EFiled: Nov 13 2013 03:39PM EST
Filing ID 54553955
Case Number 496,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Joseph Whitney, Claimant/Appellee Below, Appellant, v. **Bearing Construction**, Employer/Appellant Below, Appellee.	No. 496, 2013 Court Below: The Superior Court of the State of Delaware, in and for Sussex County, C.A. No. S13A-01-004-ESB

Opening Brief of the Claimant Below-Appellant

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DATED: November 13, 2013

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Nature of the Proceedings

This is an appeal of an Industrial Accident Board (hereinafter "I.A.B." or "Board") decision dated December 27, 2012 in the case of Joseph Whitney v. Bearing Construction, Inc., IAB Hearing No. 1289541 (hereinafter "Whitney IAB"). The Board's decision followed a hearing on the Claimant's petition for temporary partial disability benefits and payment of certain medical expenses. Following the hearing, the Board issued an order granting the Claimant's petition and awarding the requested medical expenses, temporary partial disability lost wage benefits and medical witness fees and an attorneys' fee.

The Employer-below appealed the Board's decision to the Superior Court of the State of Delaware, in and for Sussex County. Following briefing, the Superior Court issued its decision dated September 20, 2013 reversing the Board's award of benefits. Bearing Construction, Inc. v. Whitney, C.A. No. S13A-01-004-ESB (Del.Super.Ct. 9/20/2013) (hereinafter "Whitney Superior").

The Claimant below subsequently appeal the Superior Court's decision to the Delaware Supreme Court. This is the Opening Brief of the Claimant below.

Summary of Argument

1. Dr. Uthaman's testimony, coupled with other competent factual evidence in the record that was accepted by the Board, was legally sufficient and constituted 'substantial evidence' on which the Board could, and did, rely in making an award of benefits to the Claimant.

2. Even absent Dr. Uthaman's testimony, the testimony of the Employer's evaluating physician, coupled with other competent factual evidence in the record, was sufficient to support the Claimant's claim and the Board's award.

3. The Superior Court erred both in finding the testimony of Dr. Uthaman insufficient and also failing to find Dr. Piccioni's testimony to support the Claimant's claim and the Board's award.

Statement of Facts

The Claimant/Appellee below, Appellant is Joseph Whitney. The Employer/Appellant below, Appellee is Bearing Construction, Inc.

At the outset of the IAB hearing, the parties stipulated that Mr. Whitney sustained an acknowledged, work-related injury to his low back on March 4, 2005 while working for Bearing Construction, and that Mr. Whitney had been compensated for a 14% permanent partial disability to the low back. The Board further recognized that Mr. Whitney had received payments for several periods of compensation, as well as payment of medical expenses, from the carrier. Whitney IAB, *supra* at *2. The Board also took note that the claim pending before the Board was for temporary partial disability lost wage benefits as well as authorization for EMG and MRI testing ordered by the Claimant's treating physician. Id.

The Claimant testified as to the nature of his initial injury and subsequent course of care and symptoms. He related his job with Bearing Construction was very hard work and a physically demanding job, requiring a lot of bending, wrenching on pipe bolts for a water line, lifting pipe, and lifting sandbags for the pipe. Trial Transcript at 23; Appendix at A-26 (hereinafter cited "TR-__; A-__"). Mr. Whitney testified that his initial injury occurred in March of 2005 when he was lifting a road sign when he felt a pop in his back. TR-23, 24; A-

26, 27. Following the injury, the pain progressed to include his left hip, but he continued working despite the continued pain, in the hope that the pain would go away 'like a pulled muscle would'. TR-24; A-27. The pain eventually went from his hip, down to the knee and down to the foot. Id.

Mr. Whitney ultimately had surgery with Dr. Kalamchi, and related that at first he thought "it didn't work." Id. The pain increased initially following the surgery, but over time did get a little bit better as time went on. TR-24, 25; A-27, 28. The pain did not resove completely; however, he was able to return to work. TR-25; A-28. His subsequent jobs were also in the construction field. Id. Mr. Whitney testified that he had discussed with his treating doctors what kind of work he should be doing following his low back surgery, and that his doctors had suggested that he do "something more desk job like, something less demanding, something that I basically sit around all day." TR-26; A-29.

Mr. Whitney also indicated that he had never received a note from any doctor telling him that he could not do construction work. TR-26, 27; A-29, 30. He confirmed that he continued to do construction work despite having been told by his doctors that he should do something less physically demanding, because the money was good and he had a family to support, and also that he liked the work. TR-27; A-30.

Mr. Whitney confirmed that he had continuing medical treatment

following the surgery, including a series of injections and ultimately a nerve ablation procedure in his low back with Dr. Lieberman in 2009. Id. Mr. Whitney confirmed that the nerve ablation procedure was a "temporary relief," but that the pain eventually just progressed back to where it was. TR-28; A-31.

Mr. Whitney was ultimately taken out of work by Dr. Uthaman on June 1, 2012. Uthaman deposition at 29; A-32. At the time that disability note was issued, Mr. Whitney was doing similar work to that which he had been doing for Bearing Construction, except that he was traveling further to the job site. TR-28; A-31. He testified that there was no specific incident that caused him to seek treatment with Dr. Uthaman; it was merely continuing to work at his job that caused his pain to build over time. TR-28, 29; A-31, 32. At the time he began seeing Dr. Uthaman, he had been working at Dixie Construction for approximately a year. TR-29; A-32. He testified that while he was at a different company at that time, it was the same exact work. Id. Dr. Uthaman told Mr. Whitney on June 1, 2012 that he had to stop, and issued the work note taking him out of work. Id. Mr. Whitney testified that he understood from Dr. Uthaman at that time that he should do something less demanding, "like every other doctor had suggested." Id.

Mr. Whitney testified that he began looking for other work immediately, and that he found a new job starting August 23rd at Playtex in Dover, via a

temporary employment agency. TR-30; A-33. Mr. Whitney testified that his job is to operate a forklift in a warehouse. Id. The warehouse floor is a smooth surface, and there is nothing demanding about the job at all. Id. He can operate the forklift either sitting or standing, and can change positions at will. Id. Mr. Whitney testified that the work is not any more physical than pulling on a lever. Id.

Mr. Whitney also testified about a 2010 dump truck incident. He indicated that he'd ridden in equipment before. TR-34; A-37. He testified that his back was hurting every day from shoveling at that time, and that he thought he would try driving the dump truck to see if it helped alleviate his pain. Id. Unfortunately, the bouncing and jarring motion of the truck over uneven ground just increased his pain. Id. However, he only missed "maybe a day" as a result of that activity, and thereafter continued to work in his physically demanding, heavy labor job. Id.

Mr. Whitney also discussed a motor vehicle accident in August of 2010, describing it as a stop sign/intersection collision where the oncoming vehicle struck him as he was making a left turn. TR-34, 35; A-37, 38. He described it as a sudden jolt, like a jar, and he felt that it aggravated things a little bit. TR-35; A-38. Mr. Whitney testified that he did not miss any work following that event, and again continued in the same heavy, physical labor job. Id. Mr.

Whitney indicated that the aggravation resolved "really quick," within a few days. Id.

Dr. Uthaman, Claimant's treating physician, testified on Claimant's behalf. Dr. Uthaman had begun treating Mr. Whitney on March 28, 2011. TR-10; A-13. He noted the history of Mr. Whitney's work injury to his low back in March 2005 while lifting a road sign. Id. Dr. Uthaman noted that Mr. Whitney had undergone conservative care for some time following the injury, and ultimately had surgery with Dr. Kalamchi in 2007. Id. Thereafter Mr. Whitney had undergone numerous injections and a nerve ablation procedure. Id. Most recently he had had a discogram and been seen by Dr. Katz, but Dr. Uthaman noted that Mr. Whitney was reluctant about having any further surgery. Id.

Dr. Uthaman noted on initial examination that Mr. Whitney had tenderness, tightness and spasm with limited lumbosacral movements, and lot of spasm extending to the thoracolumbar and upper dorsal region. TR-11; A-14. Mr. Whitney had difficulty with forward bending, extending and rotation of the lumbar spine. Id. Dr. Uthaman diagnosed chronic pain syndrome, chronic low back pain, failed back syndrome, and sciatic neuropathy on the left side. Id. Dr. Uthaman ordered x-rays and an MRI of the lumbar spine and EMG of the legs, and undertook chronic pain management treatment of Mr. Whitney's symptoms. Id. Dr. Uthaman confirmed that he related the diagnoses to the work injury and

subsequent surgery. Id.

Dr. Uthaman reviewed his ongoing care of Mr. Whitney and the patient's continuing symptoms. Id. Mr. Whitney had been referred for therapy as well as a back brace and a TENS unit. TR-11, 12; A-14, 15. Dr. Uthaman noted that the EMG results revealed that there was some nerve damage in the legs, and there had been wasting of a particular muscle that corresponds to the S1 nerve root. TR-12; A-15. Dr. Uthaman testified that the EMG findings were consistent not only with the Claimant's complaints but also with the earlier MRI findings. Id.

Dr. Uthaman noted increasing symptoms of low back and left leg pain by the August 2011 visit. Id. Mr. Whitney was at that time describing shooting pain, numbness and tingling in the left leg in addition to the back pain, and Dr. Uthaman noted spasm in the low back, but that Mr. Whitney was still working despite the pain and spasm. Id. Dr. Uthaman noted that an MRI performed on August 25, 2011 noted a mild progressive protrusion of the annulus for the right S1 nerve root, and that Mr. Whitney probably had a nerve compression on the right side at L5/S1. Id. Trigger point injections were administered, which had seemed to help with the spasm by the next visit. TR-12, 13; A-15, 16.

Dr. Uthaman performed another set of trigger point injections in September of 2011, and again in December of 2011. TR-13; A-16. Dr.

Uthaman recommended, and ultimately performed, deeper injections in Mr. Whitney's back, which were designed to deliver medication to the nerve rather than the superficial muscles alone. TR-13, 14; A-16, 17. Mr. Whitney had the deeper, paravertebral blocks in January and March of 2012. TR-14; A-17.

By June 1, 2012, Mr. Whitney was relating to Dr. Uthaman that he cannot do his physical job, due to low back pain and left leg pain. TR-15; A-18. Dr. Uthaman noted that the spasm was increasing. Id. Dr. Uthaman completed a physician's report dated June 1, indicating that Mr. Whitney could work zero hours per day at that point. Id. The note reflected that Mr. Whitney should restrict all phsycial strenuous work, and that he should do some type of desk job. Id. Dr. Uthaman testified that he issued the work note because Mr. Whitney was having increased pain and spasm. Id. He felt that the symptoms were increasing with the activities of work. Id. Dr. Uthaman recommended that Mr. Whitney return to see Dr. Katz, the surgeon, regarding a surgical opinion. TR-16; A-19. Dr. Uthaman continued to see Mr. Whitney and noted that he had returned to other employment on August 23, 2012. Id. He confirms that all of the treatment that he provided, as well as the work restrictions, were reasonable, necessary and related to the work injury. Id.

The Employer called Ellen Lock, a vocaitional case manager, as part of its case. Ms. Lock testified that she performed a Labor Market Survey identifying

ten jobs that she believed were within the Claimant's age, education, vocational, training, work experience and physical capabilities. TR-70, 71; A-73, 74. The jobs identified by Ms. Lock pad an average of $527 per week. Ms. Lock admitted that none of the employers identified on the Labor Market Survey actually offered to hire Mr. Whitney. TR-74; A-77.

Dr. Piccioni testifed as the Employer's medical expert. Dr. Piccioni had examined Mr. Whitney on March 14, 2008 and November 7, 2012. TR-79; A-82. Dr. Piccioni noted that as of the March 2008 visit that Mr. Whitney had undergone surgery, had returned to work, and was taking no pain medications at that time. TR-79, 80; A-82, 83. Dr. Piccioni had diagnosed Mr. Whitney as status post discectomy L4/5 for a herniated disk with L5 radiculopathy. TR-81; A-84.

At the time of the 2012 examination, Dr. Piccioni testified that he questioned Mr. Whitney about the May 17, 2012 date when he was taken out of work by Dr. Uthaman. TR-81; A-84. Dr. Piccioni testified that Mr. Whitney related that there was no accident or new work injury at that time; he simply had a marked increase in his pain in the lumbar spine. Id. Dr. Piccioni also testified that he was aware that Mr. Whitney had subsequently returned to work as a forklift operator. TR-82; A-85.

Dr. Piccioni noted that there had been no significant changes in the MRI

of August 2010, and tht there had been no progression of any disk herniation from the previous surgical site. Id. Dr. Piccioni testified that he reviewed records from First State Orthopedics in June of 2010 that described increased sypmtoms when Mr. Whitney was driving a dump truck off road. TR-83; A-86. In those records, Dr. Katz described the sypmtoms as a re-aggravation of the symptoms he had first experienced. Id. Dr. Piccioni also reviewed records from Dr. Lieberman that reflected the same history of driving a dump truck off road resulting in back pain. TR-83, 84; A-86, 87. Dr. Piccioni also reviewed the August 2010 records from First State Orthopedics reflecting a history of a motor vehicle accident, which described the motor vehicle accident as causing an 'aggravation of his low back, improved'. TR-84; A-87. The MRI of August 2010 followed the motor vehicle accident, and reflected no significant changes. TR-82; A-85. Dr. Piccioni testified that Mr. Whitney had been stable up to the 2010 incidents, including the dump truck episode. TR-86, 87; A-89, 90.

Dr. Piccioni confirmed that he wrote in his November 2012 report that Mr. Whitney's period of disability in 2012 was related to the 2005 work injury. TR-87; A-90. He testified that he reached that conclusion based on the history provided to him. Id. Dr. Piccioni testified that having reviewed the medical records, he no longer relates the 2012 condition to the 2005 work injury 'because he's had several other incidents with aggravation of pain and

worsening of pain.' Id. Dr. Piccioni testified, however, that he had all of the medical records from all of the providers identified, comprising some six inches in depth, and that he had those records prior to and in order to prepare his November 2012 report. TR-99, 100; A-102, 103. Dr. Piccioni claims that at the time he prepared his November 2012 report, he had the records of treatment between 2008 and May of 2012, but that he 'did not review those records heavily." TR-101; A-104.

On cross-examination, Dr. Piccioni confirmed that the August 2010 MRI would have been ordered because of the sypmtoms that Mr. Whitney was complaining of at that time, and that the MRI does not show any changes from previous MRIs that would evidence a further or worsening injury. TR-88; A-91.

Dr. Piccioni did not recall if Mr. Whitney was treating prior to the described dump truck incident, and he did not recall if Mr. Whitney was treating with anyone in 2009 for his work injury. Dr. Piccioni admitted that he did not review any medical records after March of 2008. TR-89; A-92. He admitted that he does not know how much treatment Mr. Whitney may have received between March of 2008 and June of 2010. Id. He would "assume" that Mr. Whitney was being seen for his work injury in 2009, but he "[doesn't] have a full recollection." Id. He admitted as well that he did not know for what condition Mr. Whitney was treating with Dr. Schwartz. Id. Dr. Piccioni also confirmed

his understanding that Mr. Whitney had been doing his heavy labor job as a pipe layer for Dixie Construction for a year prior to going out of work on May 17, 2012. TR-90; A-93.

Dr. Piccioni also confirmed that his November 2012 report states his opinion that Mr. Whitney's current problems are causally related to the March 4th 2005 work injury. TR-90; A-93. He also admitted that he based that conclusion on the fact that review of the records shows that he has a good chronology of ongoing treatment and never had an aysmptomatic period, and has always had the same problems of pain in the back with the left leg and occasional right leg pain. Id.

Dr. Piccioni testified that his opinion changed because he has now reviewed the records from 2010. TR-87; A-90. However, when asked if he believes that a 2010 injury or injuries are what is causing Mr. Whitney to miss time two years later, Dr. Piccioni responds that "it's a combination that he had these injuries and they worsened his back condition." TR-103; A-106.

Dr. Piccioni also admitted that he could not say within a reasonable degree of medical probability that the 2010 incidents produced an aggravation that lasted to the time of his examination in 2012. Piccioni deposition at 48-49; A-51-52_.

Dr. Piccioni also agreed that Mr. Whitney is not capable of the laborer job

that he was doing, but that it was appropriate for him to do the forklift job because he had the capability to alternately sit and stand, and wasn't doing any physical work associated with that job. TR-91; A-94. Dr. Piccioni also agreed with the recommendations for the EMG and MRI testing recommended by Dr. Uthaman. TR-92, 93; A-95, 96.

Following the hearing, the Board issued a decision granting the Claimant's petition and awarding temporary partial disability benefits along with the authorization for the EMG and MRI studies requested. Whitney IAB, *supra*. In reaching its conclusion, the Board noted that Dr. Piccioni had initially reached the same conclusion as Dr. Uthaman, Claimant's treating doctor, that the present complaints were related ot the 2005 work injury. Id. at *20-21. The Board noted, therefore, that the significance of the 2010 events was the crux of the issue; namely, whether any of them were factually and legally sufficient to interrupt causation. Id. at 21.

The Board concluded that there was insufficient factual evidence to find that the Claimant's condition was worsened beyond a temporary aggravation by any of the three events. Id. The Board noted that the Claimant only missed a brief period of time from work following each event in 2010. Id. at 21, 22. Further, the Board noted that the MRI of the low back in August 2010 evidenced no significant changes from the prior study. Id. at 22.

The Board further noted that Mr. Whitney continued with symptoms and treatment after surgery, including the nerve ablation procedure in 2009, and specifically noted that this continuing treatment took place after Dr. Piccioni's 2008 assessment that Claimant's condition was stable. Id. at 22-23. Mr. Whitney's gradual return and buildup of symptoms kept him in care with various providers in 2008, 2009, 2010 and beyond, and ultimately led him to leave his job in May 2012. Id. at 23.

The Board also rejected the Employer's attack on Mr. Whitney's credibility, finding that the claimant's failure to disclose the 2010 incidents to Dr. Piccioni is more likely because Claimant regarded them as insignificant events that did not impact his overall condition. Id. at 23. Further, the Board rejected Employer's suggestion that Mr. Whitney's failure inform subsequent emmployers about his prior low back injury impacted his credibility; the Board noted instead that his failure to disclose his prior injury was "more directly related to his strong motivation to find and be employed…" Id. at 24.

The Board specifically accepted Mr. Whitney's testimony that the dump truck incident was part of his regular duties and, while he experienced an increase in symptoms, the sypmtoms were the same as they had always been in terms of nature and scope. Id. at 23.

