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Case Number 496,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ANSWERING BRIEF OF APPELLEE BEARING CONSTRUCTION, INC.

MARSHALL DENNEHEY WARNER
COLEMAN & GOGGIN

/s/ Linda Wilson

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DATED: December 5, 2013

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NATURE OF PROCEEDINGS

Joseph Whitney ("Claimant") suffered an injury to his low back on March 4, 2005, while working for Bearing Construction, Inc. ("Employer"). Board approved Agreements and Receipts reflect he was out of work from June 9, 2005 through February 28, 2006, and for 8 days in 2009. B280-B281, B293. He returned to work as a pipe layer, full duty / full time. B72, B92. On May 24, 2012, more than six years after returning from surgery to full time heavy duty work, Claimant filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board ("Board"), alleging an entitlement to disability benefits, effective May 17, 2012, as well as a determination of compensability for an EMG and MRI.[1] That petition was heard by the Board on December 13, 2012. The Board issued its Decision on Petition to Determine Additional Compensation Due ("decision") on December 27, 2012. The decision was mailed December 27, 2012. On January 22, 2013, Employer filed a Notice of Appeal of the Board's decision. The Superior Court issued its decision on September 20, 2013, reversing the Board's decision. Claimant appealed to this Court and filed his corrected opening brief on November 13, 2013. This is Employer's answering brief.

[1] The petition alleges a recurrence of ongoing total disability, effective May 17, 2012. At his deposition prior to the hearing, Claimant's doctor testified that, although he issued a note saying no work, he told Claimant he could work, just lighter duty work. Also, by the time of the hearing, Claimant was working a new job. So, the claim became one primarily of partial disability.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly reversed the Board's decision because there is not substantial evidence in the record to support the Board's finding that Claimant's 2012 problems are causally related to the 2005 industrial accident. This is not Employer's petition seeking to terminate benefits on the grounds that there has been an intervening injury. This is Claimant's petition and, as such, Claimant has the burden of introducing competent medical testimony establishing causation within a reasonable degree of medical probability. The testimony of Claimant's expert, who had no firsthand knowledge, did not review medical records, received an incomplete history from Claimant and was found not to know anything about the 2010 incidents, which involved the same body part, was insufficient to constitute this.

2. Denied. Employer is not required to prove an alternative theory. Dr. Piccioni initially focused on records from the spring of 2012. Prior to his deposition he reviewed records from 2010. He did not review many of Claimant's other records prior to his deposition, nor did he have other information, such as whether the classes claimant was taking were physical in nature (e.g. martial arts, police training, fireman training) or why a provider other than Dr. Uthaman was prescribing Claimant medication. Thus, his testimony, like Dr. Uthaman's, is insufficient to constitute substantial evidence that Claimant's 2012 problems are related to the 2012 industrial accident.

3. Denied. See prior response.

4. If there is substantial evidence in the record to support the Board's finding that Claimant's 2012 problems are related to the 2005 industrial accident, the Board's decision should still be reversed because the Board's finding that Claimant did not suffer an aggravation / worsening of his condition is not supported by substantial evidence.

5. If there is substantial evidence in the record to support the Board's finding that Claimant's 2012 problems are related to the 2005 industrial accident, the Board's decision should still be reversed because the Board's finding that there was no untoward event is not supported by substantial evidence.

STATEMENT OF FACTS

Claimant suffered an injury to his low back on March 4, 2005, while working for Employer. B2. He was working as a pipe layer / laborer, which is a physically demanding job. B56. He had low back surgery at the L4-5 level, by Dr. Kalamchi. B225. Following the surgery, he was out of work from June 9, 2005 through February 28, 2006. B280-B281. At first, he thought the surgery "didn't work." B57. Then he got better. B58. His last visit with Dr. Kalamchi was March 6, 2006. B225. As of that date, Claimant was doing well. B225. He had nothing more than an occasional ache down the left calf, which he experienced after heavy manual labor. B225. He was not taking any pain medication, even over the counter. B225, B226. Nor was he seeing a pain management specialist. B227. He had a brace, which he did not use. B227.

