SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: **James Sobolak, Sr., v. Potts Welding & Boiler Repair Company, Inc.**
C.A. No. 05A-06-003 RRC

Submitted: March 1, 2006
Decided: May 12, 2006

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

Dear Counsel:

Currently before this Court is the appeal of James Sobolak, Sr., ("Employee" or "Appellant") from the decision of the Industrial Accident Board ("IAB" or "Board") dated May 16, 2005. The issue is whether the decision by the IAB was supported by enough evidence to satisfy the substantial evidence standard. For the reasons set forth below, this Court finds that it was. Thus, the decision of the IAB is **AFFIRMED.**

I. FACTS AND PROCEDURAL HISTORY.

The facts of this case are set forth in detail in the transcript of the IAB hearing held on April 11, 2005, as well as the Board's decision dated May, 16, 2005. Only the facts relevant to this decision are included below.

In 1985, Employee was first diagnosed with non-Hodgkin's lymphoma ("NHL"). Over the course of two decades, Employee would develop NHL two more times: in 1997 and again in 2004. Employee's oncologist, Dr. Charles J. Schneider, who first treated Employee in 1997, testified by deposition before the Board that the 2004 cancer was a recurrence of the 1997 cancer; however, because he did not have a histiology report of the 1985 cancer, he could not render an opinion as to Employee's first diagnosed cancer.[1] After the 2004 diagnosis, Employee underwent chemotherapy and immunotherapy and, as a result, he is now apparently in complete remission. However, he will still need to be monitored for cancer in the future. Employee also apparently suffers from anxiety and depression in relation to his cancer and has been advised not to return to work.

One and a half years before his first diagnosis, in August 1983, Employee started working at Potts Welding & Boiler Repair Company, Inc ("Employer" or "the plant"), where had continued to work up to the time of his third diagnosis of NHL. While employed as a laborer, Employee repaired heat exchangers that had been sent to Employer from refineries in the area.[2] To repair the heat exchanger, certain tubes had to be cut off so that they could be replaced.[3] Usually, this was done with the aid of a giant band saw.[4] However, if the tubes could not be placed on the saw, then Employee would cut the tubes off using a technique called "air arcing," which is basically the opposite of welding.[5]

The Board at the hearing on April 11, 2005, was presented with conflicting testimony as to the condition of the heat exchangers upon their arrival at Employer. Employee himself testified at the hearing before the Board that usually the tubes in the heat exchangers were dry when they

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[1] Tr. Schneider, IAB Hearing No. 1258092, at 88-89.
[2] Tr. Sobolak, at 115, 117.
[3] Tr. Sobolak, at 115.
[4] Tr. Romatowski, at 184.
[5] Tr. Sobolak, at 155.

arrived at the plant.[6] Sometimes, however, according to Employee, liquid would spill out when the tubes were cut off of the heat exchanger.[7] While at work sometime in 1984, Employee cut into a tube and "gallons" of liquid spilled out onto his feet.[8] Although at the time Employee did not know what the liquid was, he later thought that it may have been benzene.[9] Employee had also been exposed to toluene, which is a degreaser that had been used to clean the heat exchangers.[10]

In contrast, Employer presented evidence, through both Eugene Romatowski, Employee's supervisor, and Katherine Roberts, Employer's Safety Director since 1997. According to Romatowski, the heat exchangers would come into the plant to be repaired during the spring and fall months.[11] Romatowski testified that if a heat exchanger arrived dirty, it was his responsibility to return it to the refinery; however, at the time of his testimony, he had never sent a heat exchanger back because it was not clean.[12] He also denied that benzene was ever used at the plant; however, he did acknowledge that toluene had been used a couple of times per month as a degreaser.[13] Romatowski also did not remember the spill to which employee referred; he said that if such an event had occurred, he would have been aware of it.[14]

