# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

MICHAEL SWEENEY,	)	
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	)	
Appellant,	)	
	)	
v.	)	C.A. No. N12A-06-008 ALR
	)	
	)	
WAL-MART,	)	
	)	
	)	
Appellee.	)	
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	)	
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	,	

Decided: July 31, 2013

Submitted: June 7, 2013

Upon Appellant's Appeal from the Industrial Accident Board's Decision. AFFIRMED.

## **OPINION AND ORDER**

Michael D. Bednash, Esquire; Kimmel, Carter, Roman & Peltz. P.A., 56 West Main Street, 4th Floor, Newark, Delaware; Attorney for Appellant Sweeney.

Delia A. Clark, Esquire; Rawle & Henderson, L.L.P., 300 Delaware Avenue, Suite 1015, Wilmington, Delaware; Attorney for Appellee Wal-Mart.

BRADY, J.

#### INTRODUCTION

This claim arises from a December 28, 2008 work accident in which Claimant/Appellant Michael Sweeney ("Sweeney") injured his leg while working for Employer/Appellee Wal-Mart. <sup>1</sup> The accident was caused when a Wal-Mart customer reversed her vehicle, striking Sweeney's right leg. <sup>2</sup> After a hearing on the merits on June 3, 2010, the Industrial Accident Board ("IAB", "the Board") determined that Sweeney developed reflex sympathetic dystrophy ("RSD") in his right lower leg as a result of the work accident. <sup>3</sup> The Board's opinion granting benefits was dated December 17, 2010. <sup>4</sup>

On August 9, 2011, Sweeney filed a Petition of Additional Compensation Due. In the petition, Sweeney alleged that he had developed RSD in his right upper extremity in addition to the leg injury that had already been recognized by the IAB.<sup>5</sup> Sweeney sought the acknowledgement of RSD in his right upper extremity, payment of outstanding medical expenses, and payment of temporary total disability benefits.<sup>6</sup> Wal-Mart denied that Sweeney had RSD in his right upper extremity and denied that Sweeney's right upper extremity symptoms were caused by the work injury.<sup>7</sup> Wal-Mart also contended that the medical treatment received by Sweeney for his right upper extremity symptoms was unreasonable and excessive and that, contrary to Sweeney's claim of total disability, Sweeney was capable of returning to full-time sedentary work.<sup>8</sup> Sweeney's petition was heard by the IAB on February 10, 2012.<sup>9</sup> The petition

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<sup>&</sup>lt;sup>1</sup> Decision of the Industrial Accident Board (May 22, 2012) (hereinafter "IAB Decision 2012") at 2.

<sup>&</sup>lt;sup>2</sup> *Id*.

<sup>&</sup>lt;sup>3</sup> Decision of the Industrial Accident Board (Dec. 17, 2010) (hereinafter "IAB Decision 2010") at 13.

<sup>&</sup>lt;sup>4</sup> *Id*.

<sup>&</sup>lt;sup>5</sup> IAB Decision 2012 at 2.

<sup>&</sup>lt;sup>6</sup> *Id*.

<sup>&</sup>lt;sup>7</sup> *Id*.

<sup>&</sup>lt;sup>8</sup> *Id*.

<sup>&</sup>lt;sup>9</sup> Id.

was denied by the IAB in a May 22, 2012 opinion. Sweeney has appealed the denial to Superior Court. 11

In his February 2012 testimony before the IAB, Sweeney explained that he developed symptoms of RSD in his right upper extremity approximately six months after the original work accident<sup>12</sup>. These symptoms included a burning sensation from his right shoulder blade down his right arm and into his right hand, sensations of pins and needles, his right hand getting colder than his left hand, and red discoloration and swelling in his right hand.<sup>13</sup>

Dr. Bruce Grossinger testified on Sweeney's behalf. Sweeney had been examined by Dr. Grossinger and had received numerous nerve block injections from Dr. Grossinger's associate, Dr. Brajer. The nerve block injections were intended to address the patient's symptoms in both the right lower extremity and the right upper extremity. Dr. Grossinger opined that Sweeney has RSD of both his right upper and lower extremities, that the medical treatment received by Sweeney had been reasonable and necessary, and that the need for this medical treatment was causally-related to the work accident.