Finally, the Board found that, as a legal matter, even if the Board had

found any of the 2010 events to have caused a distinct worsening of his condition, that they would still be legally insufficient to end causation. The Board noted that the 2010 dump truck incident, if indeed a work injury, would have triggered the successive carrier analysis under Standard Distributing Co. v. Nally, 630 A.2d 640 (Del. 1993). The Board went on to find that there is no objective evidence as to a physical or anatomic alteration in Claimant's condition as a result of the 2010 use of the dump truck. Id. at 26. The Board found that the use of the dump truck in 2010 was not an 'untoward event' that resulted in either a new injury or an aggravation of Claimant's old injury. Id. The Board noted that it was incontroverted that Claimant was operating equipment, including the dump truck, as one of his incidental job duties. Id.

As to the non-work events of the auto accident and the lifting event, the Board similarly found that causation of the original work injury is not interrupted if those incidends follow as a 'direct and natural result' of the primary compensable injury. Id. at 27. The Board found similarly that the motor vehicle accident and the 2010 lifting event were insufficient to break the causal chain. Id. at 28. Once again, the Board found that there was no evidence that either of these events worsened the Claimant's condition in any meaningful way. Id. The Board therefore found that the Employer "failed to establish as a defense that the liability for Claimant's ongoing low back issues rests anywhere

other than with it." Id.

The Board went on to award temporary partial disability benefits based on Mr. Whitney's reduced earnings in his new job driving the forklift. Id. at 30. The Board rejected the Employer's labor market survey evidence, indicating that it was not persuaded that the medium duty jobs identified were consistent with the Claimant's phsyical abilities. Id. The Board also awarded the medical expenses for the contested EMG and MRI, along with medical witness fees and an attorneys' fee to be paid by the carrier. Id.

Following the Board's hearing, the Employer filed an appeal of that decision to the Delaware Superior Court. Following briefing, the Superior Court issued its decision reversing the Board's award of benefits. Whitney Superior, *supra*. The Superior Court's ruling was based on the Court's determination that Dr. Uthaman's testimony was insufficient to support the causal relationship of Claimant's present condition to the 2005 work injury, and that therefore the Board's award of benefits was not supported by substantial evidence. Id. at 12-13.

The Claimant below has appealed the Superior Court's adverse ruling to this Court. This is Claimant's Opening Brief.

Argument

ISSUE 1: The decision of the Industrial Accident Board was free of legal error and supported by substantial evidence, and should not have been reversed by the Superior Court.

Question Presented

Claimant argued before the IAB that he was entitled to lost wage benefits based on Dr. Uthaman's disability note and Claimant's return to work for another employer. *See*, e.g., TR-4, 5, A-7, 8. Claimant also argued that Mr. Whitney's knee injury continued to be related to the work-related injury of March 4, 2005. TR-103-110; A-106-113. Claimant maintained this argument in briefing in the Superior Court in its Answering Brief resisting the Employer's appeal.

Scope of Review

In reviewing whether the Industrial Accident Board properly exercised its authority in applying the facts to the law, the role of the appellate court is to examine the record to determine whether substantial evidence exists to support the findings below. Hebb v. Swindell-Dressler, Inc., 394 A.2d 249 (Del. 1978); Histed v. A.I. duPont de Nemours & Co., 621 A.2d 340 (Del. 1993). "Substantial evidence" means such relevant evidence as a reasonable mind

might accept as adequate to support a conclusion. Histed, *supra*, citing Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981). This Court's review of questions of law is *de novo*. Duvall v. Charles Connell Roofing, 564 A.2d 1132 (Del. 1989).

While this Court has the power to review the Board's findings below, "the scope of review is very narrow." Craig v. Synvar Corp., 233 A.2d 161, 163 (Del.Super.Ct. 1967). Absent an error of law, the standard of review for a Board's decision is abuse of discretion. Digiacomo v. Board of Pub. Educ., 507 A.2d 542, 546 (Del. 1986). The Board has abused its discretion only when its decision has exceeded the bounds of reason in view of the circumstances. Willis v. Plastic Materials Co., 2003 Del. Super. LEXIS 9 (Del.Super.Ct. 1/13/2003). Further, "in reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below." General Motors Corp. v. Guy, C.A. No. 90A-JL-5, Geblein, J. (Del.Super.Ct. August 16, 1991).

Merits of Argument

The Superior Court's decision in this case turns on a finding that there was no medical testimony to support the Board's ultimate conclusion that Mr. Whitney's condition continued to be related to his 2005 work injury. The Court's decision, however, effectively substitutes its judgement for that of the

Board, and in so doing exceeds the scope of review on appeal from a decision of the IAB. The Court also misapplies the legal precedents on causation, thereby imposing on Claimant an improper and greater burden of proof.

The Superior Court, unfortunately, engages in some speculation about the present cause of Mr. Whitney's back problems. In determining that Dr. Uthaman's opinion was defective, the Court indicates that "there are three incidents in 2010 that Dr. Uthaman was not aware of that *could well be the cause* of Whitney's current back problems." Whitney Superior at *9 (emphasis added). However, the Court's speculation about what "could well be the cause" of Mr. Whitney's symptoms is improper in light of the Court's standard of review on appeals from the IAB, which is highly deferential to the Board's factual determinations. In short, it is for the Board to decide whether the 2010 events were or were not causative of Mr. Whitney's current back problems. If there is substantial evidence to support the Board's finding, then the determination must stand. Histed, *supra*.

The Board found, both as a matter of fact and as a matter of law, that the 2010 events did not cause Mr. Whitney's back problems. The Board found those events to have caused Claimant to miss only a brief period of time from work, and resulted in no changes on the Claimant's subsequent MRI study when compared with the previous MRI. TR-21, 22; A-24, 25. Further, the Board

noted continuing symptoms from the time of Mr. Whitney's surgery, up to and though to the present time. TR-22, 23; A-25, 26. The Board also noted that the Claimant continued to work in a physical, heavy, manual labor job for approximately two more years before Dr. Uthaman finally took him out of work. Whitney IAB at 22. From these facts, which were supported by the Claimant's testimony, the Board concluded that the events of 2010 were no more than a temporary aggravation of his underlying work-related condition, and thus insufficient to break the causal chain. Id. These factual findings are supported by the record, and constitute substantial evidence upon which the Board could, and did, rely in reaching its conclusion. The Board's decision should therefore not have been disturbed by the Superior Court, and the Court therefore erred in reversing the Board's decision.

As noted above, this Court's function is to determine whether substantial evidence exists to support the Board's decision. Hebb, *supra*. This is a highly deferential standard, which does not involve the weighing of evidence or determinations of credibility by this Court. The issue on appeal is *not* whether the Board could have found differently than it did based on the factual record below, nor whether the Superior Court would have reached the same conclusion; the question is whether the factual record below contains substantial evidence in support of the ruling the Board *did* make. *See, e.g.,* State v. Stevens, 2001

Del.Super. LEXIS 167, C.A. No. 00A-02-008-CHT (Del.Super.Ct. May 15, 2001) at *12, *aff'd* 784 A.2d 1081 (2001).

In terms of what medical evidence is available that is consistent with the underlying facts as the Board has found them, the Claimant submits that the testimony of *both* doctors supports the Claimant's case. While the Employer argued below, and the Superior Court found, that Dr. Uthaman did not know of the 2010 events, the fact that the Board found those events to be insignificant makes this supposed deficit in Dr. Uthaman's testimony irrelevant – if Dr. Uthaman didn't know about these events but the Board found them immaterial, then Dr. Uthaman's opinion that does not rely on these facts is entirely sound. Further, Dr. Piccioni's initial opinion as outlined in his report was that he believed that the Claimant's condition in 2012 continued to be related to the 2005 work injury. It was only when he testified, and after he had more thoroughly reviewed the medical records in his possession, that he opined that the 2010 incidents were significant. Once again, however, the Board's factual determinations refute the supposed significance of the 2010 events. This factual determination thus restores Dr. Piccioni's original opinion as outlined in his report, namely that the condition continues to be related to the work injury.

The Superior Court's opinion holds that none of the medical testimony supports the Board's conclusion – Dr. Uthaman because he had incomplete

information, and Dr. Piccioni because the Board rejected his ultimate opinion. However, medical testimony is not an all-or-nothing prospect; the Board's rejection of Dr. Piccioni's ultimate conclusion is not equivalent to the Board's rejection of every element of Dr. Piccioni's testimony. The Superior Court's ruling intimates that the Board's rejection of Dr. Piccioni's ultimate conclusion is the equivalent of striking his testimony entirely from the record. However, the Board has the latitude to accept or reject an expert's testimony in whole *or in part*. Pearson-Gaines v. Pepco Holdings, Inc., 981 A.2d 1159, 1161 (Del. 2009), *citing* Lewis v. Formosa Plastics, 1999 Del.Super. LEXIS 391 (7/8/2009)[1]. The Board has done exactly that here, in that it has reviewed the medical testimony in order to correlate the opinions, and the bases for those opinions, with the facts as the Board has found them in order to determine the validity and utility of the medical opinions. This is a proper application of the Board's quasi-judicial powers, to be reversed by an appellate court only in cases of legal error or abuse of discretion.

Further, medical testimony is not the exclusive determinant for causation before the Board, which is nearly always a blended issue of of both expert and lay factual testimony. It is worth noting that neither Dr. Uthaman nor Dr.

[1] "[I]n weighing the testimony of physicians that testify at a Board hearing, it has "never been construed as an 'all or nothing' rule." Where the Board is presented with differing medical testimony, it is free to reject, in full or in part, the testimony of one physician based on its

Piccioni were present for any of the 2010 events (nor for the original injury). All of the doctors are therefore dependent on the Claimant for the history, and they are similarly dependent upon the Claimant for the description of symptoms and sources and areas of pain, as well as any comparisons with how those symptoms may have evolved over time. Our courts have long recognized that medical testimony is not considered in a vacuum; on the contrary, it must be synthesized and integrated with the rest of the evidence by the finder of fact. *See, e.g.* General Motors v. Freeman, 164 A.2d 686 (Del. 1960)[2]

Dr. Uthaman begins seeing Mr. Whitney in 2011, which is well after Mr. Whitney's work injury; However, his late involvement in Mr. Whitney's care does not disqualify him as a medical expert. He relies on Mr. Whitney's history, the examination findings, and prior diagnostic studies in formulating his opinions. If Dr. Uthaman is wrong about the history, his conclusions based on that history may be undermined; however, it is for the Board to determine the history and the significance thereof, and the Board has determined the history to be consistent with the Claimant's recitation of events as provided to Dr. Uthaman. The Board's factual determination is supported by substantial evidence in the record. Accordingly, Dr. Uthaman's conclusions which are

[2] On the distinction between "possible" and "probable" in medical testimony, the Court noted that testimony that a condition was "possibly" related, where "such testimony is supplemented with other credible evidence tending to show that the injury occurred…we think such evidence would be sufficient to sustain an award." Id. at 688.

premised on Mr. Whitney's factual history are similarly valid and themselves constitute substantial evidence on which the Baord can rely. *See* Perdue, Inc. v. Rogers, C.A. No. S11A-09-003-THG (Del.Super.Ct. 9/4/2012) at *16-19.

The Superior Court's final error in this case is to find that the Board's legal analysis is flawed – that, despite having considered all of the possible legal avenues and theories, that the Board's conclusion is defective because it rejected Dr. Piccioni's opinion and Dr. Uthaman's opinion is legally deficient, leaving no medical evidence on which the Board could rely. The Court notes that:

> [t]he Board covered all the apparent outcomes in this case, finding that (1) Whitney had proven that his back problems were causally related to the 2005 industrial accident, (2) Whitney's other employers were not responsible for Whitney's back problems, and (3) Whitney's misconduct or negligence did not cause his back problems.

Whitney Superior at *11-12. The Court then goes on to state that "[h]owever, Whitney first had to prove that his back problems were causally related to the 2005 industrial accident." Id. at *12. However, the Board found that the Claimant had done so, and the Board's finding in this regard is supported by substantial evidence, as noted above: the condition was previously established as compensable; the Board had as recently as February 2010 ordered the carrier to pay lost wage benefits following Mr. Whitney's radiofrequency ablation procedure (the causal relationship of which procedure was not even contested by the carrier); the Claimant testified to continuing symptoms following the 2005

work injury; the Claimant testified that the 2010 incidents were minor and did not change the character or location of his pain; and finally, that the 2010 incidents did not prevent him from continuing to work a heavy, physically demanding job for nearly two full years more before Dr. Uthaman took him out of work. The Board accepted those facts, which consitute substantial evidence in support of the Board's conclusion that the Claimant's condition continued to be related to the 2005 work injury.

Further, the Board went on to consider, *as a legal matter*, whether any of the factual circumstances alleged by the Employer could, *if accepted as a factual matter*, be sufficient to break the chain of causation under either Nally or Barkley (as to work-related and non-work related subsequent intervening events, respectively). Importantly, the Court takes no issue with the Board's legal analysis in this regard, finding only that the Claimant did not prove that his condition continued to be related to the 2005 work injury. The Court's ruling, however, partially misconstrues the law on burdens of proof applicable to this case.

The burdens of proof differ depending on which of the 2010 incidents is under consideration. The "dump truck incident" occurred at work, and as the Board noted, the legal issue is one of successive carrier liability under Standard Distributing Co. v. Nally, 630 A.2d 640 (Del. 1993). Importantly, the Nally

case places the burden of proof in successive carrier cases *on the carrier on the risk at the time of the initial injury*. Id. at 646. Thus, it is the Employer below, and *not Mr. Whitney*, who bears the burden of showing that the dump truck incident ends liability for Bearing Construction and its carrier. The Superior Court erred in placing this burden of proof on the Claimant.

Further, the Employer could not meet its burden under Nally in any event. Nally holds that a 'recurrence' of an injury, defined as the return of an impairment without the intervention of a new or intervening "untoward event" remains the responsibility of the carrier for the first work injury. Id. at 644. An 'aggravation', conversely, requires a new injury or worsening of the previous injury attributable to an "untoward event". Id. at 645. Perhaps most tellingly in the context of the instant case is the Court's statement that "The need to establish a second accident or event, *beyond the normal duties of employment*, is a continuing requirement in order to shift liability from the first carrier who bears responsibility for the effect of the original injury." Id. at 646 (emphasis added). That an untoward event *beyond the normal duties of employment* is required to shift liability is dispositive in this case – the Board found that the Claimant's activities in driving the dump truck were part of his normal duties. Consequently, the dump truck driving incident cannot, as a matter of law, constitute an 'untoward event' sufficient to shift responsibility to the second

employer.

The other events of 2010 were not connected to Mr. Whitney's work duties, and are therefore analyzed under different legal precedent. Once causation was established (as it had been by prior Board decision), the rule of "direct and foreseeable consequences" applies. Johnson Controls v. Barkley, C.A. No. 02A-01-003-JTV, Vaughn, J. (Del.Super.Ct. January 27, 2003). Under that standard, only the Claimant's intentional (or perhaps negligent) conduct will sever the casual relationship. Even a subsequent, non-work related accident does not sever the causal relationship if the injury relates to a weakened condition which is itself the result of the original work injury. The Court cited with favor Professor Larson's learned treatise on this point:

> 'When the primary injury is shown to have arisen out of and in the course of employment, *every natural consequence that flows from the injury likewise arises out of the employment* unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.'

Barkley, *supra* at *3, citing Larson, *Workmen's Compensation Law* § 1300 (emphasis added). Accordingly, under the rule of "direct and natural consequences", once causation is established, it continues absent a showing of intentional conduct by the Claimant that severs the causal chain. As with the subsequent work accident standard under Nally, the burden lies with the party

raising the issue to prove the intentional conduct of the Claimant interrupts the causal chain. There is no evidence on the record made below that the Claimant acted intentionally (or even negligently) to cause either the auto accident or the lifting injury that the Employer alleges are intervening, superceding causes in this case.

The Superior Court's ruling seems to suggest that every workers' compensation petition involves a retrial of the causation question, notwithstanding that a claimant's work injury may already have been established as compensable, either by agreement or prior Board proceeding. However, the citations[3] by the Court suggest that there may be some confusion on this point, as each of those cases involves the original petition for benefits, which is the opportunity for the initial determination of compensability. In other words, the threshold issue of causation in the initial Petition to Determine Compensation Due[4] has not yet been established; a central question for the Board to resolve in such a petition is whether the claimant's injury resulted from his work. The

[3] The Court cites Turner v. Johnson Controls, 44 A.3d 923, 2012 WL 1390345 (Del. 4/20/2012), Hoffecker v. Lexus of Wilmington, 2012 WL 341714 (Del. 2/1/2012), and Diamond Fuel Oil v. O'Neal, 734 A.2d 1060 (Del. 1999) and Rhodes v. Diamond State Port Corp., 2 A.3d 75, 2010 Del. LEXIS 358 (Del. 7/29/2010). Each of these cases involves an appeal of an initial Petition to Determine Compensation Due.

[4] The Petition to Determine Compensation Due is distinguished from the Petition to Determine *Additional* Compensation Due, which is used for cases in which a claim is already established and causation determined, either by prior Board decision or agreement of the parties.

instant matter is different because the case is long established – the workers' compensation carrier in this case has been responsible for many years of medical treatment, lost wage benefits, and permanent impairment benefits, all of which are a matter of record in this case. Accordingly, established workers' compensation cases such as this one do not come before the Board stripped of any prior history; we do not re-litigate the previously established facts. While there may be a dispute in a subsequent petition as to whether a claimant's condition *continues to be related* to a work-related injury, the existence of the work-related injury itself and the causation of the injury (having previously been established) is not subject to review.

This last issue may have been what the Superior Court was asserting when it held that the Claimant must prove that his back problems (in 2012) were causally related to the 2005 industrial accident. The Court may have failed to appreciate the significance of the Board's analysis, however: the initial causation of Mr. Whitney's injury was established not only by the claimant's testimony and that of both medical experts, but was also a foregone conclusion given that the claim had been accepted as compensable, the carrier had already paid substantial benefits and medical expenses, and the Board had as recently as February of 2010 determined the Claimant's work injury to be continuing in awarding disability benefits at that time. Indeed, the argument advanced below

was that there had been an intervening, superceding cause or causes in 2010 that interrupted the chain of causation. In addressing that argument, the Board found, as noted by the Superior Court, that Mr. Whitney's other employers were not responsible for his back problems, and that Mr. Whitney's misconduct or negligence did not cause his back problems. The Superior Court failed to appreciate, however, is that these two determinations are, in fact, the proof that the injury continues to be related to the 2005 work event – the only arguments advanced before the Board were that one or more of the 2010 events severed the causal chain. The Board's determinations that none of the three events of 2010 did so are what determine continuing causation in this case. Medical testimony from *both doctors* indicates that, in the absence of any significant intervening events in 2010, the Claimant's condition continues to be related to the work injury. The Superior Court's apparent doubts about the Board's factual determinations as to the significance of the 2010 events is an insufficient basis to reverse the Board's factual determinations, and the Superior Court erred in doing so.