Roberts testified that she started working at Employer in 1997. Her job duties included monitoring safety issues at the plant. Since she was hired, Employer implemented a system that requires a Material Safety Data Sheet ("MSDS") for every chemical that comes into the plant.[15] Thus, customers must submit an MSDS for each heat exchanger that is sent to the plant, which provides Employer with notice of the presence of any hazardous substances in the heat exchanger.[16] The customers must also certify that the heat exchanger is clean upon arrival to the plant.[17] Roberts

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[6] Tr. Sobolak, at 145.
[7] Tr. Sobolak, at 118.
[8] *Id.*
[9] *Id.*
[10] Tr. Sobolak, at 147.
[11] Tr. Romatowski, at 181.
[12] Tr. Romatowski, at 189.
[13] Tr. Romatowski, at 179.
[14] Tr. Romatowski 180-181.
[15] Tr. Roberts, at 200, 213.
[16] Tr. Roberts, at 213-214.
[17] Tr. Roberts, at 214-215.

testified that she did not recall receiving any parts that had been exposed to or still contained benzene, which would have been listed on an MSDS.[18] Roberts did admit that there was 55 gallons of toluene at the plant.[19]

Employee also presented the testimony of Dr. Melissa A. McDiarmid, who is board certified in internal medicine, occupational medicine, and toxicology.[20] Dr. McDiarmid examined Employee and opined that he had been exposed to various chemicals including benzene while employed at the plant.[21] This opinion was based on Employee's account of his working conditions as told to Dr. McDiarmid as well as Dr. McDiarmid's knowledge of Employee's type of work and the substances with which Employee said he had worked.[22] Dr. McDiarmid further opined that Employee's exposure to benzene and other substances while at the plant significantly contributed to his development of NHL.[23]

To rebut the expert testimony of Dr. McDiarmid, Employer presented the expert testimony of Dr. Ross Steven Myerson, an occupational and environmental medicine expert.[24] Dr. Myerson evaluated this case and co-wrote the expert report with Dr. Blanche H. Mavromatis, an oncologist.[25] Dr. Myerson testified that he toured the plant, but did not see nor smell any evidence of benzene.[26] Dr. Myerson was also able to corroborate the testimony of Employee's co-workers, Roberts and Romatowski, as to the "clean" condition of the heat exchangers upon arrival at the plant.[27] It is the opinion of Dr. Myerson that "within a reasonable degree of certainty[, Employee's NHL is] … not related to exposures to solvents at [Employer]."[28]

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[18] Tr. Roberts, at 222
[19] Tr. Roberts, at 201.
[20] Tr. McDiarmid, at12.
[21] Tr. McDiarmid, at 18.
[22] *Id.*
[23] Tr. McDiarmid, at 19.
[24] Tr. Myerson, at 38.
[25] Tr. Myerson, at 45-46
[26] Tr. Myerson, at 52-53.
[27] Tr. Myerson, at 50.
[28] Tr. Myerson, at 64.

II. FINDINGS OF THE BOARD

The Board, in its May 16, 2005, decision, found that the injury Employee complained of was an occupational disease.[29] However, the Board found that that the Employee had not met his burden and had not shown, by a preponderance of the evidence, "that 'the employer's working conditions produced the ailment as a natural incident of the employee's occupation in such a manner as to attach to that occupation a hazard distinct from and greater than the hazard attending employment in general.'"[30] The Board also found that Employee "failed to present substantial competent evidence of exposure to benzene or other petrochemicals in the workplace, except for toluene."[31] Specifically, the Board found that Employee's "belief that the heat exchangers arrived contaminated with benzene and other solvents and that he was exposed to them while working is not corroborated by any documents, test data, or testimony from co-workers … or customers who sent the heat exchangers."[32] The Board pointed out that "[i]n contrast, the other witnesses with direct knowledge of plant operations denied the presence of benezene or other petrochemicals (other than toluene) at Potts Welding."[33] The Board also took note of the differing opinions of the experts: "Dr. Myerson's observations [of the absence of any solvents at the plant] raise further doubts about the validity of [Dr. McDiarmid's] assumptions about chemical exposure."[34]

As to toluene, to which the Board found Employee had been exposed, the Board, however, could not engage in a causation analysis regarding toluene because Employee's expert witnesses did not offer an opinion as to the relationship between Employee's exposure to toluene and his NHL.[35]

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[29] *Sobolak v. Potts Welding & Boiler Repair*, IAB Hearing No. 1258092, at 18 (May 16, 2005).

