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Case Number 496,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH WHITNEY	§	
	§	
Claimant Below-Appellant,	§	No. 496, 2013
	§	
	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
BEARING CONSTRUCTION, INC.,	§	C.A. No. S13A-01-004
	§	
Employer Below-Appellee.	§	
	§	
	§	

Submitted: April 23, 2014
Decided: May 30, 2014

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

O R D E R

On this 30th day of May 2014, it appears to the Court that:

(1) Claimant/Appellee-Below/Appellant Joseph Whitney appeals from a Superior Court decision in favor of Employer/Appellant-Below/Appellee Bearing Construction, Inc. ("Bearing"), reversing the decision of the Industrial Accident Board (the "Board" or "IAB"). Whitney raises one claim on appeal. He contends that the Superior Court erred when it found that there was insufficient evidence to support the Board's determination that his 2005 injury caused his current

condition. We agree. Accordingly, we reverse the decision of the Superior Court and remand with instruction to reinstate the decision of the Board.

(2) In 2005, Whitney suffered an injury to his back while working for Bearing as a pipe layer / laborer. He had surgery on his back and was out of work through February 2006. Upon his return, Whitney was able to work without any restrictions. Thereafter, Whitney left Bearing and worked in several other construction jobs laying pipe. He had some residual pain but was able to continue working.

(3) In 2010, Whitney experienced three minor injuries to his back for which he sought treatment (the "2010 Incidents"). In June, Whitney was riding in a dump truck on uneven ground while working for another employer. Due to the bumpy ride, Whitney had an aggravation and sought medical treatment. Whitney returned to work after a one-day leave but was restricted from driving a dump truck. In August, Whitney was in an automobile accident, for which Whitney sought treatment on his back. His doctor described the incident as an aggravation. Finally in September, Whitney went to the Emergency Room complaining of back pain after lifting a child and some camping equipment.

(4) Beginning in 2011, Whitney started working as a pipe layer for Dixie Construction. Whitney continued treatment with Dr. Uday Uthaman, a board-certified pain management physician. Whitney told Dr. Uthaman that he was

experiencing increasing lower back pain and leg pain. Even though Whitney told Dr. Uthaman about the 2005 injury and the surgeries, there is nothing in the record indicating that he told Dr. Uthaman about the 2010 Incidents. Dr. Uthaman provided some treatment, but by May 2012 Whitney left Dixie Construction because he could no longer take the pain from the demanding physical labor. Thereafter, Dr. Uthaman advised Whitney to seek out a job that was less demanding physically. Whitney then obtained a temporary position at Playtex operating a forklift.

(5) In 2012, Whitney filed a Petition to Determine Additional Compensation Due with the Board, seeking disability benefits and medical expenses. Dr. Uthaman provided expert testimony in support of Whitney's petition. Bearing retained Dr. Lawrence Piccioni, a board-certified orthopedic surgeon, who took Whitney's medical records and initially concluded that Whitney's 2012 disability was the result of the 2005 injury. But after further review of Whitney's medical history, Dr. Piccioni changed his conclusion and found that the 2010 Incidents, which aggravated Whitney's back, actually caused the 2012 disability. After hearing from both experts, the Board determined that Whitney's disability was the result of his 2005 injury. The Board further found that the 2010 Incidents were insignificant and could not account for Whitney's current condition.

(6) Bearing appealed the Board's decision to the Superior Court. The Superior Court reversed, finding that there was insufficient evidence to support Dr. Uthaman's testimony. The court's decision was based on the fact that Dr. Uthaman did not address or appear to know about the 2010 Incidents, and thus no reasonable mind could rely upon his opinion to conclude that the injuries were related to Whitney's initial injury in 2005. This appeal followed.

(7) On appeal, Whitney argues that the decision of the IAB was free of legal error, supported by substantial evidence, and should not have been reversed by the Superior Court. Industrial Accident Board decisions are reviewed using the same standard at both the Superior Court and the Supreme Court.[1] We review legal issues decided by the Board *de novo* and "factual findings to determine whether they are supported by substantial evidence."[2] "Substantial evidence equates to 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[3] But a reviewing court "does not weigh evidence, resolve questions of credibility, or make its own factual findings."[4] Further, both this Court and the

[1] *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1258 (Del. 2013).
[2] *Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1246 (Del. 2003) (citing *Keeler v. Metal Masters Foodservice Equip. Co.*, 712 A.2d 1004, 1005 (Del. 1998) (per curiam)).
[3] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[4] *Scheers*, 832 A.2d at 1247 (citing *Alcoholic Beverage Control Comm'n v. Newsome*, 690 A.2d 906, 910 (Del. 1996)).