Claimant returned to work for the employer following the surgery. B72. He returned to work without any restrictions. B226, B227. After some time, he left and worked several other jobs, all in construction, all doing pipe laying. B58. Agreements and Receipts on file with the Board reflect that, after he returned from surgery, Claimant worked more than 3 ½ years in heavy construction without missing any work due to his work injury. In a February 24, 2010 decision, the Board found 8 days missed from work over Labor Day 2009 (August 27, 2009 - September 3, 2009) compensable and related to a nerve ablation procedure. B283.

The procedure helped and, as of December 2, 2009, Claimant was working full duty, full time. B61, B92, B237. As of December 23, 2009, he continued to work full time, full duty. B237. He continued to do construction because the money was good, he liked the work, and he liked that it was hard, physically demanding work. B60. He had pain, but he was able to work through it. B66. He did not seek any medical treatment for his back between December 2009 and June 2010. B93-B94.

In 2010, he was working at Mumford & Miller, riding in a dump truck on uneven ground.[2] B67, B83. The bouncing and jarring motion increased his pain to a breaking point. B67. He sought medical care after the dump truck incident. B87, B94. He was seen at First State Orthopaedics on June 3, 2010. B237. The history provided on that date was that he was in a dump truck that "bottomed out." B238. After the dump truck incident, he had fairly regular complaints and treatment. B245. He began seeing Dr. Lieberman and Dr. Katz.[3] B94. Claimant's medical records indicate he had an aggravation of his back pain as a result of the dump truck incident. B245. Dr. Katz's records refer to the dump truck incident as a June 2010 work accident. B239-B240, B245. As a result of the dump truck

[2] Claimant could not recall dates but records subpoenaed from that employer indicate he worked there August 18, 2008 through December 18, 2009 and January 21, 2010 through June 11, 2010. B83.

[3] Bruce Katz, M.D. is with First State Orthopaedics. Ronald Lieberman, D.O. is with Delaware Spine.

incident, Claimant was taken out of work "until Monday" then returned to light duty. B238. He was also restricted from driving a dump truck. B238. As of September 7, 2010, he was continued on light duty and Dr. Katz writes, "I do not believe he is able to work in construction at this time." B241, B242. Claimant had not previously been given a note telling him he could not do construction. B59.

Claimant told Dr. Lieberman about the dump truck incident and that he had been doing fine until he injured his back in the dump truck incident. B239. He told Dr. Lieberman that, while driving off road . . . he hit a bump and injured his back. B239. He went out of work for a short period of time following the dump truck incident. B67. He was given medical restrictions following the dump truck incident. B71.

In addition to the dump truck incident, Claimant had a motor vehicle accident on August 11, 2010. B239-B240, B94. B67, B245-B246. It caused a worsening of his back problem. B240, B246. His treating doctor described this as an aggravation. B240. B246.

On September 29, 2010, he sought treatment at the Emergency Room. B242. Those records indicate he was injured lifting a child / camping equipment. B242. The foregoing will collectively be referred to as the 2010 incidents.

Following the 2010 incidents, in addition to treating with Dr. Katz and Dr. Lieberman, on March 28, 2011, Claimant began treating with Uday Uthaman,

M.D. B160. The history Dr. Uthaman received from Claimant is as follows. On March 28, 2011, Claimant was complaining of low back and left leg pain. B160. Claimant told Dr. Uthaman he injured his back in a March 2005 industrial accident, while lifting a sign. B161. Claimant told Dr. Uthaman he had surgery in 2007, that "later on" he had injections / nerve ablation and that, "recently" he had a discogram.[4] B161. There is no evidence that Dr. Uthaman has any information regarding when Claimant had the injections / ablation / discogram. There is no evidence that Claimant told Dr. Uthaman that his symptoms were continuous. Claimant told Dr. Uthaman that over the years the pain was increasing. B185 There is no evidence in the record to indicate what years were being referenced, such as 2010 to 2012, or some other period. Dr. Uthaman knew Claimant was taking medications that Dr. Uthaman had not prescribed. B197. Dr. Uthaman did not know what those medications were for, or who was prescribing them. B197, B200. Dr. Uthaman knew Claimant was attending classes, but did not know what type. B199.

