum quantum of evidence.

 $^{^{76}}$ Glanden v. Land Prep, Inc., 918 A.2d 1098, 1100 (Del. 2007) (quoting Johnson, 213 A.2d at 66).

⁷⁷ See 29 Del. C. § 10142(d) ("The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency"). The Court would waste the Board's expertise if "it lightly dismissed the fruits of [it]." *Spring Constr. Co. v. Mendez*, 1992 WL 302072, at *2 (Del. Super. Sept. 15, 1992).

⁷⁸ State v. Cephas, 637 A.2d 20, 23 (Del. 1994) (quoting Olney, 425 A.2d at 613).

⁷⁹ Munyan, 909 A.2d at 136 (citing Anchor Motor Freight v. Ciabattoni, 726 A.2d 154, 156 (Del. 1998)).

⁸⁰ See also Arrants v. Home Depot, No. 662, 2012, 2013 WL 1897146, at *2 (Del. May 7, 2013) ("Absent an error of law, the standard of appellate review for a Board's decision is abuse of discretion. 'The Board has abused its discretion only when its decision has exceeded the bounds of reason in view of the circumstances." quoting *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (footnote and internal quotation marks omitted)).

I. Substantial Evidence—Dr. Kalamchi's Opinion—Supports the Board's Conclusion that Drainer Did Not Prove by a Preponderance of the Evidence that His Accident Legally Caused the Harm That His Doctor Recommends Surgery to Fix.

In Delaware, a party may get benefits per the Workers' Compensation Act,⁸¹ if the party proves by a preponderance of the evidence that an accident inflicted an injury to him in the course and scope of his employment.⁸² A "specific and identifiable" accident legally (or proximately) causes an injury if, but for the accident, the injury would not exist either at all or yet.⁸³ An injury can have more than one legal cause;⁸⁴ an accident can legally cause an injury even if the accident is not the sole cause or a substantial cause of the injury.⁸⁵ And if an accident aggravates an existing ailment, then the accident legally causes any "enhanced" harm.⁸⁶ As Drainer suggests,⁸⁷ an employer takes its employees as they are.⁸⁸

The record shows that Employer embraced Drainer as he was. Both parties' experts agreed that

- 1. Drainer has an ailment, degenerative back disease, 89
- 2. the ailment predates his accident, 90 and
- 3. the accident aggravated the ailment. 91

^{81 19} Del. C. ch. 23.

⁸² Histed v. E.I. Du Pont de Nemours & Co., 621 A.2d 340, 343 (Del. 1993) (citing Johnson v. Chrysler Corp., 213 A.2d 64, 66 (Del. 1965) and Weaver v. Sea Watch Int'l, 1992 WL 114063, at *1 (Del. Super. May 18, 1992)).

⁸³ Reese v. Home Budget Ctr., 619 A.2d 907, 910 (Del. 1992).

⁸⁴ Id. (quoting Culver v. Bennett, 588 A.2d 1094, 1097 (Del. 1991)).

⁸⁵ *Id*.

⁸⁶ *Id*.

⁸⁷ Appellant's Opening Br. 24.

⁸⁸ Reese, 619 A.2d at 910 (citing General Motors Corp. v. McNemar, 202 A.2d 803, 806-807 (Del. 1964)).

⁸⁹ See supra note 38 and accompanying text.

⁹⁰ See supra note 38 and accompanying text.

Employer did not contend that it is not liable for the enhanced harm that Drainer suffered in his accident. But Employer presented expert testimony that this harm had healed and thus Drainer could not prove that, but for his accident, his back would be better. The Board agreed. The Board agreed.

The Board found that Drainer did not prove that, but for his accident, his back would be better. The Board credited Dr. Kalamchi's opinion over Dr. DerKrikorian's opinion, and based on the credited opinion, the Board found that

- 1. Drainer has a degenerative back ailment that preexisted his accident, 96
- 2. although the accident aggravated that ailment, any "enhanced" harm had healed, 97 and
- 3. some other event likely aggravated the ailment and thus caused his most recent symptoms. 98

⁹¹ See supra note 39 and accompanying text.

⁹² See supra note 44 and accompanying text.

⁹³ Drainer v. Heating Oil Partners, No. 1268120 (Del. I.A.B. Sept. 27, 2011).

⁹⁴ *Id.* at 15.