Superior Court "must view the record in the light most favorable to the prevailing party below."[5]

(8) The Board's finding of fact is given a high level of deference at both the Superior Court and Supreme Court. Overturning a factual finding of the Board may only be done "when there is no satisfactory proof in favor of such a determination."[6] "[A]n award cannot stand on medical testimony alone, if the medical testimony shows nothing more than a mere possibility that the injury is related to the accident."[7] But expert medical testimony supplemented by "other credible evidence tending to show that the injury occurred directly after the trauma and without interruption" is sufficient evidence to uphold the Board's decision.[8] This supplemental evidence can include knowledgeable lay witness testimony.[9]

(9) In *Steppi v. Conti Electric, Inc.*, we stated that the absence of evidence, as long as it is considered by the Board, is not necessarily dispositive of a particular issue.[10] The Board is free to make its own inferences, weigh evidence, determine questions of credibility, and make its own factual findings and

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[5] *Wyatt*, 81 A.3d at 1258–59 (citing *Steppi v. Conti Elec., Inc.*, 991 A.2d 19, 2010 WL 718012, at *2 (Del. 2010)).
[6] *Id.* at 1259 (citing *Steppi*, 2010 WL 718012, at *2).
[7] *Id.* (quoting *Gen. Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960)).
[8] *Id.* (quoting *Gen. Motors Corp.*, 164 A.2d at 688).
[9] *Id.* (citing *Gen. Motors Corp.*, 164 A.2d at 689).
[10] *See Steppi*, 2010 WL 718012, at *3. ("The absence of evidence . . . was considered by the Board and found to not be dispositive. While the Board could have drawn an inference as the Superior Court did . . . the testimony as a whole, including Claimant's testimony, also allowed the inference [that was adopted by the Board].").

conclusions.[11] "Furthermore, the IAB may adopt the opinion testimony of one expert over another; and that opinion, if adopted, will constitute substantial evidence for purposes of appellate review. Similarly, the IAB may accept or reject an expert's testimony in whole or in part."[12] When medical testimony is supplemented by other creditable evidence, such evidence is sufficient to sustain an award under the substantial evidence standard.[13]

(10) In *Standard Distributing Co. v. Nally*, this Court reiterated the "last injurious exposure" rule, which considered the appropriate methodology for determining successive carrier responsibility where an employer alleges that a new episode of an industrial accident resulted in a changed physical condition for which the second carrier should be liable.[14] As we explained, the burden of proving a causative effect of a second event in a recurrence/aggravation dispute is upon the initial employer or insurer seeking to shift responsibility for the consequences of an original injury.[15] Thus, where an entity is found to be liable for an earlier injury, that same entity will be liable for a recurrence/aggravation where the claimant "with continuing symptoms and disability" carries his or her burden that

[11] *Id.*
[12] *Person-Gaines*, 981 A.2d at 1161. (footnote omitted) (citing *Bolden v. Kraft Foods*, 889 A.2d 283, 2005 WL 3526324, at *4 (Del. 2005); *Lewis v. Formosa Plastics Corp.*, 1999 WL 743322, at *3 (Del. Super. Ct. July 8, 1999)).
[13] *Wyatt*, 81 A.3d at 1259 (quoting *Gen. Motors Corp.*, 164 A.2d at 688).
[14] *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 644 n.1 (Del. 1993).
[15] *Id.* at 646.

the original injury caused the complained-of condition.[16] But where the employer or carrier proves that the claimant suffered "a subsequent industrial accident resulting in an aggravation of his physical condition" that could be the proximate cause of the claimant's condition, then liability shifts to the successor entity.[17]

(11) Whitney argues that the record contains sufficient evidence to support the Board's conclusion that his 2005 injury led to his lost earning capacity in 2012 and that the 2010 Incidents did not cause his back problems. Dr. Uthaman, Whitney's expert, explained that Whitney's complaints were consistent with his 2005 injury. This opinion was based on electromyography, MRI testing, and Whitney's patient history. The 2012 report by Dr. Piccioni, Bearing's expert, also stated that Whitney's 2012 disability was related to his 2005 injury. According to Whitney, these two pieces of evidence are sufficient to support the Board's factual determination that his 2012 disability was the result of his 2005 injury.