When Claimant went to see Dr. Uthaman, he told him about the work accident but did not tell him about the 2010 incidents. B161-B162. Nor did Dr. Uthaman see records that discussed the 2010 incidents. B194-B195. B208.

[4] From the Agreements & Receipts on file with the Board, it appears that the surgery was actually in 2005 or 2006.

Dr. Uthaman testified that his treatment and restrictions he placed on Claimant are related to the industrial accident. B188. His opinions were based on the history he received from Claimant. B195.

In 2012, Claimant was working for Dixie Construction ("Dixie"), as a pipe layer. B61, B74. He started working at Dixie on August 2, 2011. B74. On August 26, 2011, he told Dr. Uthaman he was having increasing low back pain and left leg pain. B167. In September of 2011, Dr. Uthaman performed trigger point injections bilaterally at L2 and L4. B173. Claimant left Dixie on or about May 16, 2012, because he could no longer do it. B74, B75, B77. After taking himself out of work, Claimant went to see Dr. Uthaman, who told him to find a job that was less physically demanding. B62. Claimant is now working through a temporary agency at Playtex, operating a forklift in the warehouse. B63.

Dr. Piccioni examined Claimant at the request of the employer. B222. He saw Claimant on March 14, 2008, and November 7, 2012. B222. It was his understanding that Claimant was alleging disability starting in May of 2012. B231. Based on that, prior to the 2012 exam, Dr. Piccioni reviewed records from April 2012 forward. B244, B254-B255. At the 2012 exam, Claimant told Dr. Piccioni he had no new injuries. B234, B255. Claimant did not tell Dr. Piccioni about the 2010 incidents. B239-B243. Based on the records he reviewed at that time and Claimant's inaccurate history, Dr. Piccioni initially felt the restrictions

placed on Claimant by Dr. Uthaman were related to the work accident. B234, B236, B247. This is because, *initially*, Dr. Piccioni thought Claimant was a plausible historian, and accepted his history. B272.

Claimant has provided untruthful or incomplete information to others, in addition to Dr. Uthaman and Dr. Piccioni. After the industrial accident and surgery, Claimant sought a job at Kent Construction.[5] B89. On November 6, 2007, he completed a form for that employer. B89. He answered questions on that form about prior back problems / surgery untruthfully. B89-B90. He also certified that his answers were truthful, when they were not. B90.

After the industrial accident, Claimant also sought a job at Dixie. B78. Dixie's application asks about prior work injuries. B78. On the Dixie application, Claimant indicated he had *not* had a prior work injury. B78. On that application, he signed a certification, saying that his answers were truthful even though they were not. B78.

On July 19, 2012, while seeking a job with his current employer, BBSI, Claimant completed a job application. B79. Despite having received restrictions from Dr Uthaman, he told BBSI he did not have any physical restrictions. B81. He also told BBSI he had been laid off, when that was not true. B82 and B77.

[5] Claimant could not recall dates but records subpoenaed from that employer indicate he worked there November 2007 to May 2008. B89.

After Dr. Piccioni reviewed the medical records regarding the 2010 incidents, he learned that the history Claimant had given him was very inaccurate. B272. Based on his review of the newly reviewed medical records, he no longer believes the May 2012 work restrictions are related to the industrial accident. B247. According to the newly reviewed records, Claimant had been stable until the 2010 incidents. B246. The 2010 incidents caused a worsening of Claimant's condition. B263. Before the 2010 incidents, Claimant was on no medication, had no injections and was seen on an as needed basis. B264. Now, he needs injections and more treatment. B264. After the 2010 incidents, Claimant had an aggravation, was placed on light duty restrictions and had "quite a bit of treatment." B246-B247. B263. Additionally, prior to the 2010 dump truck incident, Claimant had not been restricted in how long or how far he could drive. B248. Now that he has seen the medical records regarding the 2010 incidents, Dr. Piccioni believes, to a reasonable medical probability, that the 2010 incidents aggravated Claimant's back and that Claimant's current problems are due to the 2010 incidents, rather than to the 2005 injury. B264, B266. Another reason for this belief is that Claimant is now starting to have more right sided symptoms, which was never the case with the original problem. B268. If there is a change in the MRI, he would attribute that to the 2010 accident / injuries, not back to 2005. B268.