Dr. Grossinger suggested that some neck and right arm symptoms were present during his initial examination of Sweeney, but that the focus at the time was on Sweeney's leg and foot.<sup>19</sup> Dr. Grossinger further opined that Sweeney is totally disabled due to the severity of the RSD in

<sup>&</sup>lt;sup>10</sup> *Id*. at 24.

<sup>&</sup>lt;sup>11</sup> Appellant's Opening Br. (Apr, 25, 2013) at 1.

<sup>&</sup>lt;sup>12</sup> Transcript of Hearing before the Industrial Accident Board (Feb 10, 2012) (hereinafter "IAB Hearing 2012") at 11.

<sup>&</sup>lt;sup>13</sup> *Id*.

<sup>&</sup>lt;sup>14</sup> Grossinger Depo. (Jan. 31, 2012) at 9-10.

<sup>&</sup>lt;sup>15</sup> *Id*. at 10-11.

<sup>&</sup>lt;sup>16</sup> *Id*. at 14.

<sup>&</sup>lt;sup>17</sup> *Id.* at 37.

<sup>&</sup>lt;sup>18</sup> *Id.* at 19, 37.

<sup>&</sup>lt;sup>19</sup> *Id*.at 6.

both locations. 20 However, Dr. Grossinger subsequently clarified that Sweeney might be able to work at a part-time job of less than twenty hours per week, where he could change positions as needed, and where he would not be required to lift more than ten pounds.<sup>21</sup> Dr. Grossinger testified that he was not currently aware of such a job, but that he would consider returning Sweeney to work if such a job could be found.<sup>22</sup>

Two medical experts, Dr. John Townsend and Dr. Wilhelmina Korevaar, testified on behalf of Wal-Mart. After examining Sweeney and reviewing his medical records, Dr. Townsend concluded that Sweeney's medical treatments had exceeded what is reasonable or necessary.<sup>23</sup> He suggested that the locations in which the injections had been administered were inappropriate for the treatment of the patient's symptoms.<sup>24</sup> Dr. Townsend also opined that the treatments had been improperly monitored by Dr. Brajer.<sup>25</sup> According to Dr. Townsend, Delaware Worker's Compensation Practice Guidelines suggest that a patient be seen every three to four weeks between injections to determine whether the patient is experiencing functional gains.<sup>26</sup> In Dr. Townsend's opinion, Dr. Brajer had been administering the injections without the appropriate follow-up appointment or attempts to measure functional gains.<sup>27</sup> Dr. Townsend opined that it would be unreasonable to continue the injections when, as in Sweeney's case, a patient failed to show lasting improvement.<sup>28</sup>

As a result of his physical examination of Sweeney, Dr. Townsend found a two degree difference in temperature between Sweeney's arms and a mild difference in color between

<sup>20</sup> Grossinger Depo.at 15, 17.

<sup>&</sup>lt;sup>21</sup> *Id.* at 16.

<sup>&</sup>lt;sup>23</sup> Townsend Depo. (Jan. 31, 2012) at 13.

<sup>&</sup>lt;sup>24</sup> *Id.* at 15-16.

<sup>&</sup>lt;sup>25</sup> *Id*. at 13.

<sup>&</sup>lt;sup>26</sup> *Id.* at 13-14.

<sup>&</sup>lt;sup>27</sup> *Id*. at 26.

<sup>&</sup>lt;sup>28</sup> *Id*.

Sweeney's hands.<sup>29</sup> Dr. Townsend did not observe other symptoms of RSD in Sweeney's right arm such as allodynia, atrophy, differences in sweat, differences in hair growth, changes to the nail beds, shiny skin, or swelling.<sup>30</sup> Although Sweeney complained of allodynia in his right leg, Dr. Townsend found other RSD symptoms (e.g., hair growth difference, color differences, sweating differences, and temperature differences) noticeably absent in Sweeney's lower extremities.<sup>31</sup> Further, Dr. Townsend opined that while RSD can travel "horizontally" (i.e., from one side of the body to the other at the same level relative to the patient's spine), it is unlikely to travel "vertically" (i.e., over multiple levels, such as from the lower extremity to the upper extremity or vice versa).<sup>32</sup> Finally, Dr. Townsend's opined that Sweeney was capable of returning to sedentary work.<sup>33</sup>