There is ample evidence in the record – more than enough to meet the 'substantial evidence' threshold – to support the Claimant's claim: (1) Dr. Uthaman, although unaware of the 2010 incidents, believes that Mr. Whitney's condition continues to be related to the 2005 work injury. This medical opinion

is sufficient because the Board ultimately found that, as a factual matter, the 2010 events were inconsequential and did not cause any change in the Claimant's condition, thus matching the facts as found by the Board to the understanding that Dr. Uthaman had of the Claimant's history. (2) Dr. Piccioni, with the Claimant's history and the benefit of all of the medical records at his disposal, writes in his report that he believes that Mr. Whitney's condition continues to be related to the 2005 work injury. (3) Further, at Dr. Piccioni's deposition he asserts that the intervening events of 2010 *combined with* the back problem resulting from the 2005 work injury to worsen Mr. Whitney's condition. TR-103; A-106. From a causal relationship standpoint, this statement by Dr. Piccioni is itself legally sufficient to support continued causation under the "but-for" standard of Reese v. Home Budget Center, 619 A.2d 907 (Del. 1992) and either Nally or Barkley (depending on which of the 2010 events is under consideration). Finally, (4) the change in Dr. Piccioni's opinion occurs when he testifies that he believes that the 2010 events are significant and changes his opinion to reflect that the present symptoms are due to some combination of the 2010 events. However, the Board ultimately rejects the factual premise of Dr. Piccioni's changed opinion – having rejected the premise that the 2010 events were significant, Dr. Piccioni's original opinion (as written in his report) is valid – that the present condition and work restrictions

continue to be related to the 2005 work injury.

As to the medical evidence, there is no dispute that the Claimant's condition *immediately prior to* the 2010 events continues to be related to the 2005 work injury. It is undisputed that Mr. Whitney has continuing complaints at that time, and that they continue to relate to the work accident. The Board explicitly recognized this when it found that "in the absence of [the 2010] events, there is no controversy between the medical experts as to causation." Whitney IAB at *21. Indeed, the *only argument* made by the Employer to the Board was that the 2010 events were intervening causes that severed the causal chain from the 2005 work injury. The Employer cannot now argue on appeal that the causal chain was broken *before* the 2010 events, when that argument was not advanced by the Employer before the Board. Flax v. State, 852 A.2d 908 (Del. 2004); Ward v. Dep't of Elections, 977 A.2d 900 (Del. 2009). To the extent that the Superior Court's decision can be read as suggesting same, such decision would be improperly founded as not raised below, and should be reversed, as the Employer did not argue that Mr. Whitney's condition in 2010 (before the intervening events) was unrelated to work – the Employer argued *exclusively* that the 2010 events were an intervening, superceding cause. The Board thoroughly considered and rejected the employer's defense, finding not only that the alleged events of 2010 were not material as a matter of fact, but

also that as a matter of law these events were insufficient to break the causal chain.

It is clear that Mr. Whitney's condition continued to be related to the 2005 work injury. Factually, the Board found the 2010 events to be insignificant and insufficient to sever the continuing causal chain. That conclusion is consistent with Dr. Piccioni's original opinion, as recorded in his report, prior to changing his opinion at the time of his deposition in order to assert that the 2010 events, or some combination of them, were what "worsened his back condition." It is also consistent with Dr. Uthaman's opinion that is absent of reference to Drthe 2010 events. Finally it is consistent with the factual history of continued physical manual labor for two additional years beyond the 2010 events, which confirms their relatively minimal impact on Mr. Whitney's condition. The Board's decision awarding benefits to Mr. Whitney is consistent with the record evidence in this case, supported by substantial evidence and free form legal error. The Superior Court therefore erred in reversing the decision of the Board, and the Claimant respectfully requests that this Court reverse the Superior Court's decision and restore the Board's award of benefits accordingly.

Conclusion

WHEREFORE, based on the foregoing, the Claimant/Appellee Below, Appellant, Joseph Whitney, by and through his attorneys, Schmittinger & Rodgriguez, P.A., hereby respectfully requests that the Court reverse the decision of the Superior Court and reinstate the decision of the Industrial Accident Board below, consistent with the statutes and case law referenced above.

Respectfully submitted,

SCHMITTINGER AND RODRIGUEZ, P.A.

BY: /s/ Walt F. Schmittinger

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DATED: November 13, 2013

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
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RE: Bearing Construction, Inc. v. Joseph Whitney
C.A. No. S13A-01-004-ESB

Date Submitted: July 18, 2013

Dear Counsel:

This is my decision on Bearing Construction Inc.'s appeal of the Industrial Accident Board's decision granting Joseph Whitney's Petition to Determine Additional Compensation Due. Whitney was involved in a compensable work-related accident while working for Bearing Construction on March 4, 2005. Whitney worked as a laborer installing underground sewer and water pipes. Whitney was lifting a 50 pound road sign when he felt a pop in his back. Whitney was diagnosed with a herniated disc. Whitney initially received physical therapy and anti-inflamatories. Despite this treatment the pain in his back worsened and migrated to his left hip, knee

and foot. Dr. Ali Kalamchi performed back surgery on Whitney in 2006.[1] Whitney did not initially respond well to the surgery. However, over time the pain in his back decreased, but it did not disappear completely.

Whitney returned to work at Bearing Construction following his surgery and continued to work full-time in the construction industry as a pipe layer and equipment operator for a number of different employers until 2012 when he got a job driving a forklift in a warehouse because his back hurt too much to do construction work. Whitney also continued to receive medical treatment after the surgery. This included a series of injections and ultimately a nerve ablation in 2009. However, Whitney did not receive any treatment for his back from December 2009 to June 2010.

In June 2010, Whitney, while doing construction work for Mumford & Miller, was driving a dump truck over uneven ground that "bottomed out" when it hit a bump. This caused Whitney's back to hurt, prompting him to seek treatment with Dr. Bruce Katz at First State Orthopaedics on June 3, 2010. Whitney missed a few days of work and was given a doctor's note that restricted his ability to drive a dump truck.

In August 2010, Whitney was involved in a non-work related motor vehicle accident. Whitney drove his car into the side of a truck at an intersection. He thought

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[1] There is conflicting information surrounding the actual year of Whitney's back surgery. For purposes of this review, whether the surgery took place in 2005, 2006, or 2007 is irrelevant. The surgery performed was a L4-5 decompressive laminectomy and microdiscectomy.

the accident aggravated his back pain. He did not miss any work as a result of this accident. However, following the dump truck incident and the motor vehicle accident, Whitney had an MRI of his lower back. In addition to seeing Dr. Katz, he also saw Dr. Ronald Lieberman. Dr. Katz is an orthopaedic surgeon. Dr. Lieberman is a pain management specialist at Delaware Spine. Dr. Katz thought that Whitney should no longer do construction work.

In September 2010, Whitney went to the emergency room for treatment of his back, which he had hurt while taking camping equipment out of a truck and lifting his daughter.

In March 2011, approximately six months after the last of the three incidents in 2010, Whitney started seeing Dr. Uday Uthaman, a board certified pain management specialist. Whitney told Dr. Uthaman about his 2005 industrial accident, but he did not tell him about any of the incidents in 2010. Whitney also told Dr. Uthaman that his back pain had increased over time. Dr. Uthaman diagnosed Whitney with chronic pain syndrome, chronic low back pain, failed back syndrome, and sciatic neuropathy on the left side. Dr. Uthaman continued to see Whitney on a regular basis. Whitney's physical condition from visit to visit remained essentially the same. During this time, Whitney went to physical therapy and received trigger point injections to relieve the pain in his back and to reduce his back spasms. The

injections allowed Whitney to continue working. Whitney also received nerve blocks on several occasions. However, by May 2012, Whitney felt that he could no longer work laying pipe given the pain in his low back and left leg. Dr. Uthaman agreed and suggested to Whitney that he get a desk job. Whitney then got the job driving a forklift in a warehouse, earning less money than he was making in the construction industry.

THE BOARD HEARING AND DECISION

Whitney filed a Petition to Determine Additional Compensation Due with the Board alleging a recurrence of his entitlement to compensation for a partial loss of his earning capacity. He also sought approval to undergo MRI and EMG testing. Whitney had the burden of proving that his partial loss of earning capacity was a direct and natural result of the 2005 industrial accident.[2] Whitney had to produce competent medical testimony establishing causation "within a reasonable degree of medical probability."[3] The Board heard testimony on this issue from Whitney, Dr. Uthaman, and Dr. Lawrence Piccioni. Dr. Uthaman testified on behalf on Whitney. Dr. Piccioni testified on behalf of Bearing Construction.

Dr. Uthaman testified that Whitney's inability to do construction work was

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[2] *Hudson v. E.I. DuPont De Nemours & Co.*, 245 A.2d 805, 810 (Del. Super. May 27, 1968); 29 *Del. C.* §10125(c).

[3] *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060 (Del. 1999).

related to his 2005 industrial accident and that all of the treatment he had received was reasonable, necessary and related to his 2005 industrial accident. Dr. Uthaman testified further that his opinions were based upon the history provided by Whitney, his examinations of Whitney and the test reports generated at his request. Dr. Uthaman did not know about any of the 2010 incidents and had not reviewed all of Whitney's medical records.

Dr. Piccioni is a board certified orthopaedic surgeon. Dr. Piccioni examined Whitney on March 14, 2008 and November 7, 2012. At the 2008 examination, Dr. Piccioni noted that Whitney had undergone surgery, had returned to full-time work, and was not taking pain medications. At the 2012 examination, Dr. Piccioni told Whitney that the purpose of his examination was to determine whether his current back problems were related to the 2005 industrial accident. Whitney told Dr. Piccioni that he had no new accidents or injuries. Whitney did not tell Dr. Piccioni about the 2010 incidents. Whitney told Dr. Piccioni that he voluntarily stopped working as a pipe layer and equipment operator due to an increase in his back pain. Based upon his review of the records and Whitney's inaccurate history, Dr. Piccioni initially agreed with Dr. Uthaman that Whitney's inability to do construction work was related to the 2005 industrial accident. While Dr. Piccioni did have the medical records of the 2010 incidents, he admitted that he did not thoroughly review those records.

After reviewing the medical records from the 2010 incidents, Dr. Piccioni changed his opinion and concluded that Whitney's inability to do construction work in 2012 was related to the 2010 incidents and not the 2005 industrial accident.

The Board accepted Dr. Uthaman's testimony, finding that it was adequate to establish the causal connection between Whitney's current back problems and the 2005 industrial accident. In reaching this conclusion, the Board also found that the 2010 incidents caused nothing more than a temporary aggravation of Whitney's symptoms that quickly passed. The Board reached this particular finding on its own without the benefit of any medical testimony to that effect. The Board also found that Whitney was entitled to relief even if the 2010 incidents caused a distinct worsening of his condition, reasoning that the 2010 incidents did not constitute an "untoward event," which would have cut off Bearing Construction's liability under *Nally,*[4] or intentional or negligent misconduct by Whitney, which would have cut off Bearing Construction's liability under *Hudson.*[5]

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of

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[4] *Standard Distributing Company v. Nally,* 630 A.2d 640 (Del. 1993).

[5] *Hudson,* 245 A.2d 805.

the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the Board's decision is supported by substantial evidence and whether the agency made any errors of law.[6] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[7] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[8] It merely determines if the evidence is legally adequate to support the Board's factual findings.[9] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[10]

DISCUSSION

Bearing Construction argues that the Board's finding that Whitney's current back problems are causally related to his 2005 industrial accident is not supported by substantial evidence in the record. The Board's finding on this issue is based on Dr.

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[6] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

[7] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986)(TABLE).

[8] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[9] 29 *Del.C.* § 10142(d).

[10] *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

Uthaman's testimony and its own analysis of the 2010 incidents. Bearing Construction further argues that Dr. Uthaman's testimony is inadequate to support the Board's finding because he did not review Whitney's medical records from 2005 to early 2011 and was unaware of the 2010 incidents and that the Board's finding regarding the 2010 incidents is not supported by any medical testimony.

The picture that Whitney painted for Dr. Uthaman was that he was hurt at work in 2005, that he had continued to do demanding construction work, and that it had finally gotten the best of him, leaving him with no choice but to find less demanding work at lower pay. Dr. Uthaman's testimony on causation is brief. It is excerpted as follows:

> Q. Okay. And as of this point are you the physician managing his care at this point?
>
> A. For his chronic pain, yes.
>
> Q. Okay. And has all of the treatment that you've provided since March 28, 2011 through your most recent visit continued to be reasonable, necessary and related to that work injury?
>
> A. That's right.
>
> Q. And have the work restrictions that you've placed upon Mr. Whitney also been reasonable, necessary and related to the work injury?
>
> A. That's right.
>
> Q. Okay. And those are all the questions I have for you at this

time, except to ask if the opinions you've given today have been based upon reasonable medical probability?

A. Yes - - all the opinions expressed under reasonable medical probability.[11]

It appears that Dr. Uthaman reached his opinion on causation by reasoning that there was nothing else in Whitney's history that would explain his current back problems but for the 2005 industrial accident. The problem with his reasoning is that there are three incidents in 2010 that Dr. Uthaman was not aware of that could well be the cause of Whitney's current back problems. Since Dr. Uthaman was not aware of these incidents, he was not able to testify that they did not cause Whitney's current back problems. Thus, there is a critical deficit in Dr. Uthaman's knowledge about Whitney's medical history.

Moreover, there is no medical testimony supporting the Board's finding that these incidents caused nothing more than a temporary aggravation of Whitney's symptoms. Dr. Piccioni testified that these incidents caused Whitney's current back problems, stating that before the three incidents Whitney was working full-time and not undergoing any treatment and that it was only after these incidents that Whitney experienced an increase in his back pain. Thus, according to Dr. Piccioni, the 2010

[11] Deposition Transcript of Uday Uthaman, M.D. at 32-33 (Sept. 12, 2012).

incidents were much more likely to be the cause of Whitney's current back problems than the 2005 industrial accident. Dr. Piccioni, unlike Dr. Uthaman, at least articulated a rationale for his opinion on causation. Nevertheless, the Board dismissed Dr. Piccioni's testimony and reached its own conclusions. The Board is certainly free to reject a medical doctor's testimony.[12] However, this left the Board with no medical testimony to support its conclusion that the 2010 incidents were of no consequence. Dr. Uthaman did not address the 2010 incidents. Thus, the Board could not rely on his testimony. Dr. Piccioni addressed them, but the Board rejected his testimony, leaving the Board with nothing to rely upon but its own analysis of a medical issue. It is worth noting that Whitney had not sought any medical treatment for the six months before the first of the 2010 incidents and that he sought medical treatment after each of the incidents, including seeing both an orthopaedic surgeon and two pain management specialists. The first two incidents were sufficient to cause a doctor to order an MRI of Whitney's back. The third incident was bad enough to cause Whitney to go to the emergency room. Indeed, it was after these three incidents that Whitney started seeing Dr. Uthaman. While it is not appropriate for the Court to weigh the evidence, it is no more appropriate for the Board to reach

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[12] *Romine v. Conectiv Communications, Inc.*, 2003 WL 21001030, at *5 (Del. Super. April 22, 2003).

a medical conclusion without medical testimony to support that conclusion.[13] For Dr. Uthaman to offer an opinion on causation without being aware of the 2010 incidents raises a serious doubt about the sufficiency of his opinion. Similarly, for the Board to conclude that these incidents were of no consequence without supporting medical testimony raises a serious doubt regarding the sufficiency of its conclusion. In sum, the evidence that the Board relied upon to reach its conclusion about causation and the effect of the 2010 incidents on causation is not evidence that a reasonable mind would accept as adequate to support those conclusions. No reasonable mind would rely upon the testimony of a doctor whose knowledge of a patient's history is seriously deficient and who offers no rationale for his conclusion about the cause of that patient's injuries and pain.

The Board also concluded that even if it had found that any of the incidents in 2010 had worsened Whitney's condition that he still was still entitled to relief. Put another way, the Board found that (1) Whitney was entitled to relief because Dr. Uthaman testified that Whitney's back problems were causally related to the 2005 industrial accident, and (2) the 2010 incidents were not sufficient to cut off Bearing Construction's liability under either *Nally* or *Hudson*. The Board covered all the

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[13] Unrebutted objective medical evidence simply cannot be ignored. (*Pusey v. Natkin & Co.*, 428 A.2d 1155, 1157 (Del. 1981)).

apparent outcomes in this case, finding that (1) Whitney had proven that his back problems were causally related to the 2005 industrial accident, (2) Whitney's other employers were not responsible for Whitney's back problems, and (3) Whitney's misconduct or negligence did not cause his back problems. The Board's decision is a complete analysis of the legal issues in this case. However, Whitney first had to prove that his back problems were causally related to the 2005 industrial accident.[14] Under Delaware worker's compensation law, the claimant bears the ultimate burden of proof to establish that his or her injury is work-related.[15] The employer need not establish an alternative theory of causation for the injury.[16] Moreover, in order to prove the necessary causal link between the claimant's injury and his or her employment, the claimant must provide medical testimony establishing causation "within a reasonable degree of medical probability."[17] The Delaware Supreme Court has held that an employer can successfully defend a petition for worker's compensation benefits by merely rebutting the claimant's allegation that the injury

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[14] *Turner v. Johnson Controls,* 44 A.3d 923, 2012 WL 1390345 at *1 (Del. April 20, 2012).

[15] *Hoffecker v. Lexus of Wilmington,* 2012 WL 341714 (Del. Feb. 1, 2012) (citing *Strawbridge & Clothier v. Campbell*, 492 A.2d 853, 854 (Del. 1985)).

[16] *Id.*

[17] *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1066 (Del. 1999); *Rhodes v. Diamond State Port Corp.*, 2010 WL 2977331 (Del. 2010)(citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688-89 (Del. 1960)).

is work-related.[18] The Board found that Whitney did prove that his back pain was causally related to the 2005 industrial accident, but I have concluded that the Board's finding is not supported by substantial evidence in the record. Thus, since Whitney never adequately proved causation, it was not necessary for Bearing Construction to prove an alternative theory of causation for Whitney's back pain.

CONCLUSION

The Industrial Accident Board's decision is reversed for the reasons set forth herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB/sal
oc: Prothonotary
cc: Counsel
Industrial Accident Board

[18] *Id.*

4 of 8 DOCUMENTS

GENERAL MOTORS CORPORATION, Employer–Appellant, v. ARMOND GUY, Claimant–Appellee, and INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE, in and for New Castle County

C.A. No. 90A–JL–5

Superior Court of Delaware, New Castle

1991 Del. Super. LEXIS 347

January 9, 1991, Submitted
August 16, 1991, Decided

PRIOR HISTORY: [*1]

Upon appeal of a decision of the Industrial Accident Board.