ARGUMENT

I. The Superior Court correctly reversed the Board's decision because there is not substantial evidence in the record to support the Board's finding that Claimant's 2012 problems are causally related to the 2005 industrial accident. This is not Employer's petition seeking to terminate benefits on the grounds that there has been an intervening injury. This is Claimant's petition and, as such, Claimant has the burden of introducing competent medical testimony establishing causation within a reasonable degree of medical probability. The testimony of Claimant's expert, who had no firsthand knowledge, did not review medical records, received an incomplete history from Claimant and was found not to know anything about the 2010 incidents, which involved the low back, was insufficient to constitute this.

A. Question Presented

Whether the opinion of a medical expert constitutes competent medical testimony establishing causation between a 2005 industrial accident and 2012 restrictions / treatment, within a reasonable degree of medical probability, when the expert did not see Claimant in the first six years following the industrial accident, did not review any of Claimant's medical records covering the five year period after the industrial accident, and received an incomplete history from Claimant, particularly given that Claimant worked full time heavy duty for various employers following the industrial accident and was involved in three subsequent incidents involving the same part of the body, of which the expert was unaware. (B144, B146.)

B. Scope of Review

This Court reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by directly examining the decision of the agency.[6] The function of this Court is to determine whether the Board's findings are supported by substantial evidence and free from errors of law.[7] Where substantial evidence supports the Board's conclusions, the Court will not disturb that conclusion absent an error of law.[8] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[9] The Court will review the entire record to determine whether the Board could have fairly and reasonably reached its conclusion.[10] In doing so, it will review the record in the light most favorable to the party prevailing below.[11] The Court does not sit as a trier of fact and will not substitute its judgment for that rendered by the Board.[12] On questions of fact, the Court shall give deference to the experience and specialized competence of the Board.[13] In reviewing alleged errors of law, the Court's review is plenary.[14]

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[6] *Pub. Water Supply Co. v. DiPasquale,* 735 A.2d 378, 380-81 (Del. 1999).
[7] *Talmo v. New Castle Cnty*, 444 A.2d 298 (Del. Super. Ct. 1982) *aff'd 454 A.2d 758 (*Del. *1982)*.
[8] *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960).
[9] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).
[10] *Nat'l Cash Register v. Riner*, 424 A.2d 669 (Del. Super Ct. 1980).
[11] *General Motor Corp. v. Guy*, 1991 Del. Super. LEXIS 347.
[12] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[13] *29 Del. C. §10142 (d)*.
[14] *Brooks v. Johnson,* 560 A.2d 1001 (Del. 1989).

C. Merits of Argument

The decision on appeal involves a Petition to Determine Additional Compensation Due filed by Claimant. B1. The Board correctly states that, because it is Claimant's petition, he has the burden of proof.[15] B20. The Board then, erroneously, skips the next step, which would be to analyze whether Claimant has met his burden of proof.

That skipped analysis would, necessarily, begin with Claimant's contention that the symptoms he experienced in May of 2012 ("the 2012 problems"), which caused him to stop working for Dixie, derive from the 2005 industrial accident. B20, B285. He must introduce competent medical testimony establishing causation "within a reasonable degree of medical probability."[16] At page 28 of his opening brief, Claimant seems to argue that, because a back injury was acknowledged following the 2005 industrial accident, the 2012 problems are assumed to be a natural consequence of the 2005 industrial accident. He cites no authority for this position.

Because the matter before the Board was Claimant's petition, *as a preliminary matter*, Claimant must prove his 2012 problems, for which he received injections at the L2 level, are a natural consequence of the 2005 accident, for

[15] 29 *Del. C.* §10125(c).
[16] *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1066 (Del. 1999); *McCormick Transp. Co. v. Barone,* 89 A.2d 160 (Del. Super. Ct. 1952); *Perry v. Berkley*, 996 A.2d 1262 (Del. 2010).

which he had surgery at the L4-5 level.[17] Employer need not establish an alternative theory of causation.[18] Thus, it does not need to prove, as Claimant suggests, that Claimant's 2012 problems were caused by one of the 2010 incidents, or any incident. Employer can merely rebut Claimant's allegations, as it did in this case, to successfully defend a petition for benefits.[19]