Dr. Korevaar testified that Sweeney lacks the sufficient minimum symptoms to be diagnosed with RSD in the right upper extremity<sup>34</sup> and that Sweeney's upper extremity symptoms are not causally related to the work injury.<sup>35</sup> Dr. Korevaar testified that according to guidelines set by the American Medical Association, a patient would need to present with at least eight out of eleven specific symptoms in order to be diagnosed with RSD.<sup>36</sup> When Dr. Korevaar examined Sweeney, she found only three out of eleven symptoms in his right leg.<sup>37</sup> Dr. Korevaar further testified that she did not find evidence of any physical problem in Sweeney's upper extremities.<sup>38</sup> Dr. Korevaar also opined that RSD could not travel from the leg to the arm.<sup>39</sup> If

<sup>&</sup>lt;sup>29</sup> Townsend Depo. at 7.

<sup>&</sup>lt;sup>30</sup> *Id.* at 7-10.

<sup>&</sup>lt;sup>31</sup> *Id*.

<sup>&</sup>lt;sup>32</sup> *Id.* at 34.

<sup>&</sup>lt;sup>33</sup> *Id.* at 33.

<sup>&</sup>lt;sup>34</sup> Korevaar Depo. (Feb. 3, 2012) at 26-27.

<sup>&</sup>lt;sup>35</sup> *Id.* at 34-35.

<sup>&</sup>lt;sup>36</sup> *Id.* at 26-27.

<sup>&</sup>lt;sup>37</sup> *Id*.

<sup>&</sup>lt;sup>38</sup> *Id.* at 34.

<sup>&</sup>lt;sup>39</sup> *Id.* at 34-35.

RSD manifested in the leg first and then subsequently in the arm, the RSD of the arm would have to have been caused by a separate injury. <sup>40</sup> In light of the evidence, Dr. Korevaar agreed with Dr. Townsend that Sweeney's medical treatments had been unreasonable and unnecessary, <sup>41</sup> as well as improperly monitored by the treating physician. <sup>42</sup> She also agreed that Sweeney should be able to return to full-time light duty work. <sup>43</sup>

In addition to the testimony of the medical experts, both sides presented evidence concerning the impact of the symptoms on Sweeney's daily life. Sweeney, who is right-handed, acknowledged that he sometimes uses this hand for light activity, including lifting and carrying objects, using the mouse on his computer, text messaging, and smoking cigarettes. <sup>44</sup> In January 2011, prior to receiving one of the injections in question, Sweeney admitted to Dr. Brajer that he had been shoveling snow. <sup>45</sup> Nonetheless, Sweeney testified the pain intensifies the more he uses his right hand and that this has impacted his activities. He primarily types with his left hand and no longer works on his computer daily. <sup>46</sup> Two private investigators testified on behalf of Wal-Mart and presented videotaped surveillance of Sweeney. <sup>47</sup> The investigators testified that they observed Sweeney using his right hand for activities including smoking, carrying a bag, opening a door, texting, and gesticulating. <sup>48</sup> The investigators also noted Sweeney's presence for an extended period of time at the Icons Games & Comics Store ("Icons"). One investigator testified that Sweeney's extended presence at the store led him to believe that Sweeney was in fact working there and that he confirmed this by calling the store and asking if Sweeney was working

<sup>&</sup>lt;sup>40</sup> Korevaar Depo. at 34-35.

<sup>&</sup>lt;sup>41</sup> Id. at 34, 41.

<sup>&</sup>lt;sup>42</sup> *Id.* at 31-32.

<sup>&</sup>lt;sup>43</sup> *Id.* at 42-43.

<sup>&</sup>lt;sup>44</sup> IAB Hearing 2012 at 15-17.

<sup>&</sup>lt;sup>45</sup> *Id*. at 13.

<sup>&</sup>lt;sup>46</sup> *Id.* at 16-17.

<sup>&</sup>lt;sup>47</sup> *Id.* at 30, 43.

<sup>&</sup>lt;sup>48</sup> *Id.* at 33, 36-37, 44.