DISPOSITION:

Upon appeal of a decision of the Industrial Accident Board. *AFFIRMED.*

COUNSEL:

Max S. Bell, Jr., Esquire of Richards, Layton & Finger, Wilmington, Delaware for employer–appellant.

Jane W. Evans, Esquire of Evans and Evans, Wilmington, Delaware for the claimant–appellee.

JUDGES:

Gebelein, Judge.

OPINIONBY:

GEBELEIN

OPINION:

MEMORANDUM OPINION

This is an appeal by employer–appellant, General Motors Corporation, from a decision of the Industrial Accident Board awarding benefits to employee–appellant, Armond Guy, for disability from work from November 21, 1988 to March 22, 1989.

The basis of the appeal is what defendant claims is a disparity between Mr. Guy's asserted theory of liability up to the time of the hearing (occupational disease) and the basis on which the Board awarded benefits (injury due to cumulative detrimental effect of work).

I.

Claimant–appellee, Armond Guy, worked for the employer, General Motors, beginning in November of 1984. In 1985, his job duties included putting a vinyl retainer and wire binding on wires under the dashboard. As part of his job he used a drill to put screws in the retainer clip. After a while, his shoulder **[*2]** began to hurt. In 1988 his job duties included using a rivet gun to put a lock on the trunk. he was advised by his physician to seek another work position. When he did find another position, his shoulder continued to hurt and he could not perform this job.

Armond Guy then filed a Petition to Determine Compensation Due on February 21, 1989. As required by Rule 9(A), of the IAB Rules, the parties completed pre–trial memoranda dated March 31, 1989. The pre–trial memoranda cited May 18, 1988 as to the date of the accident and claimed total disability for the period May 18, 1988 to March 28, 1989. The memoranda makes no reference to occupational disease or cumulative detrimental effect. The employer denied compensability and asserted that claimant worked through October 25, 1988 and returned to work on March 28, 1989.

On July 12, 1989, General Motors amended its portion of the pretrial to include various defenses. The new defenses included *inter alia*, that: (1) there was no entitlement to benefits for disability from work, because there was no unusual exertion involved at the time claimant's alleged disability from work began; (2) claimant's bursitis was not caused by his work, and **[*3]** exacerbation of symptoms while at work is not compensable; furthermore, (3) bursitis is not a compensable occupational disease.

Mr. Guy then amended his claim by letter of July 17, 1989. The claimant asserted three claims in the letter:

(1) April 3, 1985 – accident;

(2) April 3, 1985 – date of disability caused by cumulative detrimental effect;

(3) May 18, 1988 – date of manifestation of occupational disease.

On January 16, 1990, the employer amended the pre–trial memorandum for a second time to add the defense of the two–year statute of limitations and reiterated its contention that the claimant suffered no occupational disease.

A hearing was held before the Industrial Accident Board on May 7, 1990 concluding on May 25, 1990. In granting claimant's Petition to Determine Compensation Due, the Board found that the claimant was injured as a result of the cumulative detrimental effect of his employment in May of 1988. The Board based this finding on the testimony of Dr. Robert R. Stock, who based his opinion on examination of the claimant and his review of the medical records. The Board accepted Dr. Stock's opinion that the claimant's injury was substantially caused by the claimant's **[*4]** repetitive work duties in May 1988. The Board did not find that the complaints of shoulder pain in 1985 were sufficient to bar the claimant's 1988 claim for benefits as being untimely. The Board based this decision on the fact that the claimant did not miss any time from work in 1985 and upon Dr. Stock's testimony that it was the 1988 work duties, rather than any pre–existing condition that was the cause of the claimant's injury.

The Board found that there was no prejudice or surprise to the employer if the evidence conforms to the theory of occupational injury rather than occupational disease.

By decision of June 13, 1990, claimant was awarded total disability benefits for the period November 21, 1988 to March 22, 1989 plus medical witness fees, medical expenses and attorney fees.

II.

General Motors brought this appeal on the following grounds: (1) that the Board erred in making an award of benefits based on a factual allegation and theory of liability which were different from those alleged by the claimant; (2) that the Board erred in ignoring its own Rules, particularly Rule 9(E), n1 in allowing a significant amendment to the contention of claimant as set forth by him in the pretrial **[*5]** memorandum, when no amendment was requested and there was no hearing as to whether to allow the amendment; (3) that the Board erred in its ruling that there was "no prejudice or surprise to the employer" because: (a) no notice or opportunity to be heard was given the employer on this issue; (b) the change in the theory of liability called for an entirely different factual defense which employer never had an opportunity to develop or present; and (c) employer's time to argue the case was limited so that it could not address the issues.

> n1 (E) Either party may modify a pre–trial memorandum any time up to twenty–one (21) days prior to the hearing for which the pre–trial was held. Within twenty–one (21) days of the hearing, modification of a pre–trial memorandum can only be done by permission of the pre–trial officer or the Board.

The employee responds that: (1) the Board decided this action upon the accident theory advanced throughout the proceedings and employee was in no way the victim of substantial injustice; (2) the **[*6]** petition as amended was clearly sufficient to permit the Board to enter an award of total disability for the 1988 injury; and (3) employer suffered no "substantial injustice" from any amendment of the pre–trial memorandum as required under Delaware law.

III.

The central issue in this case is whether a hearing before the Industrial Accident Board on one theory of liability, occupational disease; followed by a decision of the Board on a different theory of liability, physical injury by accident; amounts to an error of law thereby permitting the Superior Court to overturn the Board's decision.

The Court's role in reviewing decisions of the Industrial Accident Board is limited to a review of the record to ascertain if the decision is supported by substantial evidence, or whether it is in any way arbitrary, capricious or an abuse of discretion. *Kreshtool v. Delaware Power and Light, Del. Super., 310 A.2d 649 (1973).*

In this case, the basis for appeal is employer's assertion that claimant prevailed upon a theory of liability different from that asserted in his pretrial memorandum. General Motors alleges that the claimant switched his claim from one based on occupational **[*7]** disease to one based solely on occupational injury which resulted in unfair prejudice and/or surprise to the employer.

In reviewing a decision of the Board it is not the function of this Court to sit as a trier–of–fact and to rehear the case or to substitute its judgment for that of the Board. *Johnson v. Chrysler, Del. Supr., 312 A.2d 64, 66–67 (1965).* Instead, the role of the Court is to determine whether there is substantial evidence in the record to support the Board's factual findings to correct errors of law. *Chicago Bridge & Iron Co. v. Walker, Del. Supr., 372 A.2d 185, 188 (1977), overruled on other grounds, Duvall v.*

Connell Roofing, Del. Supr., 564 A.2d 1132 (1989). Only when there is no substantial competent evidence in the record to support the Board's findings may the Superior Court overturn it. *Johnson v. Chrysler Corp., supra.*

Substantial evidence is evidence with a substantial basis of fact so that the fact in question may be reasonably inferred. *Delaware Alcoholic Beverage Control Comm'n v. Alfred I. duPont School District, Del. Supr., 385 A.2d 1123, 1125 (1978). See* **[*8]** *also, National Cash Register v. Rines, Del. Super., 424 A.2d 669, 674–75 (1980)* (discussing the standard of review for administrative agencies). In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below, resolving all doubts in its favor. *Delaware State College v. Unemployment Insurance Appeal Board and Margie Cressey,* Del. Super., C.A. No. 65, 1974, Christie, J. (Feb. 20, 1975).

The Board based its decision that the claimant was totally disabled for the period November 21, 1988 to March 22, 1989 on Dr. Stock's testimony concerning his examination of the claimant and his review of the medical records and his conclusion that the cause of the injury was the result of claimant's work duties. It is the Board, and not the Court, which has the role of resolving conflicts in testimony and issues of credibility and to decide what weight is to be given to the evidence presented, *Mooney v. Benson Mgt. Co., Del. Super., 451 A.2d 839, 841 (1982).*

The issues were fully litigated by the parties at the hearing. The issues involved were fully joined by the defense. The Court **[*9]** sees no error in the Board's conclusion that employer suffered no prejudice.

IV. CONCLUSION

Accordingly, the Board's decision is supported by substantial, competent evidence, permitting the Board to award total disability for claimant's accident in 1988.

The Board is clearly correct in its determination that the employer suffered no prejudice or surprise in the award.

For the foregoing reasons, the decision of the Industrial Accident Board is *AFFIRMED.*

IT IS SO ORDERED.

15 of 16 DOCUMENTS

Caution
As of: Jan 14, 2008

ROBERT BARKLEY, Claimant Below-Appellant, v. JOHNSON CONTROLS, Employer Below-Appellee.

C.A. No. 02A-01-003 JTV

SUPERIOR COURT OF DELAWARE, KENT

2003 Del. Super. LEXIS 21

October 23, 2002, Submitted
January 27, 2003, Decided

SUBSEQUENT HISTORY: Appeal dismissed by *Johnson Controls, Inc. v. Barkley, 2004 Del. LEXIS 435 (Del., Sept. 28, 2004)*

PRIOR HISTORY: **[*1]** Upon Consideration of Claimant's Appeal From Decision of Industrial Accident Board.

DISPOSITION: REVERSED and REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: The Industrial Accident Board (Delaware) determined that appellant claimant's prior work-related back injury was not aggravated due to his slip and fall in a store's parking lot, determined that the slip and fall was a new injury, and denied his claim against appellee employer. The claimant appealed.

OVERVIEW: The claimant received medical care for his back injury from 1985 until 1994, when he stopped his treatment because he was told the insurance carrier would no longer pay for it. The back condition did not improve, however, and the claimant continued to work with restrictions until his slip and fall. After the fall, the claimant experienced an increase in back pain in the same location as the work-related back injury, was not able to work, and required surgery not previously contemplated. The Board applied successive carrier liability caselaw. Those cases were distinguishable since the second accident here was not work-related. The applicable rule of causation that was to be applied was that a subsequent injury was compensable only if it followed as a direct and natural consequences of the primary compensable injury. Under that rule the chain of causation to the original work-related injury would be broken or interrupted only if the subsequent injury was attributed to the claimant's own negligence or fault.

OUTCOME: The trial court reversed the judgment and remanded the case for further proceedings.

COUNSEL: Walt F. Schmittinger, Esq., Dover, Delaware, for Appellant.

John W. Morgan, Esq., Wilmington, Delaware, for Appellee.

JUDGES: VAUGHN, Resident Judge.

OPINION BY: VAUGHN

OPINION

On January 31, 2000, Robert Barkley, the claimant, slipped and fell on ice while walking across a Food Lion parking lot. As a result of the fall, he suffered ongoing back pain which caused total disability. In June 2001 he

underwent surgery in an effort to correct the back pain, but the surgery did not help. On September 10, 2001, Mr. Barkley filed a petition with the Industrial Accident Board ("Board") seeking compensation for the cost of the surgery and total disability from January 31, 2000. He contended that his current back problem is a compensable aggravation of a work-related back injury which he sustained on October 22, 1985. The Board denied his petition, finding that his current back problem is a new injury caused by the fall on January 31, 2000. This appeal of that denial requires the Court to consider whether the Board applied the correct rule of causation in deciding Mr. Barkley's case.

FACTS

[*2] Only a brief recitation of the facts, taken from the Board's summary of the evidence, is necessary for purposes of this appeal. On October 22, 1985, Mr. Barkley injured the lower part of his back while working at his job for Johnson Controls, Inc. ("employer"). As a result of the injury, he was restricted to light duty. The employer modified his work duties to accommodate his restrictions. He received medical care for his condition from 1985 until 1994, when he stopped his treatment because he was told the insurance carrier would no longer pay for it. The back condition did not improve, however, and Mr. Barkley continued to work with restrictions until his slip and fall in the Food Lion parking lot. After the fall, Mr. Barkley experienced an increase in back pain. The pain was in the same location as his work injury but it was worse. It rendered him unable to work. As mentioned, back surgery did not relieve the pain. Before the fall in January 2000, no surgery was contemplated. There was medical testimony that the claimant's fall on the ice was the reason that surgery became necessary but that surgery would not have been necessary due to the slip and fall if the claimant had not suffered **[*3]** the pre-existing, 1985 back injury.

STANDARD OF REVIEW

The scope of review for appeal of a Board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law. [1] "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [2] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings." [3] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings. [4]

1 *Robinson v. Metal Masters, Inc., 2000 Del. Super. LEXIS 264 (Del. Super. 2000)*; *See Histed v. E.I. DuPont De Nemours & Co., 621 A.2d 340, 342 (Del. 1993)*; *Johnson v. Chrysler Corp., 59 Del. 48, 213 A.2d 64, 66*, 9 Storey 48 (Del. 1965).

2 *Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981)*; *See Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966).*

[*4]

3 *213 A.2d at 66.*

4 *ILC of Dover, Inc. v. Kelley, 1999 Del. Super. LEXIS 573*, at *3 (Del. Super. 1999).

DISCUSSION

Under *19 Del. C. § 2347*, a claimant is entitled to compensation if he suffers an increase in a compensable incapacity. In reaching its decision that the fall in 2000 caused a new injury, rather than an increase in the old one, the Board reasoned as follows:

> Claimant argues that the law in Delaware is that once an employee is injured in an industrial accident, the employer is responsible for all aggravations caused by any factor unless the aggravation is caused by a claimant's own negligence. The Board disagrees. Under Delaware law, an employee who has suffered a work-related injury may seek compensation for a recurrence of that injury if the impairment has returned "without the intervention of a *new or independent accident." DiSabatino & Sons, Inc. v. Facciolo, Del. Supr., 306 A.2d 716, 719 (1973)* (emphasis added). . .
>
> In considering whether there is a recurrence or a new injury, **[*5]** the Board's inquiry is two-fold. *Standard Distributing Co. v. Nally, Del. Supr., 630 A.2d 640 (1996)*; *Wohlsen Construction Co. v. Hodel*, Del. Super., C.A. No. 94A-04-017 . . . (The fact that there is no successive carrier does not deprive the first carrier of the opportunity to show a

> claimant's claim was due to a further injury accompanied by an intervening event.) The Board must first determine whether the January 31, 2000 fall constituted an intervening or untoward event. *Id. at 645*. The Board must then determine whether there was a change in Claimant's condition as a result of the fall. A mere increase in symptoms is not enough to establish a new injury. *Id.*

The Board reasoned that the fall was an intervening or untoward event and that the significant increase in back pain which it caused was a new injury, not a mere increase in symptoms.

In reaching its decision, the Board relied upon cases which are part of a line of cases which address successive carrier liability. These are cases in which a claimant has suffered two, separate, industrial accidents, one insured by one carrier, and one insured by a different carrier. The question **[*6]** is which carrier should bear responsibility for the second accident. The rule applicable to successive carrier liability, as stated by the Delaware Supreme Court in *Standard Distributing Company v. Nally*, [5] is as follows:

> The rule we endorse for determining successive carrier responsibility in recurrence/aggravation disputes places responsibility on the carrier on the risk at the time of the initial injury when the claimant, with continuing symptoms and disability, sustains a further injury unaccompanied by any intervening or untoward event which could be deemed the proximate cause of the new condition. On the other hand, where an employee with a previous compensable injury has sustained a subsequent industrial accident resulting in an aggravation of his physical condition, the second carrier must respond to the claim for additional compensation. [6]

This rule is intended for situations where both accidents are covered under workers' compensation, and the issue is which of two carriers should be responsible. The focus of the inquiry is on the nature of the second event. The rule is influenced by policy concerns which are mentioned in *Standard Distributing Company* **[*7]** .

5 *630 A.2d 640 (Del. 1993)*.
6 *Id. at 646*.

From the Board's findings and conclusions, it appears that the Board believed that the above-mentioned rule should be applied in this case, which does not involve successive carrier liability, because of this Court's decision in *Wohlsen Construction Co. v. Hodel*. [7] In that case the claimant was injured in two industrial accidents. The first occurred when he was an employee covered by workers' compensation insurance. The second occurred when he was self-employed, after leaving the previous employment. There was no workers' compensation insurance covering the second accident. The Court concluded that the case involved circumstances similar to a successive carrier case. It further concluded that the successive carrier line of cases should apply because to do otherwise would lead to inconsistent results based upon the claimant's insured status. The *Wohlsen* case is distinguishable because the second accident in this case was not **[*8]** work related and the circumstances are, therefore, not similar to a successive carrier case.

7 *1994 Del. Super. LEXIS 574 (Del. Super. 1994)*.

The rule of causation applicable where a work-related injury is aggravated by a subsequent, non-work related accident is set forth in a separate line of cases, beginning with *Hudson v. E.I. Du Pont De Nemours & Co., Inc.*. [8] In *Hudson*, the claimant suffered a work-related back injury in October 1964. In August 1966 he experienced significant back pain when he attempted to rise from a beach chair. One of the issues was whether a worsening of the claimant's back pain from his attempt to rise from the beach chair was caused by the October 1964 back injury. The applicable rule of causation, as stated by the court, is that a "subsequent injury is compensable only if it follows as a direct and natural result of the primary compensable injury." [9] The court also observed that if the subsequent injury is attributable to the claimant's own negligence or fault, **[*9]** the chain of causation is broken and the subsequent injury is not compensable. [10]

8 *245 A.2d 805 (Del. Super. 1968)*.
9 *Id. at 810*.
10 *Id.*

In *Amoco Chemical Corporation v. Hill*, [11] the claimant suffered a compensable injury while at work in January 1970. He was still able to work, however. In February 1971, he experienced significant back pains after playing basketball. At that point, he became totally disabled. The issue was whether the worsened back condition following the basketball game was caused by the January 1970 back injury. The court set forth the applicable rule of causation as follows:

> A general rule of causation in such cases as this is stated by Larsen's Workmen's Compensation Law, § 1300 as follows:
>
> "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment unless it is the result of an independent intervening cause **[*10]** attributable to claimant's own intentional conduct."
>
> When the question arises as to whether compensability should be extended to an injury or aggravation following a primary compensable injury, the rules that come into play essentially are based upon the concept of "direct and natural results", and of Claimant's own conduct as an independent intervening cause. [12]

Where the subsequent injury or aggravation is not the result of quasi-course of employment activity, the chain of causation may be deemed broken by either negligent or intentional misconduct on the part of the claimant. [13] Under this rule, absent such negligence, a weakened condition stemming from a compensable injury may be deemed the cause of an aggravation of the injury which occurs in a subsequent non-work related accident. [14]

11 *318 A.2d 614 (Del. Super. 1974)*.
12 *Id. at 618*
13 *Id.*
14 *Groce v. Johnson's Used Cars, 1997 Del. Super. LEXIS 450 (Del. Super. 1997)*; 1 Arthur Larson, *Larson's Workers' Compensation Law § 10.06[2]* (2002).