In an effort to prove his claim, Claimant introduced the testimony of Dr. Uthaman. B183. Dr. Uthaman testified that the 2012 problems are related to the work accident. B188. Dr. Uthaman is the only medical expert who testified that the 2012 problems are related to the work accident.[20]

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[17] *Rhinehardt-Meredith v. State*, 963 A.2d 139 (Del. 2008). (This case, in direct contradiction to the argument on page 29 of Claimant's opening brief, sets out that proof of causation is necessary with regard to petitions to determine additional compensation due).

[18] *Hoffecker v. Lexus of Wilmington*, 36 A.3d 349 (Del. 2012) *citing Strawbridge & Clothier v. Campbell,* 492 A.2d 853, 854 (Del. 1985).

[19] *Id*.

[20] Dr. Piccioni testified that when he issued his report, based on an inaccurate history from Claimant and an incomplete review of Claimant's records, he initially thought the 2012 problems were related to the industrial accident. Once he reviewed additional records, he realized the history Claimant had given him was inaccurate. At the time of his testimony, based on additional records he reviewed, he did not believe Claimant's 2012 problems were related to the industrial accident. (B262). Based on the records he reviewed, he thought it more plausible that the 2010 incidents, as compared to the 2005 industrial accident, were the cause of Claimant's 2012 problems. However, he also testified that, although he reviewed records regarding the 2010 incidents prior to his testimony, he did not spend a lot of time reviewing records between 2008 and April of 2012. (B251-B252). As a result, if it is found that the 2010 incidents were inconsequential, because of his lack of review of these other records, his testimony would be insufficient to constitute substantial medical evidence that the 2012 problems are related to the industrial accident. Furthermore, Employer disagrees with the statement at page 33 of Claimant's opening brief that it is undisputed that Claimant's condition *immediately* prior to the 2010 events continued to be related. Claimant had a fourth accident in that time frame. Additionally, there was a break in treatment prior to the 2010 incidents and unknowns (e.g. physical nature of Claimant's class / reason for medication from other provider).

The Board is free to accept the testimony of one medical expert over another, so long as the expert's testimony constitutes substantial evidence to support the decision.[21] In this case, Dr. Uthaman's testimony is insufficient to constitute substantial evidence.[22] This is because Dr. Uthaman is unaware of fundamental facts of this case.[23] He has no firsthand knowledge of Claimant's condition for the first six years after the industrial accident. B160. Not once in 2005, 2006, 2007, 2008, 2009, 2010, or early 2011 did he examine, or even speak with, Claimant. This lack of firsthand knowledge can be "cured" by reviewing medical records from medical providers who did see Claimant. However, that did not happen in this case. Dr. Uthaman does not recall reviewing <u>any</u> records, other than one MRI report from more than five years after the industrial accident. B189, B190, B193, B194-B195, B208. This means, he did not see any treatment notes from shortly after the 2005 industrial accident. He did not see the operative report. He did not see records from the surgeon who performed Claimant's surgery, such as the post surgical note releasing Claimant to return to work, full duty. Nor did he see any records regarding treatment Claimant received in 2007, 2008, 2009, 2010, or the beginning of 2011.

[21] *Cottman v. Burris Fence Constr.* 918 A.2d 338 (Del. 2006).
[22] *Perry v. Berkley*, 996 A.2d 1262, 1267 (Del. 2010).
[23] *Id*.

Given the lack of firsthand knowledge or records review, Dr. Uthaman's causation opinion is, necessarily, based on the history provided by Claimant. B195. Relying solely on a history from Claimant, without more, is insufficient to constitute reliable foundation for the medical expert's opinion.[24] Testifying that a condition is related "because [the Claimant] said so is not a medical opinion at all; instead any lay person could arguably come to the same conclusion."[25] There is no evidence in the record that Claimant was able to describe the medical nature of his injury (e.g. herniation versus stenosis / whether his work injury was at L4-5 or L2, etc). Without having firsthand knowledge of Claimant's condition in the first six years following the work accident, and without having reviewed records from that period, Dr. Uthaman cannot know the nature and extent of Claimant's injury close in time to the 2005 industrial accident. In fact, the records that Dr. Uthaman did not review indicate that Claimant's work injury was at the L4-5 level. There are no records indicating that Claimant's 2005 injury was at the L2 level. However, as part of his treatment of Claimant, Dr. Uthaman rendered injections at the L2 level. He then testified that his treatment was related to the work accident. He gave no explanation for how injections at L2 relate to an injury at L4-5, and why there are now right-sided complaints. B173, B225.