(the person who answered the phone told the investigator that Sweeney was working and put Sweeney on the line).<sup>49</sup> The investigators also observed Sweeney standing near the counter and speculated that this might have been because he was working at the store.<sup>50</sup> Sweeney testified that he had been at the store to participate in a *Magic: The Gathering* card game tournament.<sup>51</sup> The tournament lasted eight weeks and Sweeney estimated that he spent five hours a day at the store on tournament days.<sup>52</sup> He testified that each day of the tournament, he would play three hour-long rounds, with breaks in between rounds.<sup>53</sup> This was Sweeney's explanation of his extended presence at the store. Sweeney denied having ever worked at Icons.<sup>54</sup>

The IAB found that (a) Sweeney's upper right extremity symptoms were not causally related to his work accident, (b) the medical treatment he had received not been reasonable or necessary, (c) Sweeney was able to return to full-time sedentary work, and (d) Sweeney is entitled only to partial disability benefits. <sup>55</sup> On these grounds, the IAB denied Sweeney's claims for acknowledgement of compensability of the injury to his upper right extremity, for payment of medical expenses related to this injury, and for ongoing total disability benefits. <sup>56</sup> The Board found the testimony of Dr. Townsend to be the most credible, but also relied on the testimony of Dr. Korevaar. <sup>57</sup> However, where the testimony of Dr. Townsend and Dr. Korevaar conflicted, the Board adopted Dr. Townsend's position. <sup>58</sup> The Board rejected Dr. Grossinger's opinions as not credible. <sup>59</sup>

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<sup>&</sup>lt;sup>49</sup> *Id.* at 38.

<sup>&</sup>lt;sup>50</sup> IAB Hearing 2012 at 37-38, 46.

<sup>&</sup>lt;sup>51</sup> *Id.* at 9-10

<sup>&</sup>lt;sup>52</sup> *Id*.

<sup>&</sup>lt;sup>53</sup> *Id* 

<sup>&</sup>lt;sup>54</sup> *Id.* at 10.

<sup>55</sup> IAB Decision 2012 at 16.

<sup>&</sup>lt;sup>56</sup> *Id.* at 24.

<sup>&</sup>lt;sup>57</sup> *Id*. at 16.

<sup>&</sup>lt;sup>58</sup> *Id*.

<sup>&</sup>lt;sup>59</sup> *Id*.

## PARTIES' CONTENTIONS

Sweeney now appeals the IAB's denial of his Petition of Additional Compensation Due. 60 He contends that the Board's findings were not supported by "substantial evidence", that is, "evidence that a reasonable person would accept to support a conclusion". 61 Specifically, Sweeney alleges that the Board acted unreasonably in rejecting the opinions of Dr. Grossinger, who had been following the patient on an ongoing basis, in favor of the opinions of Dr. Townsend and Dr. Korevaar, who had only examined the patient in connection with the IAB proceedings. 62 Sweeney suggests that the Board should have at least accorded Grossinger's opinions some weight, but that it failed to do so. 63

Sweeney further alleges that the Board acted unreasonably in relying on Dr. Grossinger over Dr. Townsend in its December 17, 2010 decision, but reversing course and relying on Dr. Townsend over Dr. Grossinger in its May 22, 2012 decision. Further, he suggests that the Board improperly ignored a key component of Dr. Grossinger's testimony, namely that the patient experienced no symptoms in his upper right extremity prior to the work accident. Sweeney suggests that the Board did not give appropriate weight to this fact, which Sweeney takes as indicative of causation. Sweeney faults the Board for instead focusing on the fact that Sweeney did not report arm symptoms until six months after the accident, which the Board took

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<sup>&</sup>lt;sup>60</sup> Appellant's Opening Br. at 1.

<sup>&</sup>lt;sup>61</sup> *Id.* at 7.

<sup>&</sup>lt;sup>62</sup> *Id*.

<sup>63</sup> *Id*. at 8.

