IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ZENITH PRODUCTS CORP.,	)	
	)	
Employer Below/	)	
Appellant,	)	
	)	
v.	)	C.A. No. 05A-09-005
	)	
EDWIN RODRIGUEZ,	)	
Claimant Below/	)	
Appellee.	)	

Submitted: January 18, 2006
Decided: March 3, 2006

UPON APPEAL FROM A DECISION FROM THE
INDUSTRIAL ACCIDENT BOARD
AFFIRMED

J.R. Julian, Esquire, Wilmington, Delaware, Attorney for Appellant.

Gary S. Nitsche, Esquire, Wilmington, Delaware, Attorney for Appellee.

ABLEMAN, JUDGE

Zenith Products Corp. ("Zenith") has appealed a decision of the Industrial Accident Board ("IAB" or "Board"). Because the findings of the Board's hearing officer were supported by substantial evidence and are the product of a logical and orderly deductive process, and because Zenith failed to raise its *Daubert* objection before the Board, the decision of the hearing officer is hereby **AFFIRMED**.

Facts

Edwin Rodriguez ("Rodriguez") filed a petition with the IAB seeking compensation for an injury suffered while working for Zenith on August 24, 2004. Rodriguez was operating a "walkie," or a type of motorized pallet to transport parts from one area of the business to another. In order to do this, Rodriguez was forced to cross some tracks used by carts to transport wood. The tracks had an epoxy ramp designed to allow the walkies to cross, but the rails were apparently bent upward, possibly by forklifts that had crossed the rails without raising the forks. The walkie struck the track and stopped completely, throwing Rodriguez to the ground. Rodriguez testified that he landed on his hands and feet and felt immediate pain.

Rodriguez was sent to the Omega Medical Center where he was told that he had a pulled muscle. When he returned to work, however, Rodriguez found that he could not stand on the walkie without pain and was

subsequently transferred to the shipping department where he could sit for short periods of time. After three days he stopped working due to the pain.

Rodriguez then went to Dr. P. Trent Ryan, a chiropractic neurologist for treatment on September 8, 2004, apparently on the advice of his lawyer. Dr. Ryan diagnosed lumbar sprain and strain with severe, acute lumbar radiculopathy and found Rodriguez totally disabled. Dr. Ryan ordered an MRI on September 20, 2004, which showed no disk herniation, but a later MRI performed in November with a stronger magnet showed a small disk herniation. Dr. Ryan began by providing conservative chiropractic treatment to Rodriguez, but because the pain was not resolving Dr. Ryan referred Rodriguez to Dr. Bikash Bose. During treatment, Dr. Ryan also noticed signs of depression, which worsened and began to include discussion of suicide. Concerned, Dr. Ryan referred Rodriguez to Dr. Leland Orlov.

Dr. Orlov first saw Rodriguez on November 11, 2004. At this meeting Rodriguez discussed his mood, the thoughts he had that life was not worth living, and the anger he felt toward his employer, whom he thought did not care about his well-being. Based on his observations of and interview with Rodriguez, as well as questionnaires Rodriguez had completed, Dr. Orlov recommended hospitalization and Rodriguez agreed. Rodriguez was hospitalized for just under three weeks. After three weeks of

observation, the hospital diagnosed single episode major depression, with psychotic features. This depression was diagnosed as being related to constant back pain and to familial stress related to Rodriguez being unable to provide for his family because of his injury.

Rodriguez was released from the hospital on December 1, 2004. Shortly thereafter he went to see Dr. Bikash Bose, on referral from Dr. Ryan. Dr. Bose diagnosed a herniated disk and performed surgery to remove it. That surgery improved Rodriguez's pain. Dr. Bose estimated that a return to sedentary work would likely be possible eight to twelve weeks after the surgery. Dr. Bose testified that the herniated disk pre-existed the accident, but that the symptoms, which had previously been dormant, had been caused by the accident.

In response to Rodriguez's claim, Zenith had its own doctors examine Rodriguez. Dr. Brian Schulman reviewed Rodriguez's medical records and interviewed him on January 19, 2005. Dr. Schulman opined that Rodriguez's psychiatric problems pre-dated the work accident and are of a biological origin. Specifically, Dr. Schulman testified that Rodriguez is likely bipolar because the depression developed very quickly, and because Rodriguez apparently misrepresented the presence of a number of psycho-social stressors in his life. Accordingly, Dr. Schulman testified that

Rodriguez's psychological treatment had been reasonable and necessary, but unrelated to the work accident.