⁹⁵ *Id.* at 14. According to Drainer, Dr. Kalamchi's opinion that any added or enhanced harm had healed is an assumption. Appellant's Opening Br. 24, 26, 27, 30. Drainer's attorney asked Dr. Kalamchi whether the surgeon opined that Drainer's current condition was unrelated to the accident because he returned to "baseline." Employer's Ex. 1 at 71:16–21. Dr. Kalamchi testified that this was a "fair assumption" based on the facts. Employer's Ex. 1 at 71:22–72:11. Even though Dr. Kalamchi used the phrase "fair assumption," his statement is not an assumption; it is an inference. An "assumption" is "[a] fact or statement taken as true or correct" and an "inference" is "[a] conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 143, 847 (9th ed. 2009). Under these definitions, Dr. Kalamchi's statement—his opinion—is an inference because it is a conclusion that he reached based on his expertise and the facts. The fact that he identified the inference as an assumption is inconsequential.

⁹⁶ Drainer v. Heating Oil Partners, No. 1268120, at 14 (Del. I.A.B. Sept. 27, 2011).

⁹⁷ *Id.* The Board could find that any added or enhanced harm had healed even though Employer had paid Drainer's medical bills until July 2011, although Employer's acts might support his argument that his accident caused his most recent symptoms, as he asserts. Appellant's Reply Br. 7-8.

The Board concluded that Drainer failed to prove by a preponderance of the evidence that any "enhanced" harm remained and could thus cause his most recent symptoms. ⁹⁹ Because sufficient evidence supports this conclusion, the Court must accept it.

Substantial evidence—specifically, Dr. Kalamchi's opinion—supports the Board's decision. In general, the Board accepted Dr. Kalamchi's opinion and rejected Dr. DerKrikorian's opinion. This is allowed, as "the Board [may] accept the testimony of one medical expert over the views of another" if the Board gives "specific, relevant reasons for doing so." Although the Board did not cite to the record in the decision, the Board explained its choice enough. That is, the Board explained how Dr. Kalamchi's opinion fit the facts better.

[The] [c]laimant had the burden of proving to the Board that her compensable work-related injury was [legally causing] her subsequent neck and shoulder pains. The Board considered this argument and concluded that although [the] [c]laimant had failed to demonstrate such a connection between her original injury and her current complaints, [the employer's expert] had provided a solid rationale for considering the injuries as separate and distinct.

Id. The Court concluded that substantial evidence supported the Board's decision. *Id.* Thus, the Board could find that Dr. Kalamchi supplied a solid rationale for why Drainer's earlier injury is separate and distinct from his current injury if substantial evidence supported the finding.

⁹⁸ Drainer v. Heating Oil Partners, No. 1268120, at 15 (Del. I.A.B. Sept. 27, 2011).

⁹⁹ *Id.* The Board may find that a previous, compensable injury is not causing a claimant's most recent symptoms and deny additional compensation. In *Tingle v. E.I. DuPont DeNemours & Co.*, the claimant argued that her current injury was part and parcel of an earlier, compensable injury. 2003 WL 367548, at *4 (Del. Super. Feb. 11, 2003). The Court noted:

Drainer v. Heating Oil Partners, No. 1268120, at 14 (Del. I.A.B. Sept. 27, 2011). The Court respects the Board's preference even though both experts testified by deposition. See Estate of Herbert Mitchell v. Allen, 2012 WL 6846555, at *3 (Del. Super. Nov. 28, 2012) ("Although a credibility determination as to deposition testimony is not given the deference generally ascribed to live testimony because the deponent is not physically present at the hearing and cannot be 'sized up' against appearing witnesses, deposition testimony can still be persuasive and carry weight.").

¹⁰¹ Standard Distrib. Co. ex rel. Pa. Mfrs. Ass'n Ins. Co. v. Nally, 630 A.2d 640, 646 (Del. 1993) (citing DiSabatino v. Wortman, 453 A.2d 102, 105 (Del. 1982)).

¹⁰² Turbitt v. Blue Hen Lines, Inc., 711 A.2d 1214, 1215 (Del. 1998) (citing Lemmon v. Northwood Constr., 690 A.2d 912, 913-14 (Del. 1996)).

¹⁰³ But Employer argued otherwise: "The Board provided specific and detailed reasons for accepting the opinions of Dr. Kalamchi and cited appropriately to the evidentiary record." Appellee's Answering Br. 26.

¹⁰⁴ Drainer v. Heating Oil Partners, No. 1268120, at 14–15 (Del. I.A.B. Sept. 27, 2011).

And because his opinion is legally adequate to support the Board's conclusion, ¹⁰⁵ the Court must uphold it.