[*11] This rule of "direct and natural consequences" is the rule of causation which should have been applied in this case. The Board committed legal error by applying the rule applicable to successive carrier cases. The case will be remanded to the Board so that it may make additional findings and conclusions applying the correct rule of causation.

The decision of the Board is ***reversed and remanded*** for further proceedings consistent with this opinion.

IT IS SO ORDERED.

BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

JOSEPH WHITNEY, Employee, v. BEARING CONSTRUCTION, Employer.	)	Hearing No. 1289541

DECISION ON PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on December 13, 2012, in the Hearing Room of the Board, in Milford, Delaware.

PRESENT:

VICTOR R. EPOLITO JR.
Board Member

JOHN F. BRADY
Board Member

Angela M. Fowler, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Walt Schmittinger, Attorney for the Employee
Linda Wilson, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Joseph Whitney ("Claimant") was involved in a compensable industrial accident on March 4, 2005, while working for Bearing Construction ("Employer"). As a result of this accident, Claimant suffered injury to his low back for which he has received certain workers' compensation benefits including payment of medical expenses and periods of compensation for lost wages.

On May 24, 2012, Claimant filed a Petition to Determine Additional Compensation Due asserting an entitlement to partial disability and payment for an EMG and MRI. Employer opposes this relief on the premise that any lost earning capacity or ongoing medical issues that Claimant may be experiencing at this point are unrelated to his 2005 industrial accident. Employer further argues that it should be awarded a credit against future benefits potentially owing to Claimant due to Claimant's failure to appear for a duly scheduled defense medical examination with Dr. Piccioni which resulted in a *no-show* fee being assessed Employer.

A hearing was held on Claimant's petition on December 13, 2012. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Uday Uthaman, M.D., a board certified pain management physician and Claimant's treating doctor, testified by deposition on Claimant's behalf. In this capacity, Dr. Uthaman opined that Claimant has physical limitations related to his 2005 industrial accident that require he work in a modified duty capacity. Dr. Uthaman further testified that all of the treatment Claimant has received has been reasonable, necessary and related to his 2005 industrial accident.

Dr. Uthaman testified that he began treating Claimant on March 28, 2011, when Claimant presented with a chief complaint of low back and left leg pain. Claimant reported a history of a

March 2005 work accident that occurred while he was lifting a large sign. Claimant indicated that his pain increased over time following this event leading him to treat with several physicians for the condition. Through this treatment, Claimant was found to have a disc problem for which he undertook care that included medications, therapy and injections. In 2007, Claimant had back surgery performed by Dr. Ali Kalamchi which was followed by numerous injections and a 2009 nerve ablation. Claimant had also recently undertaken a discogram performed by Dr. Bruce Katz but was reluctant to consider further surgery given his age. Claimant reported his desire to continue working and his hope to find some treatment that would allow him a greater pain tolerance. Claimant indicated that he was taking Lyrica, Tylenol and Cervela; the first two of which were related to pain control for his back.

Dr. Uthaman indicated that physically, he discovered tenderness, tightness and spasm with limited lumbosacral movement on Claimant's part. Dr. Uthaman described a lot of spasm extending to the thoracolumbar and upper dorsal region of Claimant's back. He noted that Claimant had difficulty in forward bending, extending and rotations of the lumbosacral spine. Claimant's sciatic stretch was positive on the left side and his ankle and knee reflexes were diminished on the left more so than on the right.

Dr. Uthaman diagnosed Claimant with chronic pain syndrome, chronic low back pain, failed back syndrome, sciatic neuropathy (left side), and sought to rule out any other cause for the chronic pain. Dr. Uthaman ordered X-rays and an MRI of Claimant's low spine, an EMG of Claimant's legs and the beginning of some chronic pain management care. Dr. Uthaman related Claimant's condition to his 2005 work injury and subsequent back surgery.

Dr. Uthaman testified that he began seeing Claimant on approximately a monthly basis. Throughout this time, Claimant's physical findings remained essentially the same. In May 2011,

Dr. Uthaman ordered physical and occupational therapy for Claimant as well as use of a back brace and TENS unit. In June 2011, Claimant's urine screen showed evidence of Sobaxin; a drug that Claimant denied using. By July 2011, the EMG had been performed and showed some nerve damage on Claimant's left side leg muscles corresponding with the S1 nerve root; findings that Dr. Uthaman found consistent with both Claimant's subjective complaint and his MRI which revealed a mild, progressive protrusion of the annulus towards the right S1 nerve root at L5-S1. By August 2011, Claimant presented with increasing low back and left leg pain as well as numbness, tingling and shooting pain in this left leg. Physical examination revealed Claimant's back muscles to be sticking out and spasming. Claimant continued to work with difficulty and was administered trigger point injections to reduce the spasms. Dr. Uthaman concluded that Claimant's 2007 hemilaminectomy and disectomy at L4-5, as performed by Dr. Kalamchi, probably created some subsequent nerve compression on the right side at the L5-S1 level.

According to Dr. Uthaman, by Claimant's September 2011 office visit, he was reporting that the trigger point injections seemed to relax the muscles in his back. Claimant's extended ride to work and ongoing heavy duty job requirements, however, seemed to be contributing to increased pain and spasm and Claimant's desire to have additional injections. Claimant's long-acting medications, including Flexeril, Oxycodone and Naproxen, were helping some but not entirely managing his symptoms. Additional trigger point injections were performed bilaterally at L2 and L4. Claimant's presentation at his October 2011 visit confirmed that the trigger point injections had again provided him some relief and he was continued on his medications. In December 2011, the injections were repeated with continued success in providing Claimant pain relief. Because, however, trigger point injections are somewhat superficial, the decision was made to proceed with a deep nerve paravertebral block that would go all the way down to the

nerve coming out of the foramen. In February 2012, Claimant reported the success of the deep nerve block in relieving his spasm and pain. Noting that it may take several of these deep nerve blocks to get Claimant's pain better under control and more stable, additional paravertebral blocks were performed in February and March 2012.

Dr. Uthaman testified that this pattern of complaint and treatment continued. In April 2012, Claimant denied any new accidents or injuries while his pain complaints and physical presentation remained the same. By June 2012, Claimant was reporting that he could no longer do his physically demanding job given the pain in his low back and left leg. According to Dr. Uthaman, Claimant's back spasms were increasing and his pain was in a vicious cycle. Dr. Uthaman thus issued a workers' compensation physician's report dated June 1, 2012, indicating that Claimant was incapable of working any hours per day of strenuous work instead suggesting that Claimant undertake a desk-type job. Dr. Uthaman explained that his decision to restrict Claimant in this way was based on the increased pain and spasm that Claimant was experiencing with his work activities. Claimant was kept on the no-work status through Dr. Uthaman's June 28, 2012, and July 26, 2012 office visits. By the time of his August 23, 2012 visit, however, Claimant had secured employment that was less physically demanding; a proposition sanctioned by Dr. Uthaman.

Moving forward with Claimant's care, Dr. Uthaman indicated that the plan consists of conservative treatment including medication management, restricting Claimant's work activities, use of a back brace and use of a TENS unit. Injections will be used on an as-needed basis if Claimant's pain and/or spasm increase. As the physician managing Claimant's chronic pain, Dr. Uthaman indicated his opinion that Claimant's treatment since March 28, 2011, has been

reasonable, necessary and related to his 2005 work injury as have been the work restrictions that Claimant has been placed on since June 2012.

On cross examination, Dr. Uthaman confirmed that his treatment of Claimant began on March 28, 2011. He could not recall whether or not he had access to or possession of the records of other of Claimant's prior medical providers at that time but confirmed that he did not have such records at present. Dr. Uthaman indicated that, while he did review Claimant's prior MRI, he was aware of Claimant's 2007 back surgery because Claimant reported that to him. Dr. Uthaman denied ever reviewing the records of Dr. Katz, De. Lieberman or records of Kent General Hospital for Claimant. As such, Dr. Uthaman confirmed that the opinions he rendered in this case have been based upon the history provided by Claimant, his own examination findings and test reports generated at his request.

Dr. Uthaman indicated that his failure to list the Delaware Health Care Practice and Treatment Guideline that he was treating Claimant under was an oversight on his part in the issuance of Claimant's workers' compensation physician's reports.

In terms of Claimant's medications, Dr. Uthaman confirmed that when Claimant first came to him he reported taking Lyrica, Tylenol and Cervela. Dr. Uthaman indicated that he is unaware of who prescribed Claimant the Cervela (or if Claimant even spelled the name of the drug correctly) or the other two but noted that he has not prescribed any of the three to Claimant. Dr. Uthaman confirmed that Claimant's June 6, 2011 drug screen performed in his office was positive for BUPE (a/k/a Sobaxin); a drug administered to patients for detoxification. Dr. Uthaman is not, however, aware that Claimant has undergone any detoxification and, to the contrary, Claimant has denied that.

Dr. Uthaman admitted that while he listed zero hours per day of work for Claimant in his June 1, 2012 physician's report, he advised Claimant at that time that he could work in a less physically demanding capacity. Dr. Uthaman could not recall what kind of work Claimant was doing when he reported finding a new job in August 2012.

Dr. Uthaman could not recall Claimant having any other accidents or injuries.

During a combination of re-direct and re-cross examination, Dr. Uthaman confirmed that the physician's reports that he gave Claimant indicated that Claimant could work zero hours per day despite his verbal advisement to Claimant to seek out more sedentary employment. The zero hour restrictions were based on construction work rather than Claimant's ability to work in any capacity. Dr. Uthaman confirmed that he is and has been treating Claimant under two Guidelines including Chronic Pain and postsurgical back pain.

Claimant, 28 years old, testified that he worked for Employer as a pipe layer/laborer installing water and sewer lines. This work required extensive shoveling, bending, lifting and wrenching; all work that Claimant characterized as hard, physically demanding labor. Claimant indicated that while performing this work on March 4, 2005, he lifted a large caution sign causing his back to pop. The pain from this pop in his back got worse over time eventually migrating to his left hip, knee and foot. As a result, Claimant engaged conservative medical care until he undertook a 2007 back surgery. According to Claimant, initially following the back surgery, his pain got worse. With time, however the pain slowly improved. While not completing resolving, most of his leg pain went away for a time, allowing Claimant to return to work at several different construction jobs. Claimant testified that he was advised by all of the doctors he saw following the work accident to seek less physically demanding jobs. Claimant, however, stuck with construction because the money was good, he liked the work and he had a

family to support. Claimant's pain returned incrementally. He treated with Dr. Schwartz and Dr. Lieberman for injections and a 2009 nerve ablation (which provided temporary relief).

Claimant continued to work in the construction trade throughout this time. In the spring of 2012, he was employed as a pipe layer for Dixie Construction ("Dixie") working, much as he did for Employer, digging ditches, climbing ladders, bending, lifting and shoveling. Claimant indicated that his daily pain had been building in the year or more that he worked with Dixie. Eventually, Dr. Uthaman took Claimant out of work and, like his previous doctors, suggested that Claimant find less demanding work. Claimant immediately started looking for work and found employment with Playtex through a local temporary employment agency (BBSI) beginning August 23, 2012. This employment consists of operating a forklift which Claimant indicated includes little more, physically, than pulling a lever. This is a full-time position, 40 hours per week, for which Claimant is paid $11.05 per hour. Unlike his prior jobs which required extended travel and long days, this current job is closer to home and more conductive to his physical limitations. This current job allows for better management of his low back and leg symptoms though Claimant still experiences pain and aggravation from the underlying industrial injury he suffered with Employer. According to Claimant, the long drive time associated with prior jobs was just icing on the cake in terms of increasing his pain; the work itself was too physically demanding.

Claimant acknowledged that in 2010 he was driving a dump truck off road for his then employer. After a day of this work, Claimant reported to First State Orthopedics an increase in his low back symptoms. Claimant continued to work, however, missing only a few days for the aggravation of his condition. Similarly, in August 2012, Claimant was involved in a motor vehicle accident wherein his vehicle collided with another. Claimant indicated that in bracing

for that impact, he tensed up the muscles in his body leading to what he believes was an aggravation of his preexisting and ongoing low back symptoms. Again, Claimant did not stop working as a result of this accident and returned to his baseline condition within a couple of days. In fact, Claimant indicated that he had a low back MRI following those two events that showed no change in the condition of his back. Thereafter, Claimant had an additional MRI in 2012 at the behest of Drs. Uthaman and Katz.

On cross examination, Claimant confirmed that he had no driving restrictions prior to 2010 but after the 2010 dump truck work day was issued a written note by his physician indicating that he could work light-duty but was not allowed to drive the dump truck.

Claimant testified that it is his belief that he overlooked the August 21, 2012 defense medical examination with Dr. Piccioni because he was in the middle of moving.

Claimant confirmed that after his 2007 surgery, he went back to work for Employer for a period of time. Later Claimant went to work for Dixie Construction. His application for Dixie was signed and dated by him on July 28, 2011, while his first day on the job was August 2, 2011. Claimant was hired by Dixie to work as a pipe layer for $16 per hour and was earning $18 per hour by the time he left that job on May 16, 2012, when he voluntarily left the job due to pain in his low back and leg. Claimant regularly worked over-time throughout his employment with Dixie. Claimant, who advised Dr. Piccioni that he left the Dixie job because he could no longer physically tolerate the work, admitted that he lied on his application to Dixie by denying any prior work-related injuries.[1] Claimant similarly lied on his medical history form for employment with Kent Construction in November 2007[2] and on his application to the temporary employment agency that helped secure him the medium-duty forklift position that he currently holds by

[1] *See* Employer's Exhibit 1 (Dixie Construction application for Claimant).
[2] *See* Employer's Exhibit 2 (Kent Construction Medical History Form).

failing to provide information as to his physical restrictions and advising the agency that he had been laid off by Dixie.

In confirming his employment history following the 2005 industrial accident, Claimant indicated that from November 2007 through May 2008 he worked for Kent Construction; to whom he was dishonest about his past work-related injury and condition. From August 18, 2008 through December 18, 2009, and again from January 21, 2010 through June 11, 2012, Claimant was employed by Mumford and Miller construction company where he had an unrelated and minor work injury affecting his ribs as well as the June 2010 dump truck experience which led him to seek care for increased low back symptoms on June 3, 2010. Claimant indicated that both he and the doctor at First State Orthopedics felt that operating the dump truck had aggravated his preexisting low back symptoms though Claimant is unsure of exactly how many days he missed from work as a result. Thereafter, from September 23, 2010 through April 2011 Claimant worked for CoilStone, also doing construction work.

Claimant admitted that after treating with Dr. Lieberman, he attempted to detoxify himself from pain medications. That was, however, the only detox that he has ever undergone.

From December 2009 until June 2010, Claimant is unsure of whether or not he was treating for his back or with whom that treatment may have occurred. After the June 2010 day of driving the dump truck, however, he treated with at least Dr. Lieberman and Dr. Katz. Claimant also advised Dr. Katz of his August 2010 motor vehicle accident.

Claimant indicated that he has no recollection of an emergency room visit for low back care in September 2009 related to lifting a child and some camping equipment.

During re-direct examination, Claimant indicated that he did not tell Dixie and other employers of his 2005 industrial accident or resulting injuries and limitations because he was concerned that he would be denied employment as a result.

Ellen Lock, a vocational rehabilitation specialist for Coventry, testified on Employer's behalf. Having conducted a Labor Market Survey of Claimant's employability in the local labor market, Ms. Locke opined that Claimant is employable without any significant wage loss.

Ms. Locke testified that in gathering information relevant to Claimant for her Labor Market Survey, she became aware that Claimant is working in a medium-duty capacity as a forklift operator at Playtex through a temp. agency (BBSI). She considered this employment as well as Claimant's past vocational experience and the fact that he resides in Dover, Delaware, as parameters for her employment search for Claimant. In doing so, Ms. Lock identified ten jobs within Claimant's physical and vocational abilities.[3] She testified that she spoke to each of the potential employer's identified in the survey to confirm the nature of the job and that Claimant would be given equal consideration for employment at each. She also observed the performance of each job to ensure that there were no related job duties that might exceed Claimant's physical limitations.

Finding Claimant thus employable in the local labor market, Ms. Locke testified that the average weekly wage for the positions identified in the Survey is $527 per week.

On cross examination, Ms. Lock indicated that she assumed Claimant to be capable of light to medium-duty work. She testified that several of the warehouse jobs identified on the Survey may well include forklift operation positions or pallet jack operator positions. In fact, the BBSI temp. agency position listed on the survey mirrors the employment that Claimant currently has and reflects an average weekly wage range from $440 per week up to $520 per week.

Admittedly, virtually all employees, as was the case with Claimant, are hired at the $440 average weekly wage and after 90 days can receive a raise.

Upon questioning by the Board, Ms. Locke acknowledged that several of the jobs identified in the survey have work locations that exceed a thirty mile radius of Claimant's home. In fact, the New Castle position identified is more than 40 miles from Claimant's residence while the job in Northeast Maryland is more than 48 miles away and the Elkton Maryland job is more than 42 miles away.

Dr. Lawrence Piccioni, M.D., a board certified orthopedic surgeon, testified by deposition on Employer's behalf. Having assessed Claimant in addition to reviewing Claimant's relevant medical records, Dr. Piccioni opined that Claimant's current back condition is not attributable to the 2005 industrial accident at issue.

Dr. Piccioni testified that he examined Claimant on two separate occasions; March 14, 2008 and November 7, 2012. At the first examination in 2008 related to partial permanent impairment resulting from Claimant's work-related low back injury, Claimant reported to Dr. Piccioni that he was initially injured on the job in 2005 when lifting a heavy sign. The pain in his back grew more severe and migrated into his left leg over time. An MRI revealed a disc herniation at L4-5 and, after failed conservative management, Claimant eventually went to surgery, a L4-5 decompressive laminectomy and microdisectomy, with Dr. Kalamchi. Following this procedure, Dr. Kalamchi documented that Claimant was doing well experiencing little more than an occasional ache down his left calf after heavy manual labor. Claimant was not taking any pain medications following the surgery and was released to return to work. Claimant advised that he had returned to work in the construction field for several different employers without any restrictions or medications. As of this 2008 visit, Claimant was also not

[3] *See* Employer's Exhibit 3 (Labor Market Survey).

undertaking any additional injections, was not using a back brace and was not seeing a pain management specialist. Dr. Piccioni testified that he found Claimant's condition to be stable at their 2008 visit. There were no significant physical findings documented and Dr. Piccioni concluded that Claimant was status post disectomy L4-5 for a herniated disc and an L5 radiculopathy.