[24] *Miller v. United States*, 422 F.Supp. 2d 441, 444 (D. Del. 2006).
[25] *Id*.

As noted above, relying solely on a history from Claimant, without more, is insufficient to constitute reliable foundation for the medical expert's opinion. In this case, in addition to not having any medical information regarding Claimant's condition close in time to the 2005 accident, the history Dr. Uthaman received from claimant was factually incomplete.[26] Whether intentionally or inadvertently, Claimant never told Dr. Uthaman about other incidents. Thus, Dr. Uthaman knew nothing about the 2010 incidents. Each of these incidents involved Claimant's back and were significant enough for Claimant to seek treatment and/or miss time from work. Because he was not given this history, Dr. Uthaman knew nothing about the treatment Claimant received following these incidents, as compared to prior to the incidents. Nor did he have an opportunity to compare Claimant's complaints and findings (either personally, through records, or by questioning Claimant) before and after these incidents.

The lack of foundation of Dr. Uthaman's testimony is further demonstrated by the fact that he failed to ascertain relevant information during the period he was actually treating Claimant. For example, Dr. Uthaman knew Claimant was taking medications not prescribed by him but he did not know what those medications were for, or who was prescribing them.[27] B197, B200. He knew Claimant was

[26] A complete summary of Dr. Uthaman's testimony regarding the limited history he received from Claimant is set out in the Statement of Facts, page 5.
[27] Nor did Dr. Piccioni.

attending classes, but did not know what type. B199. So, for example, if Claimant, who, admittedly, likes to be physically challenged, was attending physically demanding classes, such as martial arts classes, or classes to become a fireman, policeman, or corrections officer, Dr. Uthaman was not aware of that or what those classes entailed.[28]

The Board acknowledges that Dr. Uthaman lacked knowledge of relevant facts, specifically finding he had no knowledge of any additional accidents or injuries that Claimant experienced beyond the industrial accident of 2005. B20. Dr. Uthaman's lack of knowledge about relevant facts in this case goes directly to the substance of his testimony.[29] As a result, his testimony cannot constitute substantial medical evidence.[30]

Once the Board determined Dr. Uthaman was unaware of foundational facts, its analysis should have stopped and it should have rendered a decision that Claimant failed to meet his burden of proof. It did not. Instead, it made baseless assumptions and leapt to an analysis of whether there was sufficient evidence to show an untoward event and worsening of Claimant's condition. B20, B28. Assuming *arguendo* that, at some point, it is proper to conduct such an analysis, the Board erred by turning to that analysis before first finding, based on substantial

[28] Nor was Dr. Piccioni.
[29] *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010).
[30] *Id*.

medical evidence, that the 2012 problems are causally related to the 2005 industrial accident.[31] It did not make such a finding because the record does not contain substantial medical evidence to support such a finding. Further, given that Dr. Uthaman offered no testimony as to the effect of the 2010 incidents, the Board's findings that these incidents were insignificant is not supported by substantial medical evidence. B28.

[31] *Turner v. Johnson Controls*, 44 A.3d 923 (Del. 2012).

II. If there is substantial evidence in the record to support the Board's finding that Claimant's 2012 problems are related to the 2005 industrial accident, the Board's decision should still be reversed because the Board's finding that Claimant did not suffer an aggravation / worsening of his condition is not supported by substantial evidence.

A. Question Presented

Whether the following five findings of the Board in support of its finding that Claimant did not suffer an aggravation / worsening of his industrial injury are supported by substantial evidence. (This question pertains to the standard of review for a decision of the IAB and is, therefore, not a question required to be preserved below as such.)

B. Scope of Review

The scope of review is as set out in part "B" of Argument 1 and is hereby incorporated.