<sup>&</sup>lt;sup>64</sup> *Id.* at 3, 9. At the 2010 IAB Hearing, Dr. Grossinger testified on behalf of Sweeney and Drs. Townsend and Piccioni testified by deposition for Wal-Mart. *See* IAB Decision 2010, at 3-7. In its decision, the Board relied upon Dr. Grossinger's assessment of Sweeney and rejected Dr. Townsend's assessment. "The Board relies on the opinion of Dr. Grossinger." *Id.* at 10. "The Board agrees with Dr. Grossinger." *Id.* at 11. "The Board rejects the opinions of Dr. Townsend." *Id.* "The Board did not agree with Dr. Townsend's theory." *Id.* The Board "rel[ies] instead on the clinical findings of the treating physician, Dr. Grossinger." *Id.* at 12.

to suggest that the arm symptoms were not caused by the accident. <sup>66</sup> Sweeney suggests that his failure to report arm symptoms sooner after the accident can be explained away as due to the overshadowing effect of the much-worse leg pain. <sup>67</sup> Finally, Sweeney suggests that the Board acted inconsistently, given that its earlier determination that Sweeney had RSD in his leg caused by the accident was based on the absence of symptoms prior to the accident and the presence of symptoms after the accident. 68 Sweeney suggests that it was unreasonable for the Board not to use the same reasoning to find RSD in the arm. <sup>69</sup>

Wal-Mart maintains that the Board's findings are supported by substantial evidence and thus should not be disturbed. 70 It is within the purview of the IAB to weigh the evidence, determine the credibility of witnesses, and resolve conflicting witness testimony.<sup>71</sup> Specifically, Wal-Mart argues that it was within the Board's discretion to accept the testimony of one medical expert over another so long as the decision is supported by specific relevant reasons. <sup>72</sup> Wal-Mart suggests that the Board had several good reasons to accept the testimony of Dr. Townsend and Dr. Korevaar over the testimony of Dr. Grossinger. First, Wal-Mart contends that the other evidence in the record is consistent with Dr. Townsend and Dr. Korevaar's opinion that the patient was not suffering from RSD in his right extremity. 73 Wal-Mart cites the testimony of the two private investigators, the video surveillance, and the testimony of Sweeney himself as evidence that Sweeney had been using his right hand. 74 Wal-Mart suggests that a reasonable person might take this evidence to show that Sweeney did not have a serious injury or ailment of

Appellant's Opening Br. at 9.Id. at 9.

<sup>&</sup>lt;sup>70</sup> Appellee's Reply Br. (May 13, 2013) at 9.

<sup>&</sup>lt;sup>71</sup> *Id*. at 10

<sup>&</sup>lt;sup>72</sup> *Id.* (citing *Turbitt v. Blue Hen Lines*, 711 A.2d 1214, 1215 (Del. 1998)).

<sup>&</sup>lt;sup>73</sup> *Id.* at 11.

<sup>&</sup>lt;sup>74</sup> *Id*.

the right extremity. 75 Second, Wal-Mart maintains that Dr. Grossinger's experience with the patient was not as extensive as Sweeney suggests. According to Wal-Mart, Grossinger had only met Sweeney twice in twenty-one months. 76 Wal-Mart claims that Dr. Townsend actually examined Sweeney on more occasions than Dr. Grossinger. 77 Further, Dr. Grossinger's testimony suggests that his diagnosis was based in large part on the patient's subjective complaints. 78 Dr. Grossinger reported the patient's subjective symptoms such as burning and dysesthesia.<sup>79</sup> He also suggested that many sorts of objective tests would be ineffective at measuring RSD symptoms. 80 Finally, Wal-Mart highlights the fact that there is general agreement between the opinions of Dr. Townsend and Dr. Korevaar. 81 Wal-Mart suggests that it is reasonable for the Board to accept the corroborated opinion of two medical professionals over the differing opinion of a third.<sup>82</sup>

## STANDARD OF REVIEW

Under 29 Del. C. §10142, the standard under which the court reviews the factual findings of a state administrative agency is highly deferential. "The Court's review, in 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". 83 Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".84

<sup>&</sup>lt;sup>75</sup> *Id*.

<sup>&</sup>lt;sup>76</sup> Appellee's Reply Br. at 12.

<sup>&</sup>lt;sup>77</sup> *Id.* The record is somewhat unclear as to the precise number of times Sweeney was seen by Grossinger as compared to how many times Sweeney was seen by Townsend. Nonetheless, a similar point can be made that Sweeney's characterization of Grossinger as the treating physician may be somewhat misleading given that the therapeutic injections were performed entirely by Dr. Grossinger's associate, Dr. Brajer. (See IAB Hearing 2012 at 8.) <sup>78</sup> Grossinger Depo. at 25-28.

<sup>&</sup>lt;sup>79</sup> *Id*. at 9.

