SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Ms. Tuesday M. Lopez
552 Dorian Drive
Apartment A
Chester, Pennsylvania 19013
Appellant

Raymond C. Radulski, Esquire
Chrissinger & Baumberger
3 Mill Road
Suite 301
Wilmington, Delaware 19806
Attorney for Appellee Parkview Nursing Home

Re: Tuesday Lopez v. Parkview Nursing Home
C.A. No. 10A-03-013

Submitted: January 11, 2011
Decided: March 15, 2011

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

Dear Ms. Lopez and Mr. Radulski:

INTRODUCTION

This appeal requires the determination of whether the Industrial Accident Board's (the "Board") finding that Appellant Tuesday Lopez ("Employee") did not sustain any permanent injury due to a March 3, 2008 work related injury while employed by Parkview Nursing Home ("Employer") is supported by substantial evidence. Employee is *pro se* on this

appeal as her attorney handling the Board hearing did not believe there was a basis for the instant appeal.[1]

This Court holds that the Board properly considered and decided all issues presented by the conflicting medical and factual evidence. The Board possesses broad discretion in weighing evidence and reaching conclusions, and this Court's review is limited to confirming that the Board's decision was supported by substantial evidence and that the Board did not abuse its discretion. In this case, the Board's determination was supported by substantial evidence and was not an abuse of its discretion. Accordingly, the decision of the Industrial Accident Board is **AFFIRMED.**

FACTS AND PROCEDURAL HISTORY

This case arises from a March 3, 2008 work accident which occurred when a closet door "came out and down and hit [Employee] in [her] head."[2] A February 23, 2010 decision of the Industrial Accident Board awarded medical expenses, medical witness fees, and attorney's fees, but nonetheless found that Employee did not sustain any permanent impairment as a result of the work accident.[3]

In its decision, the Board noted that the parties relied on conflicting medical expert testimony.[4] Employee produced Peter B. Bandera, M.D., a pain management and rehabilitation specialist, as an expert witness; Dr. Bandera testified that Claimant suffered a 16% permanent impairment of the cervical spine and an 8% impairment of the lumbar spine due to the instant accident.[5] Dr. Bandera testified that Employee may have been afflicted with

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[1] It appears that notices sent to Employee from her attorney were incorrectly addressed; consequently, Employee missed the filing deadline for this appeal. Thereafter, Employee wrote to this Court and advised that she had not received notice of the various appeal papers because the incorrect address was used; this Court treated Employee's correspondence as a Superior Court Civil Rule 60(b) motion to vacate its July 19, 2010 order dismissing Employee's appeal. *Tuesday Lopez v. Parkview Nursing Home,* Del. Super., N10A-03-013 RRC, Cooch, R.J. (Oct. 14, 2010) (ORDER). Under the circumstances, Employer did not oppose Employee's motion, and a new briefing schedule was issued. *Tuesday Lopez v. Parkview Nursing Home,* Del. Super., N10A-03-013 RRC, Cooch, R.J. (Oct. 25, 2010) (ORDER).

[2] Appendix to Appellee's Answ. Br. Ex. A at 18.

[3] *Id.* Ex. D at 11-12.

[4] *Id.* at 10.

[5] *Id.* at 3.

cervical spondylosis prior to the accident, but the accident inflamed the region and caused a traumatic cervical strain and sprain, or a "traumatic expression of cervical spondylosis making a previously asymptomatic process symptomatic."[6]

In contrast, Employer produced Jason P. Brokaw, M.D., a physical medicine, rehabilitation, and pain management specialist, as an expert witness.[7] Dr. Brokaw opined that, as a result of the instant accident, Employee suffered soft tissue injuries of the right forehead, neck, and lower back.[8] Dr. Brokaw believed that Employee did not require any further therapy, treatment, or medication, and that her pain complaints were out of proportion to the objective findings.[9] Significantly, Dr. Brokaw testified that "there were significant differences in covert versus overt observation, meaning [Employee] was performing very differently when she knew I was watching her versus when she didn't know I was watching her."[10] In short, Dr. Brokaw testified that Employee "qualifies for zero percent permanent impairment."[11]