Dr. Piccioni indicated that he next saw Claimant on November 7, 2012. Claimant was advised by Dr. Piccioni that the purpose of his assessment was to provide an opinion as to whether or not Claimant's current condition is work-related. Claimant advised that in May 2012 when he stopped working, he was employed by Dixie Construction as a pipe layer and equipment operator. Claimant admitted that Dixie, with whom he had been employed for approximately a year, was not aware of his prior industrial injury. Claimant denied any new injury or accident on the date that he stopped working indicating instead that he simply had a marked increase in his pain and symptomotology that prevented him from continuing in such a physically demanding job.

Claimant described having pain in his lumbar spine and down his left leg towards his knee with occasional pain down to his left calf. Claimant advised that the pain was similar to the pain that he has always had following the 2005 industrial accident but noted that he now also experiences right-sided leg pain that he did not have before. Claimant also admitted that he left his work with Dixie in May 2012 voluntarily and without being specifically advised to do so by any treating physician. By the time of this assessment, however, Claimant had been employed for approximately four months by a new employer, Playtex, working as a full-time forklift operator; a job from which Claimant had not lost any time from work for back issues. Claimant reported no new injuries or medical problems since their meeting in 2008 though Dr.

Piccioni gleaned from a review of Claimant's medical records that Claimant had been following up with Dr. Uthaman, a pain management specialist, for some time. Dr. Uthaman's records, in fact, reveal Claimant's reports to Dr. Uthaman that he was working as a laborer and traveling 90 miles each way to work, all of which seemed to be contributing to increased pain and spasm in Claimant's back.

Dr. Piccioni testified that a 2010 MRI of Claimant's low back taken after an August 2010 motor vehicle accident showed no progression of any new disc herniation or any recurrent disc hernaiton from Claimant's prior surgical site. Dr. Piccioni again confirmed, however, that despite medical records to the contrary leading up to this MRI, Claimant did not report any new accidents or injuries to him. This would include a November 13, 2009 work fall that Claimant experienced. Looking also to the changes in Claimant's care, Dr. Piccioni confirmed that Claimant's records between 2009 and 2010 reveal that when seen by First State Orthopedics on December 2, 2009 and December 23, 2009, Claimant was working full-time, full-duty. By June 3, 2010, however, First State Orthopedic Records document that Claimant suffered severe soreness to his back as a result of a full day of driving an off-road dump truck without springs; an event which Dr. Katz qualified as a re-aggravation of Claimant's earlier low back symptoms and one which required Claimant take off work for several days and return in a light-duty capacity with restrictions against driving the dump truck. According to Dr. Piccioni, a subsequent June 8, 2010 note from Dr. Lieberman confirms the records of Dr. Katz as Dr. Lieberman documented his belief that Claimant had been fine until he reinjured his back (a week earlier), driving an off-road dump truck. Moreover, according to Dr. Piccioni, these records comport with the later, August 12, 2010 notes from First State Orthopedics which confirm that Claimant was involved in a motor vehicle accident on August 11, 2010, but was

being seen on August 12, 2010 for his June work-related injury. Later, on August 17, 2010, First State Orthopedics documented their specific treatment of Claimant's low back relevant to the motor vehicle accident noting that Claimant's low back pain got worse a couple hours after the accident while his leg pain remained the same. This same note characterizes Claimant's condition as an aggravation of his low back pain. Dr. Piccioni also confirmed that after these two events, Dr. Katz documented his opinion that Claimant could not work in the construction industry at that time. Dr. Piccioni confirmed that Claimant also failed to advise him of a September 29, 2010 hospital emergency room visit wherein Claimant developed low back pain after lifting a child and/or camping equipment.

Dr. Piccioni testified that physically in November 2012, Claimant presented with mild tenderness to palpation at L4-5 and L5-S1 bilaterally. He had some moderate iliolumbar tenderness on the left at the top of the SI joint as well as some on the right. Claimant had moderate sciatic notch tenderness on the left and right sides. His hamstrings were tight but his neurologic examination was normal.

Dr. Piccioni acknowledged that in his initial written report following his November 2012 assessment of Claimant, he opined that Claimant's current problems and closed period of restricted work ability are both related to the 2005 work accident with Employer. In doing so, however, he was relying almost entirely on the history or lack thereof provided by Claimant. Dr. Piccioni admitted that he did not exercise due diligence in reviewing all of Claimant's records from the time of their first visit until this second one, relying instead primarily on the records from the period for which Claimant was alleging disability. As such, he was not then aware of the regular complaints and treatment that Claimant received following the 2010 dump truck and motor vehicle incidents. As such, Dr. Piccioni indicated that later review of these additional

records in comparison to Claimant's condition prior to June 2010 suggests that Claimant's low back condition was stable until these two events. Claimant was working full-duty, taking no pain medication and no injections and then following June and August 2010, his symptoms increased requiring additional treatments. Dr. Piccioni indicated that these subsequent incidents aggravated and worsened Claimant's pain, need for medical treatment and work restrictions.

On cross examination, Dr. Piccioni confirmed that it was only after issuing his initial November 2012 report in this matter that he actually reviewed Claimant's 2010 First State Orthopedic Records. He indicated that this review supports the proposition that the August 2010 MRI of Claimant's low back was ordered because of symptoms that Claimant was complaining of to First State Orthopedics. The MRI, however, was read as showing no significant change; a reading that Dr. Piccioni cannot challenge as he has not read the actual films himself.

Dr. Piccioni acknowledged that he has a number of records for Claimant that predate June 2010 but has no recollection of anything specific from those records. Specifically, Dr. Piccioni could not recall if Claimant was treating for his low back before the dump truck incident in 2010, if Claimant was seeing any physicians for his low back in 2009 or what treatment, if any, Claimant received for the condition following his 2008 assessment of Claimant. While indicating that Claimant was being treated for his work-related low back condition in 2009 and that he has seen records from First State Orthopedics, Edelman Spine Center, Dr. Lieberman, and Dr. Schwartz, Dr. Piccioni indicated he has unsure of what treatment Claimant actually received from these providers in the days and months leading up to June 2010 and the dump truck incident.

Dr. Piccioni confirmed his understanding that Claimant had been working for Dixie Construction for about a year before taking himself out of work on May 17, 2012. Throughout this time, Claimant was performing a very physical, construction-type job.

Dr. Piccioni confirmed that his November 2012 report on Claimant concluded that Claimant's current problems are related to the 2005 work accident based on the fact that review of Claimant's records shows a good chronology of ongoing symptom(s), ongoing treatment and the absence of an asymptomatic period with regard to his low back and left leg. In fact, Dr. Piccioni wrote that Claimant has always had the same problems of pain in the back with left leg pain and occasional right leg pain. Dr. Piccioni maintained, however, that these conclusions were based on his review of only Claimant's most recent medical records from approximately April 2012 to current. Dr. Piccioni strictly accepted Claimant's report of no new injuries or accidents as well as his report that he had never been asymptomatic in his back and leg(s), whether he treated or not, since the 2005 work accident.

Dr. Piccioni agreed that the treatment that Claimant has received has been reasonable including ongoing pain management, the possibility of repeat injections, and the MRI recommended by both Drs. Uthaman and Katz. Dr. Piccioni further agreed that Claimant should have had some work restrictions during the period in question. Specifically, Dr. Piccioni indicated that he felt from May 17, 2012 (when Claimant left construction) until he began his new job as a forklift operator, Claimant was capable of some type of sedentary-duty work, irrespective of causation, but could not have done the laborer's job he was performing, particularly with the 90 mile drive each way. Dr. Piccioni indicated that as of his examination of Claimant in November 2012, he believes that Claimant could perform the physically demanding

laborer's position he once filled in the construction industry if he were not required to drive 90 miles in each direction to and from work.

With regard to Claimant's May 2012 condition, Dr. Piccioni confirmed that Claimant reported to him no specific accident or work-related injury but instead a marked increase in pain over a short period of time. Specifically, consistent with the records of Drs. Uthaman and Katz, Claimant reported that his pain was building up and building up over a period of weeks prior to his departure from the job in May 2012. Dr. Piccioni further acknowledged that Claimant's November 2012 physical findings were also consistent with Claimant's complaints.

Dr. Piccioni confirmed that he changed his opinion regarding the causal nexus between Claimant's current condition and the 2005 work accident based upon three separate incidents: the 2010 dump truck incident, 2010 motor vehicle accident and 2010 hospital trip after lifting a child and/or camping equipment. He made this change in his opinion despite the fact that Claimant was able to go to work in a heavy-duty, physically demanding job with Dixie for at least a year after the last such event. Dr. Piccioni indicated that the concern would be that these events constituted an aggravation of his condition that caused more treatment and over time cost him his ability to stay employed in such a physically demanding capacity. Dr. Piccioni indicated that these three 2010 events could have potentially caused a significant aggravation or worsening of Claimant's problems whether the MRI shows significant change or not and are more likely than not the reason that Claimant requires treatment now.

Dr. Piccioni confirmed that he found Claimant to be a plausible historian who exhibited no exaggerated behaviors in both 2008 and 2012. Dr. Piccioni indicated that Claimant struck him as being a diligent guy who tried to maintain employment and take care of his family.

Dr. Piccioni indicated that any change on an updated MRI of Claimant's low back now would only strengthen his argument that it was events in 2010 that led to Claimant's current condition. Dr. Piccioni also indicated that the development of right-sided symptoms, which Claimant never had as part of the original problem, is a tell-tale sign of new injury. Dr. Piccioni confirmed that Claimant's 2005 MRI showed a herniated sic at L4-5 as well as a tear and some changes at L5-S1. Those L5-S1 changes were not surgically addressed by Dr. Kalamchi and continue to show up in the 2010 MRI at which time they were described as minimally impinging on the S1 nerve root. Dr. Piccioni also confirmed that adjacent disc disease and the fact that Claimant's L4-5 level is fused could potentially affect and deteriorate the L5-S1 level as a function of the fusion surgery itself. In fact, Dr. Piccioni indicated that had Claimant not had any intervening injuries, such an adjacent deterioration would certainly have been reason enough to opine that Claimant's current condition is related to the 2005 accident and treatment.

During re-direct examination, Dr. Piccioni confirmed that an individual can have the same findings on MRI that Claimant has and be asymptomatic. Similarly, the physical findings that Dr. Piccioni made upon examination of Claimant in November 2012 could just as easily related to the dump truck, motor vehicle or lifting incidents of 2010.

Dr. Piccioni indicated he found Claimant plausible both in speaking with him and based upon the full effort that he exerted as part of his clinical assessment. Nevertheless, review of Claimant's medical records and the three incidents of 2010 lead to the conclusion that Claimant's current condition is related to the 2010 events rather than the 2005 work-accident.

On re-cross examination, Dr. Piccioni admitted that he was not entirely sure how much time Claimant missed from his construction work as a result of the three 2010 incidents though he indicated he believed it was a fairly short amount of time. Dr. Piccioni indicated that the

combination of three injuries Claimant had in 2010 worsened his preexisting, work-related back condition which was compounded by his laborer's job and 90 mile commute each way.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Recurrence of disability

Claimant has filed the current Petition to Determine Additional Compensation Due alleging a recurrence of his entitlement to compensation for a partial loss of earning capacity. As such, he has the burden of demonstrating that he has not only suffered such a partial loss but that this loss is causally related to the underlying 2005 industrial accident with Employer. In an attempt to meet this burden both Claimant and his treating physician, Dr. Uthaman, have testified that Claimant's symptoms have been ongoing and derivative of the low back injury he experienced with Employer. Employer, on the other hand, has provided the testimony of Dr. Piccioni who opines that several unrelated events that Claimant experienced in the 2010 timeframe are actually responsible for any physical working limitations that Claimant has had since May 2012 and any that he may currently have.

In assessing the respective arguments of the parties, the Board finds the primary issue separating the opinions of the medical experts to be the effect, if any, of a June 2010 dump truck incident, an August 2010 motor vehicle accident and a September 2010 lifting event, as least as each may relate to Claimant's current physical condition from both a medical and legal standpoint. In determining this to be the crux of the matter, the Board acknowledges that Dr. Uthaman, Claimant's treating physician, indicated that he had no knowledge of any additional accidents or injuries that Claimant experienced beyond the industrial accident of 2005. As such he offered no testimony as to the impact of the three events identified by Employer and Dr. Piccioni as making the difference in this case. The Board also notes, however, that Dr. Piccioni,

at least initially based upon his own physical assessment of Claimant and Claimant's historical report, reached the same conclusion as Dr. Uthaman in regards to the existence of a causal relationship between Claimant's present physical state and the 2005 industrial accident. As such, it would seem to the Board that in the absence of those events, there is no controversy between the medical experts as to causation. Thus, the Board must determine whether or not one or some combination of those three events is factually and legally sufficient to serve as a basis for departure from the opinion of Dr. Uthaman and the original conclusions reached by Dr. Piccioni.

Looking then to the evidence presented regarding these three 2010 events, the Board finds that factually, there is insufficient evidence to find that Claimant's condition was worsened beyond a temporary aggravation by any of the three events. The initial event at issue was a June 2010 report by Claimant that he aggravated his low back condition after a full day of driving a dump truck off road for his then employer. Other than Dr. Piccioni's testimony that Dr. Katz described this event 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. Dr. Piccioni suggested that the development or increase in right-sided symptoms may be indicative of new injury but, notably, Dr. Piccioni was aware of Claimant's right-sided symptoms when he issued his initial November 2012 report indicating that Claimant's present condition is related to the 2005 work accident. Claimant missed only a brief period of time from work and obtained care specific to this aggravation for a limited period of time. It is true that after this event Claimant was specifically advised in writing to work in a light-duty capacity and not to operate a dump truck again, (restrictions that had not previously been placed upon him in writing), however Claimant's undisputed testimony was that every physician he had treated in the years following his 2005 industrial accident had advised him in some form or fashion to seek out a less

physically demanding career field. While this temporary aggravation of his symptoms may have inspired Dr. Katz to actually memorialize that recommendation in writing, the Board is persuaded by Claimant's testimony and evidence of his injury that this was not the first time such an advisement had been issued. As had been the case previously, Claimant disregarded this advisement and returned to work as a laborer and pipe layer; a vocational field that he remained in for another almost two years following June 2010.

The Board makes similar findings related to the August 2010 motor vehicle accident and September 2010 lifting event. Claimant testified that he stiffened up in preparation for the impact of the motor vehicle accident which subsequently caused him some residual increase in low back symptoms. Following this event, Claimant received what appears to have been a limited period of treatment with First State Orthopedics. This stint of care included a repeat low back MRI which, even after the dump truck aggravation and car accident, showed no significant changes in Claimant's lumbar spine anatomy. Again, Claimant missed only a brief period of time from work before returning to the same physically demanding construction industry. Moreover, the only testimony regarding a lifting incident in September 2010 was provided by Dr. Piccioni who indicated that Claimant presented to the local hospital emergency department for acute care after a lifting event involving a child and/or camping equipment. Claimant had no recollection of this event and there was no testimony regarding additional follow-up care, recommendations or any other evidence that this event had any impact on Claimant's underlying condition. Claimant continued working, as he had for a number of years following the 2005 industrial accident, with the same baseline pain and discomfort.

Claimant testified that he worked in pain for the entire period following his industrial accident. While he acknowledged that his condition improved for a time following his 2007

surgery and subsequent 2009 nerve ablation procedure (which notably took place after Dr. Piccioni's 2008 assessment that Claimant's condition was stable), he indicated that over time the pain and lower extremity symptoms returned. It was this gradual return and build up of symptoms that kept Claimant in care with various providers in 2008, 2009, 2010 and beyond. It was also this gradual deterioration in his condition which eventually caused him to leave his job in May 2012; unable to continue physically performing in such a demanding environment. Employer, in attacking Claimant's credibility on this and all issues, has argued that because Claimant was dishonest in reporting the 2010 events to his treating doctor and to Dr. Piccioni and was dishonest with subsequent employers regarding the occurrence of his 2005 industrial accident, injuries and ongoing medical condition, he should not be believed in general. The Board does not, however, find this rationale persuasive. In fact, Claimant testified that he did not think the June 2010 dump truck event was an event at all. He indicated that operating such equipment was a part of his regular duties and while he experienced some spike in symptoms following a full day of this work along with many other mundane tasks, the symptoms were the same as they had always been in terms of nature and scope. He indicated that there was no accident or event to specifically report. He indicated that the same was true for the August 2010 car accident after which he quickly returned to his baseline low back condition. Noting that Dr. Piccioni himself testified that his focus was on the period from April 2012 through to his November 2012 assessment of Claimant, it is plausible to find that Dr. Piccioni did not ask the kinds of questions that would have inspired Claimant to go back to what he thought were insignificant events occurring more than two years earlier that did not impact his overall condition. Moreover, the Board is unwilling to find that Claimant's credibility should be entirely discounted because he was reluctant or unwilling to inform potential employers that he

had a prior work-related low back injury. It has been stated by our State Supreme Court that if "the claimant advises prospective employers that he has a physical limitation, and he does not get the job, there is an inference that employer turned the claimant down because of the partial disability."[4] Given thus that the Court finds it a reasonable assumption that an injured worker may be discriminated against due to a prior injury, Claimant's equal inference seems more directly related to his strong motivation to find and be employed than it does as some statement on his character or credibility.

Even had the Board found any of the three events suffered by Claimant to have factually caused a distinct worsening of his condition, Employer's argument fails in the legal analysis as well. Normally, when a worker sustains an injury, the employer/insurance carrier remains liable for workers' compensation benefits flowing from that injury. In such cases, the question of compensability of future symptoms or treatment is resolved using the "but for" standard of causation. That is to say, when there has been a work accident, subsequent injuries, whether physical or psychological, are compensable if "the injury would not have occurred but for the accident."[5] However, when a previously injured worker has a second or subsequent work accidents, the issue then becomes whether liability remains with the original employer/carrier or switches to the employer/carrier on the risk at the time of the second or subsequent events.

Earlier case law had held that, in such situations, the issue was whether Claimant suffered a "recurrence" or an "aggravation" of the prior injury. If Claimant

> suffers a recurrence, . . . the liability therefor falls upon the insurer which was liable for the original benefits. On the other hand, if [Claimant's] condition is not a true recurrence, but is brought about or aggravated by a new work-connected

[4] *Watson v. Wal-Mart Associates*, 30 A.3d 775, 780 n. 4 (Del. 2011)(citing *Keeler v. Metal Masters Foodservice Equipment Co.*, 712 A.2d 1004, 1005 (Del. 1998)).

[5] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

> accident, the liability falls upon that insurer whose policy is in effect at the date of the new accident.

DiSabatino & Sons, Inc. v. Facciolo, 306 A.2d 716, 719 (Del. 1973). This judicial statement, however, created a new question as to what constituted a "recurrence" and what was considered an "aggravation." This question was address in *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993).