II. The Board Did Not Abuse Its Discretion When It Denied Drainer's Motion for Reargument Because It Did Not Overlook or Misapprehend Anything.

A motion for reargument allows the Board to reexamine the facts in the record or the law as it applies to those facts; 106 a motion for reargument is not a chance for a party to rehash an argument that the Board considered before. The Board will grant a motion for reargument only if the Board

- 1. overlooked a controlling precedent or legal rule, or
- 2. misapprehended the law or the facts in a way that changed the decision's outcome. 108

The Board denied Drainer's motion for reargument as untimely and, in the alternative, because the Board did not overlook or misapprehend anything. Although Employer argued differently before the Board, Employer now concedes that Drainer filed the motion on time. But as Employer still argues, 112

¹⁰⁵ See Munyan, 909 A.2d at 136 (citing Reese, 619 A.2d at 910) ("Where the Board adopts one medical opinion over another, the opinion adopted by the Board constitutes substantial evidence for purposes of appellate review.").

¹⁰⁶ Cf. Merendino v. Kupcha, 2002 WL 32067546, at *3 (Del. Super. Dec. 30, 2002) (quoting Miles, Inc. v. Cookson Am., Inc., 677 A.2d 505, 506 (Del. Ch. 1995)) (describing the purpose of a motion for reargument in Superior Court).

¹⁰⁷ Cf. Anderson v. Airco, Inc., 2004 WL 2827887, at *1 (Del. Super. Nov. 30, 2004) (quoting McElroy v. Shell Petroleum, Inc., 618 A.2d 91, 1992 WL 397468, at *1 (Del. Nov. 24, 1992)) (describing the limits of a motion for reargument in Superior Court).

¹⁰⁸ Cf. Monsanto Co. v. Aetna Cas. & Sur. Co., 1994 WL 46726, at *2 (Del. Super. Jan. 14, 1994) (quoting Wilshire Rest. Group, Inc. v. Ramada, Inc., 1990 WL 237093, at *1 (Del. Ch. Dec. 19, 1990)) (stating the standard for granting a motion for reargument in Superior Court), aff'd, 653 A.2d 305 (Del. 1994).

¹⁰⁹ *Drainer v. Heating Oil Partners*, No. 1268120, at 1–2 (Del. I.A.B. May 22, 2012).

¹¹⁰ Employer's Resp. ¶¶ 1–2, *Drainer v. Heating Oil Partners*, No. 1268120 (Del. I.A.B. Oct. 19, 2011).

¹¹¹ Appellee's Answering Br. 32.

the Board did not abuse its discretion when it denied the motion because substantial evidence supports the Board's decision, as the Court discussed *supra*. In other words, the Court did not act arbitrarily or capriciously because the Board did not overlook or misapprehend anything; its dating error was merely typographical and played no part in its decision.

III. The Court May Not Consider Drainer's Claim that Employer Agreed that, but for His Accident, His Ailment Would Be Better Because He Did Not Raise the Claim Before the Board and the Interests of Justice Do Not Require Otherwise.

Delaware holds to the doctrine of exhaustion of administrative remedies, ¹¹⁴ under which this Court may consider an issue on appeal from an agency's decision only if the appellant raised the issue before the agency:

It is settled Delaware law that an issue is waived for appeal if it was not raised below. . . . [The] argument was not presented to the appropriate tribunal . . . ; therefore, the Court [cannot] hear the issue on appeal. 115

¹¹² Appellee's Answering Br. 32–33.

¹¹³ See supra Discussion Part II.

¹¹⁴ Levinson v. Del. Comp. Rating Bureau, Inc., 616 A.2d 1182, 1187 (Del. 1992) (citing James Julian, Inc. v. Hall, 349 A.2d 750, 752–753 (Del. Super. 1975) and Murphy v. T.B. O'Toole, Inc., 76 A.2d 313, 314 (Del. Super. 1950)). Neither party disputes that the doctrine applies here.