<sup>&</sup>lt;sup>80</sup> *Id.*. at 25-28.

<sup>81</sup> Appellee's Reply Br. at 12.

<sup>83 29</sup> Del. C. §10142(d).

<sup>84</sup> Oceanport Ind. v. Wilmington Stevedores, 636 A.2d 892, 899 (Del. 1994).

Substantial evidence requires "more than a scintilla but less than a preponderance". <sup>85</sup> The court does not weigh the evidence, determine questions of credibility, or make its own factual findings. <sup>86</sup> The court's role is merely to determine if the evidence is legally adequate to support the agency's factual findings. <sup>87</sup>

It is well-established that, in the case of conflicting expert testimony, the IAB is free to accept the opinion of one medical expert over another. The Board is "free to reject, in full or in part, the testimony of one physician over another based on its experience in gauging the testimony of witnesses who give conflicting testimony". <sup>88</sup> Furthermore, when the expert medical opinion is based in large part on a claimant's recital of subjective complaints and the Board finds the underlying facts to be different, the Board may reject the expert's conclusion. <sup>89</sup> A trier of fact may determine that an expert has given undue weight to a claimant's subjective complaints and reject the expert's opinion on this basis. <sup>90</sup>

### **DISCUSSION**

Sweeney argues that the Board improperly discounted Dr. Grossinger's medical opinion in favor of the opinions articulated by Dr. Townsend and Dr. Korevaar.

In *Lindsay v. Chrysler Corp.*, the court reversed and remanded the IAB's denial of the claimant's petition for additional compensation.<sup>91</sup> The court reversed on the grounds that the Board did not demonstrate that it had made "specific factual determinations based on the

<sup>85</sup> Onley v. Cooch, 425 A.2d 610, 614 (Del.1981).

<sup>&</sup>lt;sup>86</sup> Johnson v. Chrysler Corp., 213 A.2d 64, 66 (Del. Super. Ct. 1986).

<sup>87</sup> Keim v. Greenhurst Farms, 2001 WL 1490060, \*2 (Del. Super Ct.).

<sup>&</sup>lt;sup>88</sup> *Turbitt v. Blue Hen Lines*, 711 A.2d 1214, 1215 (Del. 1998). See also, *DiSabatino v. Wortman*, 453 A.2d 102, 105 (Del. Super. Ct. 1982); *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993).

<sup>&</sup>lt;sup>89</sup> Breeding v. Contractors-One-Inc., 549 A.2d 1102, 1104 (Del. 1988); Sears, Roebuck & Co. v. Farley, 290 A.2d 639, 641 (Del. 1972); Debernard v. Reed, 277 A.2d 684, 686 (Del. 1971).

<sup>&</sup>lt;sup>90</sup> Debernard, 277 A.2d at 686. See also, *Campbell v. Whorl*, 2008 WL 4817078, \*3-4 (Del. Super. Ct.); *Phillips v. Loper*, 2005 WL 268042, \*2 (Del. Super. Ct.); *Gier v. Kananen*, 628 A.2d 83, \*2 (Del. 1993).

<sup>&</sup>lt;sup>91</sup> Lindsay v. Chrysler Corp., 1994 WL 750345, \*1 (Del. Super. Ct. 1994).

evidence". <sup>92</sup> Instead, the Board's findings on a pivotal issue amounted to a single paragraph in which the Board simply stated that it found one expert more credible that another. <sup>93</sup> The court reasoned that, "a determination of credibility in regard to a particular witness is not an adequate substitute for factual findings on unresolved matters. Such findings are within the province of the Board". <sup>94</sup> Further, the deference that might otherwise be due to the Board's credibility determinations was mitigated by the fact that both medical experts testified by deposition. <sup>95</sup>

The court concluded that where there is substantial medical evidence and the experts disagree, the Board must provide clearly articulated factual findings. <sup>96</sup> Otherwise, it is impossible for the reviewing court to evaluate the Board's decision. "The Board's failure to make specific findings of fact on the pertinent issues does not allow the Court to fulfill its statutory obligation to determine whether there is a proper evidentiary basis for the decision". <sup>97</sup>