C. Merits of the argument.

Dr. Uthaman was not aware of the 2010 incidents. Therefore, he offered no opinions related to these events. Dr. Piccioni is the only medical expert in this case who reviewed Claimant's records and was aware of the 2010 incidents. His testimony regarding the 2010 incidents is competent unrebutted testimony, which the Board is not permitted to ignore.[32]

[32] *Pusey v. Natkin & Co*., 428 A.2d 1155, 1157 (Del. 1981).

a. Temporary aggravation.

The Board finds there is insufficient evidence in the record to find Claimant's condition was worsened beyond a temporary aggravation by any of the 2010 incidents. B21, B22. This finding is not supported by substantial medical evidence. Dr. Piccioni described how Claimant's condition worsened after the 2010 incidents. No medical expert testified that Claimant's condition was only temporarily worsened. The record reflects that, after his recovery from surgery, Claimant returned to construction, doing pipe laying. B58. Per his prior exam and through the records he reviewed, Dr. Piccioni was aware that, as of March 6, 2006, Claimant was doing well. B225. He had nothing more than an occasional ache down the left calf, which he experienced after heavy manual labor. B225. He was not taking any pain medication, even over the counter. B225, B226. Nor was he seeing a pain management specialist. B227. He had a brace, which he did not use. B227. He returned to work without any restrictions. B226, B227. As of December 2, 2009, he was working full duty, full time. B92, B237. As of December 23, 2009, he continued to work full time, full duty. B237. Prior to 2012, no doctor ever gave him a note telling him he could not do construction. A59. He did not seek any medical treatment for his back between December 2009 and June 2010. B93-B94.

After the 2010 dump truck incident, Claimant had fairly regular complaints and treatment. B245. More than a year later, on August 26, 2011, he was still complaining of significant low back pain and left leg pain. B167. Where, before the 2010 incidents, he had no injections, now, he needs injections and more treatment. B264. Based on the foregoing, the Board's finding that there is insufficient evidence in the record to find Claimant's condition was worsened beyond a temporary aggravation by any of the three events in 2010 is not supported by substantial evidence.

b. New or worsened injury.

The Board finds that, other than Dr. Piccioni's testimony that Dr. Katz described the 2010 dump truck incident as an aggravation of Claimant's long-standing low back condition, there is no evidence that Claimant suffered a new or worsened injury as a result of the 2010 incidents. B21, B22. There is not substantial evidence in the record to support this finding. After making this finding, the Board notes Dr. Piccioni's opinion that an increase in right sided symptoms supports that there was a new injury.[33] So, clearly, there is evidence, in addition to the reference by Dr. Katz that is noted by Dr. Piccioni, about a new or worsened injury. Perhaps the Board's intention was to say that it was not persuaded by this opinion when it says, "notably, Dr. Piccioni was aware of

[33] There are additional reasons for Dr. Piccioni's opinion. However, this discussion will be limited to this one.

Claimant's right-sided symptoms when he issued his initial November 2012 report." B21. However, no medical expert rebutted Dr. Piccioni's expert medical testimony regarding the significance of the right sided symptoms. The Board is not permitted to disregard competent unrebutted medical testimony.[34]

c. Care for only a limited time.

The Board indicates Claimant obtained care specific to the 2010 aggravations for only a limited period of time. B21, B22. There is not substantial evidence in the record to support such a finding. The only medical expert to review Claimant's records was Dr. Piccioni and he does not say this. His unrebutted testimony is that, after the surgery, Claimant was doing well. B225. He was not taking any pain medication, including over-the-counter. B225, B226. Nor was he seeing a pain management specialist. B227. He did not seek any medical treatment for his back between December 2009 and June 2010. B93-B94. After the 2010 incidents, he had "quite a bit of treatment." B246-B247. B263. He still needs injections and more treatment. B264. The Board is not permitted to disregard Dr. Piccioni's unrebutted competent medical testimony.[35]

d. Same baseline pain and discomfort.