Jan. 11, 2002) (citing Wilmington Trust Co. v. Zakrewski, 2002 WL 144273, at *4 (Del. Super. Jan. 11, 2002) (citing Wilmington Trust Co. v. Connor, 415 A.2d 773, 781 (Del. 1980) and O'Brien v. Unemployment Ins. App. Bd., 1993 WL 603363, at *4 (Del. Super. Oct. 20, 1993)) (footnotes omitted). The Court's jurisprudence in this area is muddled. The Court has "held that '[i]t is settled Delaware law that an issue is waived for appeal if it was not raised [at the Industrial Accident Board hearing] below." Standard Distrib., Inc. v. Hall, 2005 WL 950118, at *2 (Del. Super. Mar. 18, 2005) (quoting Potts Welding & Boiler Repair Co., 2002 WL 144273, at *4) (alterations in original), aff'd, 897 A.2d 155 (Del. 2006). But the issue is not waived, although courts and commentators have referred to the doctrine's application as a "principle of 'waiver." Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 1115 (3d ed. 1992). In fact, the doctrine's application is more akin to forfeiture. See United States v. Olano, 507 U.S. 725, 733 (1993) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right." (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))). The doctrine is more forgiving than any principle of waiver; the Court can consider a "unexhausted" issue if the interests of justice so

The Court has stated otherwise in *dicta*, ¹¹⁶ but the doctrine does not shrink the Court's jurisdiction; ¹¹⁷ in rare cases, the Court may decline to apply the doctrine because "[its] application . . . is a matter of judicial discretion." And although the Court will presume that the doctrine applies, ¹¹⁹ the Court will decline to apply it if the interests of justice so require, ¹²⁰ as Drainer argues. ¹²¹

Drainer has asked the Court to consider whether he and Employer created an implied agreement that his accident aggravated his ailment, any "enhanced" harm has not healed, and the harm is causing his most recent symptoms. However, Drainer has not shown that

- 1. he raised this issue before the Board or
- 2. the interests of justice require the Court to consider the issue.

First, before the Board, Drainer only contended that Employer "acknowledged the injury" and "pa[id] for all the bills with the exception of the two most recent visits with Dr. DerKrikorian." Drainer never asked the Board to infer an agreement from Employer's actions or bar Employer from arguing that any "enhanced" harm had healed. He only asserted that

require, see *infra* note 120 and accompanying text, and the Court can decide the issue on the record, see 19 *Del. C.* § 2350(b) and Super. Ct. Civ. R. 72(g).

¹¹⁶ See Id. (noting that because the appellant had failed to raise an issue before the Board, the Court lacked jurisdiction over the issue on appeal).

¹¹⁷ *Levinson*, 616 A.2d at 1190.

¹¹⁸ *Id.* at 1189.

¹¹⁹ *Id.* at 1190.

¹²⁰ *Id.* at 1189; *Eckeard v. NPC Int'l, Inc.*, 2012 WL 5355628, at *3 (Del. Super. Oct. 17, 2012) (quoting *Levinson*, 616 A.2d at 1189); *Hundley v. O'Donnell*, 1998 WL 842293, at *2 (Del. Ch. Dec. 1, 1998) (quoting *Levinson*, 616 A.2d at 1189).

¹²¹ Appellant's Resp. to Appellee's Mot. to Strike ¶ 1.

¹²² Hr'g Tr. 82:13–15.

the Board overlooked the fact that Employer has acknowledged the compensability of the low back injury, was fully aware of the degenerative condition, and has paid for [his] medical treatment over the past six years. 123

At most, Drainer asked the Board to consider the Employer's actions as proof that any "enhanced" harm had not yet healed. Because he did not ask the Board to give legal effect to the Employer's actions, he did not raise the issue before the Board.

Second, because Drainer has not shown that the interests of justice require the Court to consider the issue, ¹²⁴ he has not overcome the strong presumption that the doctrine applies. Thus, the Court may not consider the issue.

CONCLUSION

The Court must respect the Board's expertise; ¹²⁵ both the standard of review and the doctrine of exhaustion of administrative remedies maintain the proper relationship between the Court and the Board. ¹²⁶ The doctrine, in particular, protects the Board's authority and conserves the Court's resources. ¹²⁷ For the reasons *supra*, the motion to strike is **GRANTED**, and the Board's decision is **AFFIRMED**.

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Richard R. Coo	och, R.J

cc: Prothonotary
Industrial Accident Board

 $^{^{123}}$ Claimant's Mot. ¶¶ 5, Drainer v. Heating Oil Partners, No. 1268120 (Del. I.A.B. Oct. 13, 2011).

¹²⁴ See Eckeard, 2012 WL 5355628, at *3 (stating when the interests of justice require the Court to consider a claim that the appellant did not raise before the agency below).

¹²⁵ See supra note 77 and accompanying text.

¹²⁶ *Levinson*, 616 A.2d at 1187 (noting that the doctrine maintains the proper relationship between the Court and the Board).

¹²⁷ Woodford v. Ngo, 548 U.S. 81, 89 (2006).