Dr. Leonard Katz also testified for Zenith. Rodriguez was initially referred by the emergency room physician to Dr. Katz. Dr. Katz saw Rodriguez on August 31, 2004, and again on March 2, 2005. Dr. Katz maintained the opinion that Rodriguez could do sedentary work and that Rodriguez was exaggerating his symptoms. This opinion was based in part on a straight leg-raising test in which Rodriguez was better able to raise his legs while sitting than lying down. Dr. Katz testified that the treatment administered to Rodriguez by Drs. Ryan and Bose had been excessive. Although Dr. Katz acknowledged that chiropractic treatment is often effective, he felt that Rodriguez's treatment should have been discontinued when there was no improvement. Dr. Katz also testified that he felt surgery was not a good option for Rodriguez, and that it was unnecessary in any event because the primary injury was a bad sprain to the low back. Dr. Katz did feel, however, that the back injury was related to the accident and acknowledged that the surgery did relieve Rodriguez's pain and was therefore "not unreasonable."

By stipulation, a hearing to determine additional compensation due was conducted before a hearing officer of the Industrial Accident Board.

The hearing officer found that Rodriguez was injured at work, that his back injury was a preexisting condition that became symptomatic when it was exacerbated by the injury at Zenith, and that Rodriguez was therefore essentially an eggshell employee. The hearing officer felt that Drs. Ryan, Bose and Katz agreed that Rodriguez suffered from a back abnormality that the work accident aggravated. The hearing officer additionally chose to rely on Rodriguez's primary treating doctor, Dr. Ryan, in finding that Rodriguez had been totally disabled as of September 8, 2004.

The hearing officer additionally found that Rodriguez suffered depression related to pain and stress. The hearing officer specifically stated that he felt that neither Dr. Orlov nor Dr. Schulman had spent sufficient time with Rodriguez to properly diagnose him. The hearing officer did feel, however, that the hospital personnel, who spent nearly three weeks with Rodriguez, were better able to render an opinion. Because Dr. Orlov had substantially relied on those records in making his diagnosis, the hearing officer chose to accept his testimony rather than that of Dr. Schulman.

Accordingly, the hearing officer found that Rodriguez's medical expenses had been reasonable and necessary. Specifically, the hearing officer found that Zenith only contested the causation of Rodriguez's psychiatric problems, not the reasonableness and necessity of the care.

Those problems had been found to be related to the accident, and were therefore compensable. The hearing officer likewise found that Dr. Katz agreed that the surgery was "not unreasonable" and that those expenses were also reasonable and necessary. Finally, the hearing officer found that, while the chiropractic care did continue even though it was not providing Rodriguez with relief, the care had initially helped to reduce the intensity of Rodriguez's pain and served a diagnostic purpose. Therefore, the hearing officer also approved the chiropractic expenses as reasonable and necessary.

Contentions on Appeal

Zenith now argues on appeal that the testimony presented by Rodriguez's doctors does not comport with the standards for expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] Zenith argues that because Drs. Ryan, Orlov, and Bose relied on subjective complaints instead of objective scientific testing to diagnose Rodriguez's condition, their testimony cannot constitute substantial evidence under *Daubert*. Zenith therefore argues that the opinions of these doctors must be discounted. The reliance on Rodriguez's complaints is a problem, Zenith contends, because the Board found that Rodriguez had been "less than

[1] 509 U.S. 579 (1993).

candid" regarding difficulties at home and these doctors' opinions should be discounted as reliant on the word of a liar.

Zenith additionally argues that there was not substantial evidence to support the hearing officer's finding that Rodriguez's injuries were related to the work accident. Zenith contends that because Dr. Ryan's initial MRI did not show a disk herniation, some unidentified unreported subsequent accident must have caused the injury. Zenith additionally argues that the hearing officer's reliance on Dr. Orlov's psychiatric opinion could not constitute substantial evidence because Dr. Orlov admitted that he did not take an extensive background from Rodriguez and that his findings were not comprehensive.

Standard of Review

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency. The function of the reviewing Court is limited to determining whether substantial evidence supports the Board's decision and is free from legal error.[2] Substantial evidence is such relevant evidence as a reasonable mind

[2] 29 *Del. C.* § 10142(d); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1995); *Soltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *M. A. Harnett, Inc. v. Coleman*, 226 A.2d 910 (Del. 1967); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

might accept as adequate to support a conclusion.[3] The reviewing Court does not weigh the evidence, determine questions of credibility, or make its own factual findings[4] but merely ensures those findings are the product of an orderly and logical deductive process.[5]

Simply put, the Court does not sit as trier of fact, nor should the Court replace its judgment for that of the Board.[6] Instead, this Court merely determines if the evidence is legally adequate to support the agency's factual findings.[7] Application of this standard "requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."[8] In this process, "the Court will consider the record in the light most favorable to the prevailing party below."[9] Only where there is no satisfactory proof in support of the factual findings of the Board, may the Superior Court or the Supreme Court overturn it.[10]

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[3] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995); a*ccord 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), *app. dism.*, 515 A.2d 397 (Del. 1986).
[4] *Johnson*, 213 A.2d at 66.
[5] *Shortess v. New Castle County*, 2002 WL 388116 (Del. Super. Ct.).
[6] *Id*.
[7] *Histed*, 621 A.2d at 342.
[8] *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct. 1980).
[9] *General Motors Corp. v. Guy*, 1991 Del. Super. LEXIS 347, Gebelein, J. (Aug. 16, 1991).
[10] *Johnson*, 213 A.2d at 64.