(12) Bearing contends that this evidence is insufficient for a number of reasons. First, Bearing explains that there is no information in the record to indicate that Dr. Uthaman was aware of the 2010 Incidents that aggravated Whitney's back condition. In his deposition, Dr. Uthaman detailed the medical

[16] *Id.*; *see, e.g.*, *Rhodes v. Diamond State Port Corp.*, 2 A.3d 75, 2010 WL 2977331, at *2 (Del. 2010) ("It is the petitioner's burden to establish by a preponderance of the evidence that the injury sustained was caused by occupational exposure to asbestos." (citing 29 *Del. C.* § 10125(c))).
[17] *Nally*, 630 A.2d at 646 (citing *Pa. Mfrs. Ass'n Ins. Co. v. Home Ins. Co.*, 584 A.2d 1209, 1212 (Del. 1990)).

history provided by Whitney, which did not include any discussion of the 2010 Incidents. Second, Bearing notes that Dr. Piccioni changed his conclusion after a further review of Whitney's medical history, finding that the 2010 Incidents worsened Whitney's condition. Third, Bearing disputes the Board's factual findings that 2010 Incidents were only temporary aggravations because the only medical testimony related to the 2010 Incidents came from Dr. Piccioni. And Dr. Piccioni explained that the incidents were significant enough to cause an aggravation of Whitney's condition. Because this testimony was unrebutted, Bearing believes the Board's decision to the contrary cannot stand.

(13) The IAB considered the testimony of both Dr. Piccioni and Dr. Uthaman. The Board concluded that there was "insufficient evidence to find that Claimant's condition was worsened beyond a temporary aggravation by any of the three events."[18] There is substantial evidence to support the Board's factual finding that Whitney's post-2010 injuries were the result of his 2005 injury and that the 2010 Incidents did not contribute to his condition. Dr. Uthaman testified that Whitney's current condition is related to his original injury in 2005. Although Dr. Uthaman did not have knowledge of the 2010 Incidents, his testimony is supplemented by additional credible evidence. Whitney's MRI, which was taken after the 2010 Incidents, showed no structural changes in his physiology. Whitney

[18] *Whitney v. Bearing Construction, Inc.*, No. 1289541, at 21 (Del. Indust. Accident Bd. Dec. 27, 2012).

also testified that he continued to experience symptoms after his surgery and before the 2010 Incidents. This is sufficient evidence to support the Board's finding that Whitney's condition was the result of his 2005 injury.

(14) Moreover, the record shows that Bearing failed to carry its burden of proving that the 2010 Incidents were subsequent events proximately causing Whitney's condition. Once Whitney carried his burden of proving that his condition in 2012 was the result of his 2005 injury, it was Bearing's burden under *Nally* to prove to the Board, as the trier of fact, that the 2010 Incidents proximately caused Whitney's condition in 2012. Because Bearing failed to carry its burden, we must uphold the Board's finding that the 2010 Incidents did not cause Whitney's injuries.

(15) In making our determination to reverse, we are mindful of the limited review of an appellate court. The court must only determine if the Board's decision is supported by substantial evidence when viewed in the light most favorable to the prevailing party.[19] A reviewing court does not weigh evidence or make credibility determinations.[20] The Board chose to rely on the testimony of Dr. Uthaman, the results of the MRI, and Whitney's own testimony over the testimony

[19] *See Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (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 support the finding of the Board, and, if it finds such in the record, to affirm the findings of the Board.").

[20] *See id.* ("On appeal from the Board, however, the Superior Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions.").

of Dr. Piccioni. Although we do not condone the fact that Whitney kept information about the 2010 Incidents from Doctors Uthaman and Piccioni, the record indicates that the Board fully considered the 2010 Incidents and relied on substantial evidence to conclude that they were nothing more than temporary aggravations. "[T]he Board is entrusted to find the facts in any given case, and its findings of fact 'must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way.'"[21] For these reasons, we reverse and reinstate the IAB decision.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and this matter is **REMANDED** with instruction to reinstate the decision of the Industrial Accident Board.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[21] *Wyatt*, 81 A.3d at 1259–60 (quoting *Steppi*, 2010 WL 718012, at *2).