The Court in *Nally* made it clear that the use of the terms "recurrence" and "aggravation," in the legal sense, is different from the use of those terms in the medical sense, where they might be used interchangeably.[6] Whether a doctor characterizes a condition as a recurrence or an aggravation is not the issue. "[T]he question is not whether the employee's pain or other symptoms have returned but whether there has been a new injury or worsening of a previous injury attributable to an untoward event."[7] This "untoward event" is not a question of whether an "unusual exertion is present but whether a genuine intervening event has occurred which brings out a new injury" or a worsening of a previous injury.[8] To shift responsibility from the first carrier onto a subsequent carrier, there must be "a second accident or event, beyond the normal duties of employment."[9] Using this standard, the Court in *Nally* agreed with the Board that the employee in that case had merely suffered a "recurrence" of the back injury, the responsibility for which rested with the initial carrier.

> Nally's description of the 1989 event supports the Board's conclusion that he was engaged in normal activity in rolling a keg and performed that chore no differently on that occasion than in the past. Undoubtedly, the pain experienced by Nally following the 1989 incident was greater than that which he felt immediately before the injury but that is not the critical factor. If the 1989 incident was not an untoward

[6] *Nally*, 630 A.2d at 645.
[7] *Nally*, 630 A.2d at 645.
[8] *Nally*, 630 A.2d at 645.
[9] *Nally*, 630 A.2d at 646. The burden of proving the causative effect of the second event is on "the initial carrier seeking to shift responsibility for the consequences of the original injury." *Nally*, 630 A.2d at 646.

> event which caused a new injury or aggravated the 1988 injury, his subsequent claims for benefits must be viewed as a recurrence, as the Board determined.

Nally, 630 A.2d at 646.

As discussed earlier, there is no objective evidence as to a physical or anatomic alteration in Claimant's condition as a result of his June 2010 use of a dump truck. What Claimant had, at most, was an increase in subjective symptoms. In *Nally*, the Court observed that "the question is not whether the employee's pain or other symptoms have returned but whether there has been a new injury or worsening of a previous injury attributable to an untoward event."[10] This should not be read as requiring an objective change in condition. All that is required is a "worsening" of the condition attributable to an untoward event. That worsening can be in the form of increased subjective pain.[11] The Court in *Nally* did not mean to suggest that pain alone was not compensable, but rather that the key focus in such a case is not so much on the claimant's physical condition as it is on how that condition developed. This is what the Court meant when it stated that Mr. Nally's increased pain was "not the critical factor" but rather the critical question was whether there was an "untoward event which caused a new injury or aggravated" the prior injury.[12]

From this perspective, the Board is satisfied that Claimant's June 2010 use of a dump truck while at work for a subsequent employer was not an "untoward event" that resulted in either a new injury or an aggravation of Claimant's old injury. Claimant's uncontroverted testimony was that operating equipment including the dump truck was one of his incidental job duties as a laborer in the construction filed. As such, this was an activity that Claimant engaged

[10] *Nally*, 630 A.2d at 645.

[11] Indeed, any other reading of *Nally* would put the Board in the untenable position of trying to discern some sort of rational distinction between having a worsening of a condition and "just" having increased pain.

[12] *Nally*, 630 A.2d at 646.

in routinely in the performance of miscellaneous tasks associated with the construction industry,; an industry that he notably operated in for many years, including after this June event, in a full-duty capacity simply tolerating the ongoing pain in his low back and legs as best he could.

While the courts have historically used, at times, different language to distinguish between subsequent accidents or injuries arising from non-work related conditions, it would seem that the untoward event analysis is very much akin to these separate, non-work related situations. Even when such non-work related events have occurred, an injury is still considered compensable if it follows as a "direct and natural result" of the primary compensable injury and the employer/carrier would still be liable for benefits.[13] However, if the "chain of causation" has been broken by a subsequent injury attributable to claimant's own negligence or fault (and hence not arising as a "direct and natural result" from the prior injury), the employer would be relieved of liability.[14] Thus, absent negligent or intentional misconduct by the claimant, "a weakened condition stemming from a compensable injury may be deemed the cause of an aggravation of the injury which occurs in a subsequent non-work related accident."[15]

Phrased another way, the recurrence/aggravation distinction should only be used in successive carrier cases to decide which of two carriers should pay claimant. Otherwise, the issue is whether the claimant's subsequent condition is a "direct and natural result" of the work accident. Under *Nally*'s successive carrier rule, the employer/carrier on the initial work accident remains liable unless there is an "untoward event." Under *Hudson*, the employer/carrier on the

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[13] *See Hudson v. E.I. DuPont de Nemours & Co.*, 245 A.2d 805, 810 (Del. Super. 1968).
[14] . *Amoco Chemical Corp. v. Hill*, 318 A.2d 614, 618 (Del. Super. 1974).
[15] *Barkley v. Johnson Controls*, Del. Super., C.A. No. 02A-01-003, Vaughn, J., slip op. at 8 (January 27, 2003).

initial work accident remains liable so long as all subsequent problems remain a "direct and natural result" of the work accident. In other words, it seems as though, at its essence, an "untoward event" would be required to relieve the employer of liability under *Hudson* as well.

In assessing the instant case with these parameters, the Board further finds that the August 2012 motor vehicle accident and September 2010 lifting event (to the extent that there was one that caused even a minor irritation to Claimant's low back), are insufficient to break the chain of causation to Employer for Claimant's prior injury. There is no evidence that either of these events worsened Claimant's condition in any meaningful way or tat either one, absent the 2005 injury, would even have warranted medical care. Claimant had low back and leg pain for years following his 2005 work accident. He attempted to control and tolerate it through use of conservative and surgical measures. Despite lingering symptoms he persisted in medical treatment as needed and continued to work in the only industry he has any experience; construction. Claimant, as he testified, grit his teeth for years and did the best that he could to earn sufficient money to support his family; a proposition that even Dr. Piccioni found accurate in Claimant's case. He missed no work and engaged in no substantial treatment that the present record reflects following either of these events. In fact, to the contrary, Claimant's undisputed and credible testimony in this matter was that it was a gradual and progressive build-up of the same symptoms and issues he had had for years in his low back and legs that eventually led him to leave his job in May 2012. As such, the Board finds that Employer has failed to establish, as a defense, that liability for Claimant's ongoing low back issues rests anywhere other than with it.

Partial Disability Benefits

Finding that Claimant's present low back condition is causally related to his 2005 work accident, the Board must assess what, if any limitations this condition creates in terms of

Claimant's ability to earn wages. In this regard, Dr. Piccioni testified that if Claimant did not have such an extensive drive to work every day that he may well be able to return to the heavy-duty construction industry. According to both Dr. Uthaman and Claimant, however, this recommendation is in stark contrast to what virtually every other treating physician seeing Claimant since his work accident has suggested. Finding Dr. Piccioni's explanation lacking some credibility as to this issue, the Board adopts the opinion of Dr. Uthaman that Claimant should be working in a less physically demanding position. Having said that the Board is aware that Dr. Uthaman, while listing zero work hours from June 1, 2012 through July 2012, verbally recommended to Claimant that he work in a sedentary-duty, desk type job. Claimant does not dispute that he was aware of his ability to work in some capacity and is thus not entitled to total disability for this period.[16] Claimant, however, managed to find a job in July 2012 that is classified as medium-duty work but requires very little of him physically. As such, while Claimant may not be able to perform all medium-duty jobs, it seems as though he has found one that is physically less demanding and tolerable for him; a position that pays him $11.05 per hour 40 hours per week.

Employer has provided a Labor Market Survey created by Ms. Lock in this case. This survey identified a total of ten jobs purporting to be within Claimant's physical and vocational capabilities. At least four of these jobs, however, are 40 or more miles from Claimant's home. As such he would have to endure eight hour days of employment and then 80 plus mile roundtrip commutes to work – the very thing that Dr. Piccioni opined was making Claimant's condition so much worse. This does not seem reasonable and so the Board is eliminating these long distance employment opportunities from its consideration. The Board further notes that Ms. Locke

[16] The question becomes whether or not Claimant is completely incapacitated (*i.e.*, demonstrate "medical employability"). *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973).

acknowledged that while she has a range from $440 to $520 per week listed for BBSI on the survey, as was the case with Claimant's current BBSI employment, most new employees are hired at $440 per week and then after 90 days may be given incremental raises. Thus, eliminating the high end range for that job from consideration the Board finds the low end average for the remaining jobs to be $483.33 and the high end average for the remaining jobs to be $499.17.

Even parsing out the elements noted above from the Labor Market Survey, the Board is not entirely persuaded that the remaining medium-duty jobs identified would be consistent with Claimant's physical abilities. As previously noted, simply because Claimant had presently found a job that is classified as medium-duty but requires much less on a day to day basis, does not necessarily mean that Claimant is capable of performing any and all medium-duty jobs. As such, under the present circumstances, the Board finds that Claimant's current employment is the best indicator of his present earning capacity.

Claimant currently earns $11.05 per hour, working 40 hours for week. This equates to an average weekly wage of $442. Claimant's average weekly wage at the time of his injury was $857.46. This results in a current loss of earning capacity totaling $415.46 per week. Claimant is entitled to 66 2/3 of the different between his prior and current earning capacities ($415.46 x 66 2/3) for a total of $276.97 per week beginning May 17, 2012 and ongoing.

Medical Bills

Medical bills at issue in this hearing include an EMG and MRI. Dr. Uthaman testified that these were reasonable, necessary and causally related to Claimant's ongoing low back condition. Dr. Piccioni, setting aside his ladder opinion as to causation, agreed that these were reasonable and necessary. As such, Employer is directed to make payment for both,

commensurate with the State of Delaware Health Care Payment System as provided for by Section 2322B(3) of the Worker's Compensation Act.[17] .

Missed DME

There is no dispute that Claimant was duly scheduled to attend a defense medical examination with Dr. Piccioni on August 21, 2012. Claimant has not suggested that he received anything other than timely notice of this appointment and indicated that he believes it got overlooked because he was moving. Employer has provided documentation[18] indicating that it was subject to a $1200 "no show" cancellation fee when Claimant failed to appear for this appointment. As such, and based on the evidence presented, the Board is persuaded that Employer is entitled to a credit in the amount of $1200 against any award made herein.

Attorney's Fee and Medical Witness Fees

A claimant who is awarded compensation is generally entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller."[19] At the current time, the maximum based on Delaware's average weekly wage calculates to $9,675.20. The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded.[20] A "reasonable" fee does

[17] "The maximum allowable payment for health care treatment and procedures covered under this chapter shall be the lesser of the health care provider's actual charges or the fee set by the payment system." DEL. CODE ANN. tit. 19, § 2322B(3).
[18] *See* Employer's correspondence to the Board, copied to Claimant, and dated December 17, 2012.
[19] DEL. CODE ANN. tit. 19, § 2320.
[20] *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996).

not generally mean a generous fee.[21] Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant has achieved a finding of compensability for his ongoing low back issues which entitles him to partial disability compensation from May 17, 2012 ongoing.[22] Claimant's counsel submitted an affidavit stating that he spent a total of 24.4 hours preparing for this hearing which itself lasted approximately three hours. Claimant's counsel, who was admitted to the Delaware bar more than 17 years ago, is experienced in workers' compensation litigation; a specialized area of the law. Counsel or his firm's first contact with Claimant was on August 3, 2006. Thus, Claimant has been represented by counsel or his firm in excess of 6 years. This case was of average complexity involving no novel issues of fact or law. Claimant's attorney did not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although he naturally could not work on other cases at the same time that he was working on this litigation. There is no evidence that accepting Claimant's case precluded counsel from other employment other then potential representation of Employer. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board awards a total attorney's fee in the amount of $8,000.[23] Claimant is awarded payment of medical witness fees for testimony on behalf of Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

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[21] *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).

[22] An offer of settlement was made in this case more than thirty days prior to this hearing, however, that offer was for a limited period of partial disability whereas the Board has herein awarded partial disability benefits on an ongoing basis. As such, Claimant remains entitled to an award of reasonable attorney's fees.

[23] The Board's decision not only entitles Claimant to ongoing partial disability at the present but also potentially confers upon Claimant the non-monetary benefits of ongoing treatment. *See Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008).

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's Petition to Determine Additional Compensation Due is GRANTED. Claimant is awarded payment of related medical expenses, compensation for partial disability, a reasonable attorney's fee in the amount of $8,000.00 and the payment of his medical witness fees.

IT IS SO ORDERED THIS 27 DAY OF DECEMBER, 2012.

INDUSTRIAL ACCIDENT BOARD

VICTOR R. EPOLITO JR.

JOHN F. BRADY

I, Angela M. Fowler, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Angela Fowler, Esquire
Hearing Officer

Mailed Date: 12-27-12

OWC Staff

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

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July 31, 2012

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RE: ***Perdue Farms v. Rogers***
C.A. No. S11A-09-003

Date Submitted: April 25, 2012
Date Decided: July 31, 2012

On Appeal from the Board's Decision to Grant Claimant's Petition to Determine Compensation Due: AFFIRMED

Dear Counsel:

Perdue Farms ("Employer") appeals a decision from the Industrial Accident Board ("the Board") that found Ronald Rogers' back injury was compensable as a cumulative detrimental effect work-related injury and awarded Mr. Rogers total disability payments from March 14, 2011, ongoing. The Board's decision is affirmed for the reasons set forth below.

STATEMENT OF THE CASE

A. Factual & Procedural Background

Mr. Rogers filed, *pro se*, a Petition for Compensation Due ("the Petition") with the Board on March 14, 2011, wherein Mr. Rogers alleged he had suffered a work injury in October of 2010. In April of 2011, Mr. Rogers retained counsel. The Board held a hearing on the Petition on August 22, 2011. By way of written decision mailed September 6, 2011, the Board awarded total disability benefits to Mr. Rogers from March 15, 2011,[1] ongoing. The Board also awarded medical expenses, an attorney's fee in the amount of $8,400, and reimbursement of Mr. Rogers' medical expert deposition fee.

Employer filed an appeal with the Superior Court on September 30, 2011. On October 7, 2011, Mr. Rogers filed a cross-appeal with Superior Court. Mr. Rogers' cross-appeal has since been withdrawn. Briefing is complete with regard to Employer's appeal and the matter is ripe for decision.

DISCUSSION

A. Standard of Review

The review of the Board's decision is confined to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's findings of fact.[2] The Supreme Court and this Court have emphasized the

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[1] The Board found Mr. Rogers had not given formal notice to Employer that his injury might be work-related until the filing of the Petition on March 14, 2011.

[2] *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

limited appellate review of an agency's findings of fact. The reviewing Court must determine whether the administrative decision is supported by substantial evidence.[3] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[4] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[5] Questions of law are reviewed *de novo*.[6]

B. The Board Hearing

Mr. Rogers testified on his own behalf at the Board hearing. He told the Board his job with Employer required him to move and stack bags of chicken tenders weighing approximately sixty-five pounds each. He underwent and passed a pre-employment physical exam conducted by Employer prior to beginning work in January of 2009. Mr. Rogers testified he had not received treatment for back pain prior to January 2099. At some point, however, he had a routine physical at Employer's wellness center and told Employer's physician, Dr. Black, that he occasionally experienced back pain. In October of 2010, Mr. Rogers took two days off from work due to flu-like symptoms. After returning to work, he sought treatment from Employer's wellness center for flu

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[3] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

[4] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

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

[6] *Delhaize America, Inc. v. Baker*, 2002 WL 31667611, at *2 (Del. Super.).

symptoms but was given an appointment card for a later date. Mr. Rogers subsequently drove himself to the hospital to seek medical attention. He was given pain medicine for back pain as well as medicine to address his flu symptoms. The following Tuesday, November 2, 2010, Mr. Rogers followed up with Dr. Black, who sent him for an MRI, restricted his work capabilities, and referred him to Dr. Rowe for additional treatment.

In early December, Dr. Rowe prescribed pain medicine for Mr. Rogers and ordered several other tests. An MRI revealed a herniated disc in Mr. Rogers' lower back. At this point, Mr. Rogers was referred to Jonathan Kates, M.D. Mr. Rogers has been under Dr. Kates' care since that time. He has also seen Dr. Lieberman with regard to the appropriateness of more invasive treatment.

Mr. Rogers' back continues to cause him discomfort. At the Board hearing, he rated his pain on a scale of one to ten as an eight. Simple activities cause him pain and the medicine he is prescribed does little to relieve his suffering.

Mr. Rogers admitted to having had some aches in his back as far back as the summer of 2010. Mr. Rogers signed a "Modified Duty Agreement" filled out by the wellness center that indicated his injury was not work related. The Modified Duty Agreement provides that Employer will attempt, if possible, to accommodate Mr. Rogers' work restrictions. Mr. Rogers stated he felt he did not have a choice to sign the Modified Duty Agreement as he was asked to sign the document by his supervisor's supervisor. He did not fill out the form and did not take the time to read it. When Mr. Rogers was told

Employer was going to allow him to use Family Medical Leave Time, he believed that action indicated his injury was work-related.

Dr. Kates, a board-certified orthopedic surgeon, testified via deposition on behalf of Mr. Rogers. Mr. Rogers was seen at Dr. Kates' office by his physician's assistant, Mr. Demaio, on December 8, 2010. Mr. Rogers reported a stabbing pain in his back. A physical examination revealed tenderness over the lower edge of right scapula and his right midsection. Flexion in Mr. Rogers' cervical spine caused pain. Mr. Rogers reported that he first noticed his back pain at work about a month earlier. He described his work duties as including lifting and carrying seventy pound totes frequently. He told Mr. Demaio that he had reported the back pain to his supervisor. A review of the thoracic spine MRI revealed arthritis. Mr. Demaio diagnosed Mr. Rogers with lumbar and thoracic strain. Mr. Demaio issued light-duty work restrictions.

Mr. Demaio saw Mr. Rogers again in January and February. Mr. Rogers' pain continued and spread to his knee. MRIs of Mr. Rogers' knee and lumbar spine were ordered. From this point forward, Dr. Kates has seen Mr. Rogers, personally. The MRI of the knee was normal. However, the MRI of the lumbar spine revealed a disc protrusion or herniation at L5-S1 on the left side causing foraminal stenosis, which indicates a narrowing of the space for the nerve root at the spine. Dr. Kates testified this MRI correlated with Mr. Rogers' subjective complaints, especially with regard to his complaints of radiating pain to his lower left extremity. Dr. Kates diagnosed Mr. Rogers

with a herniated lumbar disc and undiagnosed thoracic pain. Mr. Rogers continued to see Dr. Kates as well as Dr. Rowe for his pain. Dr. Kates continued to restrict him to sedentary work duty due to his ongoing pain. Dr. Kates also referred Mr. Rogers to Dr. Lieberman for an evaluation regarding the appropriateness of invasive treatment.