[30] *Id*, at 18-19 (citing *Anderson v. General Motors Corp.*, 442 A.2d 1359, 1361 (Del. 1982) (adding that to prevail the employee must "establish by substantial competent evidence that his ailment resulted from the peculiar nature of the employment rather than from his own peculiar disposition")).

[31] *Id.* at 19.

[32] *Id.* at 20.

[33] *Id.* at 21.

[34] *Id.* at 23.

[35] *Id.* at 19.

III. CONTENTIONS OF THE PARTIES

Appellant contends that the Board's decision was not supported by substantial evidence because "[i]n order to prove exposure to a harmful element, [Appellant] must show the Board that the [Appellant] and the substance were in the same place at the same time."[36] In showing that that burden was met, Appellant relies on his own "consistent, competent testimony regarding his exposure to petroleum based chemicals during his course of employment at Potts Welding."[37] Appellant further relies on the testimony of Dr. McDiarmid, who relied on Appellant's "very good descriptive stories" of his working conditions as well as a physical examination of Appellant in concluding that Appellant's "exposure to solvents and other petroleum based chemicals including but not limited to benzene was a significant contributing factor to his development of [NHL]."[38]

Appellee responds that "[t]he Board's decision that the [Appellant] failed to prove that he was exposed to chemicals at Employer is supported by substantial evidence in the record."[39] Specifically, Appellee contends that the Board was correct when it "opined that the [Appellant] failed to prove that he was exposed to benzene [while at work.]"[40] Appellee also attacks the opinion of Appellant's main expert witness, Dr. McDiarmid, who, according to Appellee, "relied upon [Appellant's] anecdotal stories … [as] the basis for her opinions" and "did not conduct any independent investigation of the facts of this case and solely relied upon the history that she was provided by the claimant during her one examination."[41] Further, Appellee argues that all of Appellant's claims of possible benzene exposure have been refuted by the testimony of Eugene Romatowski and Katherine Roberts, co-workers of Appellant.[42]

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[36] Appellant's Op. Br. 12 (citing *Lake Forest School District v. DeLong*, 1988 WL 77665 (Del. Super.) (ruling that the Board had made a "reasonable inference" that employee had been exposed to asbestos based on uncontradicted circumstantial evidence supporting employee's position of exposure)).

[37] *Id.* at 14.

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

[39] Appellee's Ans. Br. 13.

[40] *Id.* at 14.

[41] *Id.* at 24.

[42] *Id*. at 14-16.

IV. STANDARD OF REVIEW

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[43] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[44] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[45] The reviewing Court must view the facts in a light most favorable to the party prevailing below;[46] therefore, it merely determines if the evidence is legally adequate to support the agency's factual findings.[47] When factual determinations are at issue, the reviewing Court should defer to the experience and specialized competence of the Board.[48] If the decision is supported by substantial evidence, the Court must affirm the decision of an agency even if the Court might have, in the first instance, reached an opposite conclusion.[49]

V. DISCUSSION

The issue is whether the IAB's determination that Employee did not sufficiently prove he was exposed to benzene to benzene as a natural incident of his occupation or that, although the Board found that Employee was exposed to toluene, no evidence of a connection between toluene and Employee's NHL was offered, was supported by substantial evidence.

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[43] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. Super. Ct. 1965).

[44] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. Ct. 1986), *appeal dismissed*, 515 A.2d 397 (1986).

[45] *Johnson*, 213 A.2d at 66.

[46] *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

[47] 29 *Del. C.* § 10142(d).

[48] *Histed v. E.I. DuPont De Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Julian v. Testerman*, 740 A.2d 514, 519 (Del. Super. Ct. 1999), *aff'd* 737 A.2d 530 (Del. 1999).