Therefore, when considering questions of fact, the Court shall defer to the experience and specialized competence of the Board.[11] It is the exclusive function of the IAB to evaluate the credibility of witnesses before it.[12] "The credibility of witnesses, the weight and reasonable inferences to be drawn therefrom are for the Board to determine."[13] In so doing, the Board may accept the opinion testimony of one expert and disregard the opinion testimony of another.[14] Where the opinions of the experts are directly in conflict, the Board is free to accept the testimony of one expert over the contrary opinion of another.[15] The Board's discretion is not limited by the quantity of facts an expert may have.[16] That is to say, the Board is not restricted from adopting an expert's opinion who may have less facts.[17]

Analysis

This Court has previously held that on appeal the Court is limited to the record and will not consider issues not raised before the agency.[18] Therefore, an issue is waived for appeal if it was not raised at the hearing before the agency.[19] Even though IAB hearings are less formal than court

[11] 29 *Del. C.* § 10142(d); *Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).
[12] *See, e.g.*, *Vasquez v. Abex Corp.*, 1992 Del. LEXIS 431, Horsey, J. (Nov. 2, 1992)(ORDER).
[13] *Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. Super. Ct. 1972); *Downes v. State*, 1993 WL 102547, at *2 (Del. Supr.).
[14] *Downs v. State*, 1992 WL 423935 at *2 (Del. Super.).
[15] *DiSabatino Bros. Inc. v. Wortman*, 453 A.2d 102, 106 (Del. Super. Ct. 1982).
[16] *Mountaire of Delmarva, Inc. v. Glacken*, 487 A.2d 1137 (Del. 1984).
[17] *Harvey v. Layton Home*, 1992 WL 301990 (Del. Super.).
[18] *Potts Welding & Boiler Repair Co. v. Zakrewski*, 2002 WL 144273 at *4 (Del. Super. Ct.).
[19] *Standard Distrib., Inc. v. Hall*, 2005 WL 950118 (Del. Super. Ct.).

proceedings, arguments and objections must still be preserved for appellate review.[20] This includes *Daubert* objections.[21]

Zenith does not point to, and this Court cannot find, objections before the Board's hearing officer regarding an improper reliance on Rodriguez's subjective complaints by Drs. Ryan, Orlov, and Bose. The proper time to object to an expert's qualifications or proffered testimony is at the hearing, not on appeal. A specific *Daubert* objection should have been raised before the hearing began, or at least before Drs. Ryan, Orlov and Bose testified. Zenith's appeal brief makes several fact-specific arguments citing the testimony these doctors gave, but none of these arguments were made before the hearing officer. This Court cannot evaluate such claims in the first instance. Accordingly, because Zenith did not raise these arguments until appeal, this issue has been waived.

This Court has additionally held that *Daubert* is not the standard by which the Board's decision is to be measured.[22] The proper standard is, instead, that of substantial evidence. Zenith challenges the hearing officer's finding that Rodriguez's disk herniation and psychiatric claims were related to the work accident. This Court need only find that there is such relevant evidence as a reasonable mind might accept as adequate to form a

[20] *Christiana Care Health Sys., VNA v. Taggart*, 2004 WL 692640 at *17 (Del. Super. Ct.).
[21] *Standard Distributing*, 2005 WL 950118 at *2.
[22] *State v. Stevens*, 2001 WL 541473 at *4 (Del. Super. Ct.).

conclusion to uphold the hearing officer's findings. As noted above, where the evidence is in conflict, the Board is well within its discretion to accept one doctor's opinion and disregard that of another.

In this case, the hearing officer accepted Dr. Ryan's testimony that an MRI with a stronger magnet showed a disk herniation that had not previously been detected with a less sensitive magnet. Indeed, the hearing officer specifically held that the magnet sensitivity was a rational explanation and rejected Zenith's additional unreported accident theory. As fact finder, the hearing officer has the discretion to accept one expert's testimony over that of another and the exercise of that discretion was proper here.

Additionally, the hearing officer was well within the purview of the Board in choosing to accept Dr. Orlov's testimony and discount that of Dr. Schulman. Although Zenith argues here that Dr. Orlov's testimony did not rely on a sufficiently comprehensive history from Rodriguez, the Board's discretion is not limited by the number of facts an expert may have or upon which he relies. Therefore, the hearing officer committed no error in relying on Dr. Orlov's opinion, and that opinion constituted adequate evidence to reach the conclusion that Rodriguez's hospital bills were compensable.

Conclusion

Accordingly, for all of the foregoing reasons, the opinion of the hearing officer of the Industrial Accident Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary
cc: J.R. Julian, Esquire
Gary S. Nitsche, Esquire