In *Glanden v. Land Prep, Inc.*, the Delaware Supreme Court addressed the applicability of *Lindsay* to future IAB cases. <sup>98</sup> The Court endorsed *Lindsay* for the proposition that where there is substantial medical evidence and the experts disagree, "the need for clearly articulated findings is crucial". <sup>99</sup> However, the Court found *Glanden* distinguishable on the grounds that, whereas the IAB's decision in *Lindsay* "amounted to a single, conclusory paragraph as to why it

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Since a reviewing court's deference is founded on the assumption that the Board has had the opportunity to observe the demeanor of the witnesses, the rule fails when the testimony is given by deposition... Since both medical experts in the case at bar testified by deposition, the Court affords less than usual deference to the Board's *unexplained preference* for Dr. Varipapa's testimony. [emphasis added] *Id*.

Nevertheless, the problem court made clear that the problem was not that the Board one expert over another. Even when the testimony is deposition, it is still within the purview of the Board to judge one expert's testimony more credible. Instead, the problem in this case was that the Board's preference for the employer's expert was "unexplained". *Id.* 

<sup>&</sup>lt;sup>92</sup> *Id.* at \*3.

<sup>&</sup>lt;sup>93</sup> *Id*.

<sup>&</sup>lt;sup>94</sup> *Id*.

<sup>&</sup>lt;sup>95</sup> *Id*. The court explained,

<sup>&</sup>lt;sup>96</sup> *Lindsay*, 1994 WL 750345 at \*3.

<sup>&</sup>lt;sup>97</sup> Id.

<sup>98</sup> Glanden v. Land Prep., Inc. 918 A.2d 1098, 1101 (Del. 1997).

<sup>&</sup>lt;sup>99</sup> *Id.* (citing *Lindsay*, 1994 WL 750345 at \*3).

found the employer's physician's testimony more persuasive", the IAB opinion in *Glanden* "included over five pages of well reasoned findings of fact and conclusions of law" that specifically addressed the relevant medical issue. For example, the Board stated that it was persuaded that the employer's medical expert had found no signs of permanent injury over the course of five examinations of the patient. The Board also offered the credentials and work experience of the employer's expert as reasons in favor of accepting his conclusions. Finally, the Board explained its reasons for discounting the testimony of the employee's expert, including that the expert was an evaluating physician, not a treating physician; and that the Board found his conclusion "exaggerated". The *Glanden* Court held that the Board had thus demonstrated that its opinion was based on an adequate weighing of the evidence.

In the instant case, as in *Glanden*, the medical experts disagree about the causation and extent of the claimant's injury. Further, like in *Glanden*, it was the employee's expert who found a serious injury causally-related to the work accident and the employer's experts who found no such injury. <sup>105</sup> In both cases, the IAB chose to accept the testimony of the employer's experts over that of the employee's experts and denied additional benefits to the claimant.

Whereas the Board in *Lindsay* wrote only "a single, conclusory paragraph" stating that it found the employer's witness more credible, the Board in the instant case, like the Board in *Glanden*, spent numerous pages detailing substantive reasons for its decision. While it is true that the board begins its analysis with the conclusory statements that it "accepts the opinions of Dr. Townsend and found Dr. Townsend's opinions to be the most credible" and that it "did not

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<sup>&</sup>lt;sup>100</sup> Glanden, 918 A.2d at 1101-02.

<sup>&</sup>lt;sup>101</sup> *Id.* at 1103.

<sup>&</sup>lt;sup>102</sup> *Id*.

<sup>&</sup>lt;sup>103</sup> *Id*.

 $<sup>^{104}</sup>$  Id

<sup>&</sup>lt;sup>105</sup> *Id.* at 1101.

<sup>&</sup>lt;sup>106</sup> Glanden, 918 A.2d at 1103.

find Dr. Grossinger's opinions to be credible", it spends seven subsequent pages justifying these conclusions with reference to specific facts. 107