The Board's decision noted that "[t]here was no study or test, which supported the level of Claimant's complaints," and that "[w]ith all of her complaints of neck and back pain, Claimant somehow managed to attend the hearing in high-heel boots, as the Board observed."[12] Likewise, the decision of the Board states that "it was difficult for the Board to find Claimant credible."[13] Consequently, the Board held that it "accepts Dr. Brokaw's opinion that Claimant's complaints were exaggerated for sprain/strain injuries and even for her arthritic conditions," and that "[e]verything points to Category I, where a zero impairment rating is assigned."

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[6] *Id.* Ex. B. at 9-10.
[7] *Id.* Ex. C at 6.
[8] *Id.* Ex. D at 7.
[9] *Id*. Indeed, Dr. Brokaw testified that "it was a remarkable lack of any objective findings in both her physical examination [were done] on two occasions as well as the review of her diagnostic studies including x-rays, CAT scans and MRI's, all of which came back entirely within normal limits without any evidence of objective findings." *Id.* Ex. C at 20.
[10] *Id.* Ex. C at 17.
[11] *Id.* at 19.
[12] *Id.* Ex. D at 10.
[13] *Id.* at 11.

CONTENTIONS OF THE PARTIES

Although the Briefing Schedule issued by this Court directed Employee to file an "Opening Brief" and "Reply Brief," Employee's submissions are not so captioned. Instead, Employee submitted three letters: one which roughly corresponds with the deadline for Employee's Opening Brief, one which was filed after Employer's Answering Brief but prior to the deadline for Employee's Reply Brief, and finally, a letter which was filed on the deadline date for Employee's Reply Brief. Although not filed in accordance with this Court's protocols, in the exercise of its discretion, this Court will consider all of Employee's submissions.[14]

Employee's Opening Brief simply alleges that she has "suffered great injuries to [her] neck and back while working at Parkview Nursing Home and have doctors stating this very fact," and that she has been out of work "in pain and suffering."[15] Employee also expresses dissatisfaction with the fact that her employee and medical experts received compensation since "[she is] the reason the case was ever opened."[16] Employee states that she has "been through pain, stress, and mental anguish and [is] still suffering, [and] all [she] want[s] is justice."[17]

With respect to Dr. Brokaw's opinion, Employee wrote as follows (all errors in original):

> When I travel down to Baltimore MD from [Employee's home address] to see Jason Brokaw he never gave me examination. He never even touch any part of my body. I explain to him I was in. . .pain from traveling, also asking him why my pain is increasing and have been in pain since March the 3rd 2008. The time I was telling him about my injury I was sitting in the char in his office, he never ask me to get on the examination table or put his hands on any part of my body he continue to write on a clip board making me think he was writing down what I was telling him. . .I don't understand how he could say I didn't have a permanent injury when he never examine me that day. That was the last time I seen him or heard anything or seen my [lawyer]

[14] Given that Employee did not submit briefs and Employee submitted three filings, in the interest of clarity, Employee's submissions will be cited as "Appellant's Letter of ____."
[15] Appellant's Letter of Nov. 14, 2010.
[16] *Id.*
[17] *Id.*

> about any transcripts about my case or the doctor decision until I heard it at the hearing. That's why I feel as though I was misrepresented by my [lawyer].[18]

Employee's final submission is largely dedicated to expressing her dissatisfaction with her attorney. Employee argues that there were "important papers" that her attorney should have had at the hearing, and that it was "very unprofessional" for the hearing to continue.[19] Employee alleges that her attorney "never did say a word about [her] case or what [she] was up against," and she expressed dissatisfaction that she was not reimbursed for her travel from her home address in Pennsylvania to the Board hearing in Wilmington, Delaware.[20] With respect to the instant injury, Employee stated as follows (all errors in original):