The Board finds that Claimant continued working as he had for a number of years following the 2005 industrial accident "with the same baseline pain and

[34] *Pusey v. Natkin & Co*., 428 A.2d 1155, 1157 (Del. 1981).
[35] *Id*.

discomfort." B22. This finding is not supported by substantial medical evidence. According to Dr. Piccioni, the only medical expert who reviewed Claimant's records, as of March 6, 2006, Claimant was doing well. B225. He had nothing more than an occasional ache down the left calf, which he experienced after heavy manual labor. B225. He was not taking any pain medication, even over the counter. B225, B226. He was not seeing a pain management specialist. B227. He did not seek any medical treatment for his back between December 2009 and June 2010. B93-B94.

After the 2010 dump truck incident, Claimant had fairly regular complaints and treatment. B245. As of August 26, 2011, he was still complaining of significant low back pain and left leg pain. B167. Where before the 2010 events Claimant had had no injections, now, he needs injections and more treatment. B264.

e. Gradual return and build up of symptoms

The Board notes that Claimant had a "gradual return and build up of symptoms that kept Claimant in care with various providers in 2008, 2009, 2010 and beyond." B23. This is not supported by substantial medical evidence. According to the only medical expert who reviewed Claimant's records, Claimant did not seek any medical treatment for his back between December 2009 and June

2010. B93-B94. He then had "quite a bit of treatment" following the 2010 incidents. B246-B247. B263.

III. If there is substantial evidence in the record to support the Board's finding that Claimant's 2012 problems are related to the 2005 industrial accident, the Board's decision should still be reversed because the Board's finding that there was no untoward event is not supported by substantial evidence.

A. Question Presented

Whether the Board's finding that the dump truck incident was not an untoward event is supported by substantial evidence. (This question pertains to the standard of review for a decision of the IAB and is, therefore, not a question required to be preserved below as such.)

B. Scope of Review

The scope of review is as set out in part "B" of Argument 1 and is hereby incorporated.

C. Merits of the argument.

Should this Honorable Court conclude that there is substantial medical evidence to support the Board's finding that Claimant's 2012 problems are related to the 2005 industrial accident and that, therefore, it is appropriate to conduct an analysis as set forth in *Standard Distributing Co. v. Nally*, the employer submits that there is not substantial evidence in the record to support the Board's finding that the dump truck incident was not an untoward event.[36] *Nally* requires the first employer to prove that there was an untoward event while Claimant was working

[36] 630 A.2d 640 (Del. 1993).

for a second employer, and that, as a result of the untoward event, Claimant suffered a worsening of his condition.

The Board notes that operating equipment, including the dump truck, was one of Claimant's incidental job duties. B26. This is not supported by substantial evidence. Claimant testified he worked as a pipe layer, digging ditches, laying pipe. He testified that he has "ridden in equipment before." He did not describe the equipment. There is no evidence upon which to find he was ever previously in a dump truck, much less that he regularly was in a dump truck prior to the day in question. The "equipment" to which he refers could equally have been a pickup truck or bobcat, used on paved roads.

On the day in question, he was in a dump truck that hit uneven ground and "bottomed out." Claimant told his doctor he hit a bump. B239. Dr. Katz referred to the dump truck incident as a June 2010 work accident. B239-B240, B245. This accident caused an immediate and significant increase in his pain. There is no evidence that riding a dump truck and having his body jarred due to hitting an uneven surface or bump is what Claimant did on a regular basis or even on a prior occasion while working as a pipe layer. It may be that Claimant did drive a dump truck incidental to his pipe laying activities. However, there is not substantial evidence of this. Nor is there substantial evidence in the record to support a finding that the jarring of the body that Claimant experienced from "bottoming

out" that day in June 2010 was part of his normal work activities and not an untoward event.

Dr. Piccioni talked about the effects of the dump truck accident on Claimant. His testimony is unrebutted since Dr. Uthaman was not aware of the event. The Board is not permitted to ignore unrebutted competent medical testimony.[37]

[37] *Pusey v. Natkin & Co.*, 428 A.2d 1155 (Del. 1981).

CONCLUSION

For the foregoing reasons, Employer respectfully requests that this Honorable Court affirm the Superior Court's September 20, 2013 decision reversing the Board's December 27, 2012 Decision on Petition to Determine Additional Compensation.

Respectfully submitted,

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