The Board cites specific reasons for its findings concerning all three of the substantive issues raised in Sweeney's petition; namely, the claim that Sweeney developed RSD in his upper right extremity due to the work accident, the reasonableness of the medical expenses, and whether Sweeney should be considered totally disabled. For example, the Board explains that it does not find Sweeney's claim that the work accident caused the symptoms in his upper right extremity convincing because (a) the original injury involved only Sweeney's leg, and (b) Sweeney did not report arm symptoms until six months after the accident, and (c) it was not convinced that RSD could travel from the lower extremity to the upper extremity. 108 Concerning the medical expenses, the Board based its decision on testimony that Sweeney had failed to experience a long-lasting benefit from the treatment and the opinion of the employer's medical experts that it would be unreasonable to continue administering injections when several series of injections had failed to produce a lasting benefit. 109 Concerning the total disability claim, the Board took into account both the opinions of the medical experts as well as independent evidence, such as the claimant's testimony concerning his abilities and the Board's own observations of the claimant, in assessing the accuracy of Dr. Grossinger's opinion that the claimant was totally disabled. 110 Specifically, the Board cited Sweeney's testimony that he competed successfully in an eight-week long card tournament requiring concentration and skill as well as Sweeney's ability to sit relatively still during the hearing and his ability "to

<sup>&</sup>lt;sup>107</sup> IAB Decision 2012 at 16.

<sup>&</sup>lt;sup>108</sup> *Id.* at 17-18.

<sup>&</sup>lt;sup>109</sup> *Id*. at 19.

<sup>110</sup> Id. at 9-21.

concentrate, to articulate, to be responsive to questioning, and to follow instructions". 111 The Board reviewed the labor market survey and concluded that there are several occupations that would be consistent with the ability demonstrated by the claimant. 112 For these reasons, the IAB chose to reject Dr. Grossinger's findings in favor of the contrary findings of the employer's medical experts.

Further, the court may accept or reject the testimony of an expert "in full or in part". 113 Thus, contrary to what Sweeney suggests, it is not problematic that the Board would rely on Dr. Grossinger's testimony regarding the RSD of the leg but rely on Drs. Townsend and Korevaar regarding the RSD of the arm. Nor is this unreasonable. A reasonable person might accept the testimony of an expert on one issue but not on another based on a variety of factors including the presence or absence of corroborating evidence, the expert's experience with the particular issue, and the independent plausibility of the conclusion. Sweeney also argues that it was inconsistent unreasonable for the Board to accept the absence of symptoms before the accident coupled with the presence of symptoms after as evidence of causation for the RSD of the leg, but not accept this as evidence of causation for the RSD of the arm. 114 Again, this is not unreasonable when considered in light of the full facts, for instance, the fact that the arm symptoms did not develop until six months after the accident, whereas the leg symptoms developed much sooner. 115

Additionally, it appears that Dr. Grossinger's findings were based largely on the patient's subjective complaints. Even when the opinion of a medical expert is uncontested, the court has found that the trier of fact may reject the opinion if it is based largely on the subjective

<sup>&</sup>lt;sup>111</sup> *Id.* at 21.

<sup>113</sup> Turbitt, 711 A.2d at 1215.
114 Appellant's Opening Br. at 9.

<sup>&</sup>lt;sup>115</sup> IAB Hearing 2012 at 11.

complaints of the patient. 116 It is within the purview of the trier of fact to decide that the medical

expert accorded undue weight to the patient's subjective complaints. <sup>117</sup> In the instant case, Dr.

Grossinger's testimony suggests that Sweeney's subjective complaints played a significant role

in the diagnosis (e.g., burning and dysesthesia). 118 He also testified that numerous sorts of

objective tests would be ineffective at diagnosing RSD. 119 Thus, in the instant case, not only was

Dr. Grossinger's testimony contested, but it was also based substantially on the patient's

subjective complaints. This occasions additional deference to the Board.

CONCLUSION

There is substantial evidence in the record from which a reasonable person could

conclude that Sweeney was not suffering from RSD in the right upper extremity as a result of the

work accident, that the medical treatment was unreasonable and unnecessary, and that Sweeney

was not totally disabled. It was within the IAB's discretion to accept the testimony of the

employer's medical experts over that of the employee's expert on these matters. Further, the

Board sufficiently justified its position in its written opinion by reference to specific facts. For

the foregoing reasons, the decision of the IAB denying Sweeney's Petition for Additional

Compensation Due is **AFFIRMED**.

IT IS SO ORDERED.

M. Jane Brady

Superior Court Judge

<sup>116</sup> Debernard, 277 A.2d at 686. <sup>117</sup> *Id*.

<sup>118</sup> Grossinger Depo. at 8-9.

<sup>119</sup> *Id.* at 25-28.

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