> [M]y body feels like I'll never get [rid] of this discomfort pain I have in my neck going down my back clear to my feet it has been very uncomfortable difficulties to believe this pain is never going to go away. I am 48 yrs old and never had this pain until I was hit in my head with that door came off the hinges at Park View Nursing Home. . . .[T]his ordeal has been very stressful painful increase throughout the years I'm still taking pain medication, from my doctor hydocodone everyday and still have pain and suffering with mental anguish."[21]

Employer responds that the Board accepted Dr. Brokaw's opinion over Dr. Bandera's, which is substantial evidence for the purpose of this Court's review, and, as a result, the Board's decision be affirmed.[22] Employer also notes that Employee's submissions are devoid of any specific reference to the Board's factual findings or legal conclusions, and instead seem to merely be "reflective of a complaint regarding [Employee's attorney's] relationship with

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[18] Appellant's Letter of Dec. 30, 2010.

[19] Appellant's Letter of Jan. 11, 2011. The "paperwork" Employee refers to appears to be Dr. Brokaw's deposition; at the Board hearing, counsel for Employer stated that he inadvertently submitted three copies of Dr. Bandera's deposition but no copies of Dr. Brokaw's deposition. Appendix to Appellee's Answ. Br. Ex. A at 9. Employee's letter contends that she was "misrepresented" by her attorney because he did not "stand up in [her] defense." Appellant's Letter of Jan. 11, 2010. However, Employee's contentions are wholly without merit; any issue with respect to "paperwork" was immediately resolved, as Employee's counsel then produced an "original and a small copy" of Dr. Brokaw's deposition. Appendix to Appellee's Answ. Br. Ex. A at 9.

[20] Appellant's Letter of Jan. 11, 2011 at 1.

[21] *Id.* at 1-2.

[22] Appellee's Answ. Br. at 7

[Employee]."[23] Employer argues that, to the extent Employee's submissions were relevant on the issue of her ongoing pain symptoms, such complaints were considered and rejected by the Board as not credible. [24]

STANDARD OF REVIEW

This Court's review of an Industrial Accident Board decision is defined by statute.[25] Pursuant to 7 Del. C. § 6009(b), this Court may affirm, reverse, or modify the Board's decision, but the Board's factual findings "shall not be set aside unless the Court determines that the records contain no substantial evidence that would reasonably support the findings." Accordingly, the scope of this Court's review is limited to determining whether the Board's decision was supported by substantial evidence and free from legal error.[26] The record must be reviewed in the light most favorable to the prevailing party.[27] Alleged errors of law are reviewed *de novo*, but in the absence of legal error, the Board's decisions are reviewed for an abuse of discretion.[28] This Court will find an abuse of discretion only when an administrative board's decision "exceeds the bounds of reason given the circumstances, or where rules of law or practice have been ignored so as to produce injustice."[29]

In conducting its appellate review of an Industrial Accident Board decision, this Court must "take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted."[30] Consequently, when reviewing an appeal from a Board decision, this Court "does not weigh the evidence, determine questions of credibility, or make its own factual findings."[31] Rather, this Court "merely

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[23] *Id.* at 9.
[24] *Id.* at 9-10.
[25] 7 Del. C. § 6009(b).
[26] *See, e.g.*, *Holowka v. New Castle County Bd. of Adjustment*, 2003 WL 21001026, *3 (Del. Super. 2003).
[27] *See, e.g.*, *James Julian, Inc. of Del. v. Testerman*, 740 A.2d 514, 519 (Del. Super. Ct. 1999) (citations omitted); *E.I. DuPont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1046-47 (Del. Super. Ct. 2004).
[28] *See Merritt v. United Parcel Svc.*, 956 A.2d 1196, 1200 (Del. 2008) (citations omitted).
[29] *Bolden v. Kraft Foods*, 2005 WL 3526324, *3 (Del. Super. Ct. 2005).
[30] 29 Del. C. § 10142(d).
[31] *Holowka*, 2003 WL 21001026 at *3; *see also Johnson v. Chrysler Corp.*, 59 Del. 48, 51 (Del. 1965) ("[T]he sole function of the Superior Court, as is the function of this Court on appeal, is to determine whether or not there was substantial competent evidence to

determines if the evidence is legally adequate to support the Board's factual findings."[32] Thus, even if this Court might have reached a different conclusion than the Board in the first instance, a decision of the Board must be affirmed if it is supported by substantial evidence and is free from legal error.[33]