[49] *Brogan v. Value City Furniture*, 2002 WL 499721 (Del. Super.).

As stated above, the Court must determine whether the Board's decision was supported by substantial evidence.[50] Under Delaware law, "[t]he Board, sitting as the trier of fact, is permitted to pass on the credibility of witnesses and to accord their testimony the appropriate weight."[51] This Court held that "[t]he function of resolving conflicts in, and reconciling, inconsistent testimony and evidence is exclusively reserved for the Board. [Citation omitted]. It is exclusively the Board's role to resolve conflicts in the testimony and weigh the credibility of each witness."[52] When the testimony of expert witnesses for opposing parties conflicts, "the Board [is] entitled to accept the testimony of one medical expert over the views of another."[53]

Here, Appellant argues that his own testimony regarding his alleged exposure to benzene is sufficient to show that he was in the same place at the same time as the benzene and was, therefore, exposed to the harmful element. However, it was the testimony of Appellee's employees and experts that benzene was not present at the plant. Thus, there is conflicting testimony as to the presence of benzene at the plant. Therefore, it is not the job of this Court, but was the Board's task, to "weigh the credibility of each witness" and to determine whether there was sufficient evidence to find that benzene was present at the plant. That is exactly what the Board did:

> In light of the absence of corroborating information from documents, data, or testimony, as well as the conflicts in the testimony that was given, the Board concludes that the anecdotal information provided by [Employee] about the chemicals he was exposed to while working on the heat exchangers is simply not enough for the Board to move forward and consider a causal connection to [Employee's] lymphoma. Without more substantial evidence that [Employee] was actually exposed to chemicals of the type and in the manner which Dr. McDiarmid assumed, the Board declines to find a causal connection between [Employee's] work activities and his lymphoma.[54]

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[50] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. Super. Ct. 1965).

[51] *Playtex Products, Inc., v. Leonard*, 2004 WL 2419141, * 5 (Del. Super.).

[52] *Id.* at * 6. *See also Christiana Health Care System, VNA v. Taggart*, 2004 WL 692640 ("It is not within the purview of this Court to resolve issues of credibility and assign weight to evidence presented." *Id.* at * 12.).

[53] *Standard Distibuting Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993) (finding that Board's decision was based on substantial evidence where it gave more weight to one expert even though another expert testified to the contrary).

[54] *Sobolak*, at * 23.

The Board weighed the conflicting testimony regarding Appellant's exposure to benzene and found that Appellant had not met his burden in front of the Board. Moreover, although the Board did find that there was sufficient evidence that Appellant was exposed to toluene, there was no evidence presented by Appellant's experts that toluene could be connected to Appellant's NHL.[55]

Appellant relies on *Lake Forest School District v. DeLong*[56] as authority that Appellant did prove exposure to benzene and, as such, that the Board's decision was not based on substantial evidence. In *DeLong*, the Board had made a "reasonable inference that [employee] was exposed to friable asbestos when he first came to work …" based on "the testimony of circumstantial evidence supporting the [employee's] position," which the Board had found to be credible.[57] The *DeLong* court also noted that "there was no evidence introduced by the District that the asbestos was nonfriable or that Mr. DeLong was not exposed."[58]

The Board may well have been able to reach a "reasonable inference that [Employee] was exposed" to benzene, but, as opposed to *DeLong*, here there was competent, substantial evidence that Appellant was not exposed to benzene. The Board was presented with testimony that contradicted the position of Appellant and the Board, in its capacity, gave more weight to the testimony adverse to Appellant's position. Such a determination is completely within the board's authority and will not be disturbed.

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[55] *Id.*

[56] 1988 WL 77665 (Del. Super.) (affirming Board's decision that appellee's mesothelioma was caused by exposure to asbestos under substantial evidence standard because appellee was in the same place at the same time as the asbestos).

[57] *Id.* at * 2.

[58] *Id.*

VI. CONCLUSION

The decision below was supported by substantial evidence and the Board committed no error of law. For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED.**

IT IS SO ORDERED.

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oc: Prothonotary
cc: Industrial Accident Board