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[34] In cases where medical evidence is in conflict, the Board must resolve the conflict; if the Board adopts one medical opinion over another, the opinion adopted by the Board is substantial evidence for the purpose of appellate review.[35] Although the Board is guided by medical evidence and testimony, "it is the function of the Board, and not that of a physician, to determine a claimant's disability-subject to the requirement that the Board's findings be based on substantial competent evidence."[36]

DISCUSSION

The resolution of this appeal is rather straightforward. In this case, the Board expressed its acceptance of Dr. Brokaw's opinion that Employee had a zero percent impairment rating.[37] It necessarily follows that the Board rejected the testimony of Dr. Bandera and Employee.

The medical testimony offered by Drs. Bandera and Brokaw was conflicting, but it is the Board's prerogative to resolve such conflict; the Board's acceptance of Dr. Brokaw's opinion over Dr. Bandera's opinion is substantial evidence for the purpose of appellate review.[38] Further, to the extent that Employee's credibility, or lack thereof, influenced the finding of the Board, this is precisely the type of factual determination that is within the "experience and specialized competence" of the Board.[39] Indeed, it is for this

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support the finding of the Board, and, if it finds such in the record, to affirm the findings of the Board.") (citation omitted).

[32] *Devine v. Advanced Power Control, Inc.*, 663 A.2d 1205, 1209 (Del. Super. Ct. 1995) (citation omitted).

[33] *Brogan v. Value City Furniture*, 2002 WL 499721, *2 (Del. Super. Ct. 2002).

[34] *Testerman*, 740 A.2d at 519 (citations omitted).

[35] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

[36] *Poor Richard Inn v. Lister*, 420 A.2d 178, 180 (Del. 1980) (citation omitted).

[37] Appendix to Appellee's Answ. Br. Ex. D at 11-12.

[38] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

[39] 29 Del. C. § 10142(d).

reason that factual findings and issues of credibility are "reserved exclusively for the Board."[40]

In this case, the Board resolved the conflicting medical opinions and credibility issues against Employee. The record discloses that the Board fully considered Employee's medical history, the credibility of her testimony, and the opinions of the respective medical experts prior to rendering its decision. Although Employee may disagree with the Board's conclusions, this is, by definition, substantial evidence for the purpose of appellate review. Further, Employee's extensive complaints about her attorney's performance in handling her case before the Board are not relevant for purposes of this Court's review of Board decisions.[41]

CONCLUSION

The medical, factual, and credibility issues in this case are "reserved exclusively for the Board."[42] The Board's acceptance of Dr. Brokaw's opinion over Dr. Bandera's opinion and its factual findings regarding Employee's credibility constitute substantial evidence for purposes of appellate review.[43] Similarly, there is no evidence to suggest that the "rules of law or practice have been ignored so as to produce injustice."[44] Consequently, the Board's decision was both supported by substantial evidence and free from legal error; as such, the Board's decision must be affirmed.[45]

Accordingly, for all the reasons stated above, the decision of the Industrial Accident Board is **AFFIRMED**.

Richard R. Cooch, R. J.

oc: Prothonotary
cc: Industrial Accident Board

[40] *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 656 (Del. 2008).
[41] It should be noted that Employee's attorney before the Board sent Employee a letter dated March 15, 2010 in which he memorialized Employee's refusal to sign appeal papers at that time, his view that there was no basis for the appeal, and Employee's rejection of a previous offer to settle her claim.
[42] *Day & Zimmerman Sec. v. Simmons*, 965 A.2d 652, 656 (Del. 2008).
[43] *Munyan*, 909 A.2d at 136 (Del. 2006).
[44] *Bolden v. Kraft Foods,* 2005 WL 3526324, at *3 (Del. 2005).
[45] *Holowka*, 2003 WL at *3.