In July of 2011, Mr. Rogers complained to Dr. Kates that he believed his left leg was atrophying. Indeed, Dr. Kates testified that measurements he took reflected a two centimeter difference in circumference between Mr. Rogers' left and right calves. This difference was significant enough that Dr. Kates became concerned that a pinched nerve had resulted from the herniated disc. Dr. Kates issued a no-work order until Mr. Rogers' next visit due to his concern with Mr. Rogers' nerve function. The current treatment plan is to wait for the results of an EMG that will test Mr. Rogers' nerve function and proceed from there.

Dr. Kates testified that his medical opinion is that Mr. Rogers' pain is caused by a protruding disc at L5-S1 that is encroaching on his left S1 nerve route. Moreover, Dr. Kates testified that the work activities that Mr. Rogers described to him were sufficient to cause the injury. Although Dr. Kates noted that one cannot tell from an MRI precisely how long a herniation has been in existence, he testified that, in his experience, symptoms from disc herniation usually occur gradually. Dr. Kates told the Board that, in his opinion, all treatment has been reasonable, necessary, and related to Mr. Rogers' work activities.

With regard to causation, Dr. Kates testified as follows:

> Counsel: Doctor, just to be clear, is it your opinion that this was a gradual onset of the injury after working in the heavy duty job over time, or there was one specific incident where his back pain began out of nowhere? Meaning he had no back pain one day and the next day he had severe back pain.
>
> Kates: Well, not to sound evasive, but it's sort of a combination. Repetitive lifting can cause some symptomatic damage and then at some point it has to start and then can get progressively worse. So, you know, there has to be a point in time when the symptoms start. But that doesn't mean that there wasn't damage prior to that.
>
> Counsel: Okay.
>
> Kates: And that is typical of all repetitive injuries I believe.
>
> Counsel: Okay. Would it surprise you then with his type of work and the injury that he has if he was telling providers intermittently that he was having some back pain just prior to the early November incident with the twinge?
>
> Kates: It wouldn't surprise me, no.
>
> Counsel: If that were true, would that change your opinion regarding causation?
>
> Kates: It would be consistent with my feeling about causation, that it was related to his activity at work.[7]

Brenda Anthony, line coach for Employer, testified on behalf of Employer. She told the Board she does not recall Mr. Rogers reporting a back injury to her. She stated that, at any given time, there were a number of supervisors on duty in the area where Mr. Rogers worked. Occasionally, Ms. Anthony testified workers would report to the wellness center during their scheduled break times.

Ron Dukes, Employer's safety security manager, also appeared before the Board

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[7] Deposition of Dr. Kates, at pp. 55-56.

on behalf of Employer. Mr. Dukes stated that the Employer's written polity regarding an injury is to immediately report the injury to the employee's supervisor. Employer does not have a record of any work injury suffered by Mr. Rogers. Mr. Dukes testified that, although employees should not be lifting full totes, a full tote would weight between forty and fifty pounds.

Edguardo Torres also testified on behalf of Employer. Mr. Torres was the head of the deboning operation where Mr. Rogers worked when he reported to the wellness center on November 2, 2010, with complaints of back pain. Mr. Torres has never seen any documentation concerning a work injury suffered by Mr. Rogers. He learned of Mr. Rogers' visit to the wellness center when someone from the center called Mr. Torres to ask him to review the Modified Duty Agreement. He was not advised of the nature of Mr. Rogers' complaint due to The Health Insurance Portability & Accountability Act ("HIPAA"). Someone at the wellness center filled out the Modified Duty Agreement. Mr. Torres agreed that people who sign the form are hopeful Employer can find a position that can accommodate their limited duty restrictions. Mr. Torres testified that Mr. Rogers' responsibilities included moving full totes from a stand to a pallet without assistance. A full tote weighs between fifty to sixty pounds.

Finally, Lawrence Piccioni, M.D., testified via deposition on behalf of Employer. Dr. Piccioni is a board-certified orthopedic surgeon who evaluated Mr. Rogers on July 15, 2011. Dr. Piccioni told the Board that Mr. Rogers reported experiencing no back pain at

the time of the evaluation. Mr. Rogers told Dr. Piccioni he did not experience a specific injury but just felt sudden pain, or twinge, in his back while at work. Dr. Piccioni stated that Mr. Rogers told him he had not had prior back pain. In response, Dr. Piccioni tried to refresh Mr. Rogers' recollection by showing him medical records from the summer of 2010 that documented complaints Mr. Rogers had made to his gastroenterologist[8] about his back.

Dr. Piccioni reviewed a thoracic MRI of Mr. Rogers from 2009 and opined that the MRI showed extensive osteophytosis, or bone spurring consistent with degenerative changes. A review of a recent MRI of Mr. Rogers' lumbar spine showed degenerative changes and disc changes at L4-5 and L5-S1, a herniated disc at L5-S1, and some evidence of moderate bilateral foraminal stenosis, or narrowing of the hole where the nerve runs. The disc protrusion at L5-S1 would usually affect the S1 nerve root, which travels to the bottom of one's foot. The stenosis as it appears in Mr. Rogers would manifest itself in pain complaints down the back and the buttock, traveling to the bottom of the left foot. Dr. Piccioni did not see any evidence of acute injury in the form of a fracture, dislocation, etc. Dr. Piccioni testified his physical exam of Mr. Rogers revealed only mild subjective tenderness on the right T6-T7-T8. Dr. Piccioni stated he thought Mr. Rogers' left leg might be slightly smaller than his right but measurements taken evidenced no disparity.

[8] The gastroenterologist treats Mr. Rogers for an unrelated medical condition.

Dr. Piccioni concluded: (1) Mr. Rogers was not credible as to his medical history; (2) there was nothing objective on physical examination to support Mr. Rogers' complaints; and (3) the injury did not seem to be work-related.

As to whether there was any evidence of cumulative trauma, Dr. Piccioni testified he did not believe so because (1) the medical records did not mention a work-related injury and (2) Mr. Rogers' complaints did not match up with the medical records as to a specific work-related injury. In Dr. Piccioni's opinion, Mr. Rogers is capable of full-duty work, subject to no restrictions. All treatment has been reasonable and necessary but not related to any work injury.

C. Questions Presented

(A.) The Board did not err by considering Mr. Rogers' injury pursuant to a theory of cumulative trauma.

The Board concluded Mr. Rogers suffered a compensable cumulative detrimental effect injury to his back that manifested on November 2, 2010, when his treating physician began restricting Mr. Rogers' work capabilities. Employer asserts that Mr. Rogers was improperly permitted to present his case as a cumulative detrimental effect claim when the claim, as filed, was presented as an acute injury claim. The manner in which a claim is framed is significant because a claimant must meet a lesser burden of proof as to causation for a cumulative detrimental effect injury. That is, when a claimant alleges an acute injury, he must show "but for" the work accident, the claimant's injury

would not have occurred. In contrast, when a cumulative detrimental effect injury is alleged, a claimant must demonstrate that "the ordinary stress and strain of employment is a substantial cause of the injury."[9]

Mr. Rogers filed his Petition *pro se* on March 14, 2011, and listed "October 2010" as the date of accident. Elsewhere in the Petition, Mr. Rogers elaborated and stated that he requested permission from his then-supervisor to see Employer's nurse for back pain "about mid-October." By mid-April, Mr. Rogers had obtained legal counsel. Counsel did not seek to amend the Petition.

In support of Employer's position, it cites Board Rule 9, which requires the parties file a joint Pre-Trial Memorandum ("Memorandum"). A Memorandum must contain "a complete statement of what the petitioner seeks and alleges."[10] Either party may modify a Memorandum prior to thirty days before the Board hearing. Subsequently, the Board may, in its discretion, permit modification. In this case, the Memorandum was filed with the Board on July 17, 2011. Pursuant to the Memorandum, the date of the accident was identified as November 3, 2010, and the the nature of the injury remained characterized as "acute." Accordingly, Employer argues the acute nature of the claim was reinforced under the guidance of counsel and may not be attributed to Mr. Rogers' ignorance at the

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[9] *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1136 (Del. 1989).

[10] Industrial Accident Board Rule 9(B)(5).

time he filed the Petition. Employer asserts its defense was premised upon challenging Mr. Rogers' claim of an acute injury. Employer implies it was prejudiced by the Board's implicit amendment of the Memorandum permitting Mr. Rogers to recharacterize the nature of his injury at the Board hearing.

Mr. Rogers responds by noting that the Employer was, in fact, on notice that Mr. Rogers' injury was not acute due to the complete absence from the available medical records, including those of Employer's wellness center, of any specific date of injury. Furthermore, Mr. Rogers notes that Employer elicited medical testimony from its own medical expert regarding the cumulative detrimental effect theory of liability. The nature of the Petition also supports a cumulative detrimental effect injury as no specific date is identified therein.

The Board's rules of procedure are designed for the "more efficient administration of justice;" as such, they are to be followed and enforced by this Court.[11] However, at times "fairness" will require the Court recognize an exception to the strict enforcement of a Board rule.[12]

In this case, the Board excused Mr. Rogers' initial characterization of his injury as "acute" because he filed his Petition *pro se* and was incapable of recognizing the legal

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[11] *K-Mart, Inc. v. Bowles*, 1995 WL 269872, at * 2 (Del. Super.) (citation omitted).

[12] *Id.*

distinction between an acute injury and a cumulative detrimental effect injury. Moreover, the Board cited the fact that the date of injury listed by Mr. Rogers was the relatively vague date of "October 2010." The Board did not specifically address whether Employer was prejudiced as a result in this change of strategy but noted that the bulk of Employer's argument centered on attacking Mr. Rogers' credibility, including the alleged unreliability of his statements as to when he began experiencing pain.

The Court concludes the Board did not err in accepting Mr. Rogers' implicit amendment to the Memorandum at the Board hearing. In so finding, the Court agrees with the Board's observation that, "since [the filing of the Petition], Claimant has argued that [the date of October 2010] was selected in error." The Court finds there is no evidence that Employer was prejudiced as a result of the change in the characterization of Mr. Rogers' injury. Employer's own wellness center did not have any record of an alleged specific work injury. The depositions of both testifying doctors covered the theory of cumulative detrimental effect. Of note is the fact that Dr. Kates' deposition, which clearly focused on the theory of cumulative detrimental effect injury, took place a week prior to Dr. Piccioni's deposition. Employer was, in fact, amply prepared to present evidence and argument on the theory of cumulative detrimental effect causation. The Court also notes Employer's competent preparation is reflected in Employer's decision not to seek a continuance of the Board hearing after counsel for Mr. Rogers indicated in his opening statement that Mr. Rogers' injury was a "gradual onset type of

injury and there is no specific date of accident." The Board's decision to exercise leniency to Mr. Rogers under the facts presented was not an abuse of discretion.

(B.) The Board did not err in finding Mr. Rogers had established that his work duties were a "substantial factor" in causing his injury.

Employer argues the substantial factor threshold is not supported by competent medical evidence in the record. In order to recover under a cumulative detrimental effect theory, compensation is determined by the "usual exertion rule." Under the usual exertion rule, a claimant, irrespective of previous condition, may recover workers' compensation benefits as long as "the ordinary stress and strain of employment is a substantial factor in proximately causing the injury."[13] The claimant has the burden of establishing through expert testimony that his employment was a material element in bringing the injury about. Employer contends Mr. Rogers' medical expert established only that Mr. Rogers' work duties were a cause of Mr. Rogers' back pain, not that his work duties were a substantial factor in the injury.

[13] *Duvall*, 564 A.2d at 1136.

Where an alleged injury is internal, "medical testimony becomes essential in order to properly determine that an injury in fact has occurred and the extent of such injury."[14] Employer seeks to expand the requirement for expert testimony to include the need for the medical expert to testify specifically to what degree it is probable that the workplace environment was a substantial factor in creating the injury. To the contrary: "Once the claimant's injury in the present case is properly established by medical testimony, then the causal connection between the act and the injury must be shown. This, of course, may be done in certain cases independent of medical opinion, depending always upon the circumstances presented."[15]

The Board cited the proper burden of proof for cumulative detrimental injury causation and went on to conclude, "in this vein the Board is persuaded that Claimant, who passed a pre-employment physical without issue and then went on to perform an unquestionably heavy duty job for two years prior to the manifestation of back symptoms, experienced a gradual accumulation of trauma to his back as a direct result of the repetitive and heavy lifting associated with his job as testified to by Dr. Kates. While this condition began to manifest itself in June of 2010, the symptoms were not sufficient at that time to put Claimant or even his doctor on notice that the condition would

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[14] *McCormick Transp. Co. v. Barone*, 89 A.2d 160, 163 (Del. Super. 1952).

[15] *Id.* (citation omitted).

progressively worsen in fairly short order."

Employer's case centered on attacking Mr. Rogers' credibility and, by extension, Dr. Kates' credibility because Dr. Kates admittedly relied upon subjective representations made by Mr. Rogers in forming his medical opinion. The Board, however, found Mr. Rogers' alleged misrepresentations to be consistent with the waxing and waning pain that a cumulative detrimental injury may cause. Moreover, the Board found Dr. Piccioni's testimony not credible in part because Dr. Piccioni summarily dismissed the possibility that Mr. Rogers' repetitive, heavy lifting – as testified to by several witnesses – served as the cause of Mr. Rogers' injuries. The Board found this oversight "almost inexplicable." As the parties well know, this Court does not retry the case below. "It is well-settled that issues of credibility rest solely within the Board's discretion and will not be disturbed absent a showing of unreasonable or capricious circumstances."[16] The Board "is free to adopt the opinion testimony of one expert over another, and that opinion, if adopted, will constitute substantial evidence for purposes of appellate review."[17]

In this case, the Board clearly accepted Dr. Kates' testimony with regard to the nature and extent of the injury as credible. That decision is supported by substantial

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[16] *Hart v. Columbia Vending Serv.*, 1998 WL 281241, at *4 (Del. Super.).

[17] *Bolden v. Kraft Foods*, 2005 WL 3526324, at *4 (Del.); *see also Jepsen v. University of Delaware – Newark*, 2003 WL 22139774, at *2 (Del. Super.) ("[A]s a finder of fact, the Board is entitled to discount the testimony of any witness on the basis of credibility, provided it states specific, relevant reasons for so doing.").

evidence in the record. Indeed, both experts testified to the existence of a herniated disc and the potential for pain to radiate down the left side of Mr. Rogers' body as a result. Dr. Piccioni also testified that he believed all treatment to have been medically necessary and reasonable. The difference of opinion between the experts lies in causation. The Court finds that there is no legal requirement that a medical expert specifically testify to what degree it is probable that a claimant's work environment was a "substantial factor" in creating his injury. The Board is free to extrapolate from expert testimony, lay testimony, and common sense that repetitive lifting of a weight in excess of forty pounds was a substantial factor in the manifestation of Mr. Rogers' injuries. In this regard, the Board's decision is free from legal error.

(C.) The Board's decision is supported by substantial evidence.

Finally, Employer argues that the evidence relied upon was manifestly against the weight of the evidence and lacked foundation. In support of this argument, Employer cites Dr. Kates' reliance on Mr. Rogers' version of events. Specifically, Employer argues the record does not support a finding that the onset of Mr. Rogers' pain came about at work as Mr. Rogers attested. In so doing, the Employer cites the emergency room records that allegedly establish that Mr. Rogers' back pain manifested on a day when he was not working. The Board considered this argument and concluded:

> Employer also points to the final days of October 2010 during which Claimant did not work on Sunday (October 24, 2010) and called out of work on Monday (October 25, 2010) and Tuesday (October 26, 2010)

> before returning to work on Wednesday (October 27, 2010). Employer argues that when Claimant was treated at the hospital on Wednesday evening, October 27, 2010, the corresponding hospital records indicate that Claimant was suffering from the flu with some mention of back pain that began on Sunday when he was not at work. Employer suggests that this is inconsistent with Claimant's report to Dr. Kates and others that he felt a twinge in his back that set off these symptoms. The testimony in this hearing, however, including that offered directly by Claimant, is suggestive of the fact that Claimant is incapable of accurately recalling exactly when the twinge in his back occurred. Clearly Claimant is a poor historian in this regard. What is of note, however, in supporting Claimant's account of the events at issue is that he did, contrary to the spin offered by Dr. Piccioni during parts of his testimony, present to the hospital on October 27, 2010 complaining of pain from his shoulder blade to his low back. The flu almost seems incidental to this contact given that the hospital the hospital administered Claimant pain killers and a take home prescription of Percocet presumably for the back pain and not the flu. Despite Employer's assertion to the contrary, it is not at all clear that Claimant reported that his back pain began on Sunday. In fact, it seems equally plausible that the Sunday reference in the hospital notes refers to the onset of Claimant's flu.

As previously noted, Employer's attack on the evidence on the record focuses on Mr. Rogers' credibility. The Board considered Mr. Rogers' seemingly inconsistent history of back pain and concluded:

> While it is true that Claimant's recollection of how and when [back complaints made during the summer of 2010 were] made is somewhat unordered, Claimant did indicate that he had, prior to October 2010, informed Dr. Black of some intermittent back pain. Claimant's testimony, however, reveals that this was treated as something of an aside by both he and Dr. Black that did not require immediate attention. While Claimant also mentioned the back pain to [his gastroenterologist] wondering if his medication regimen in that arena could possibly have created back pain as a side effect, there is no evidence that the intermittent pain at that point rose to a level requiring treatment or anything else. Quite to the contrary, Claimant continued to work without issue performing the heavy lifting in his job testified to by Mr. Torres and Claimant himself. Under such

> circumstances, the Board finds credible the possibility that Claimant did not perceive those limited complaints as a history of back issues when [giving his medical history to Dr. Rowe]. Furthermore, in comparing this intermittent summer 2010 history to the medical testimony provided by both Drs. Kates and Piccioni, it seems entirely plausible that this kind of waxing and waning pain would be expected in someone who has suffered or is suffering the gradual onset of back issues, particularly with the preexisting degenerative changes that Claimant indisputably had. Dr. Kates testified, very credibly, that in Claimant's circumstance, it seems most likely that Claimant experienced a cumulative impact on his low back from the heavy lifting for Employer that got progressively worse until late October or early November 2010 when it presented as a more isolated, insidious event.

In addition, the Board noted that, although Mr. Rogers has a criminal record involving a crime of dishonestly, no evidence was presented to indicate that Mr. Rogers was anything less than a reliable, hard-working employee. Nor was there any indication that Mr. Rogers engaged in any workplace dishonesty.

In sum, the Board, after exhaustive review, determined Mr. Rogers to be a credible witness as to the circumstances surrounding his back injury. Similarly, the Board found the testimony of both Dr. Kates and Dr. Piccioni to support the same medical findings of internal injury. With regard to causation, the Board clearly rejected Dr. Piccioni's testimony due to his failure to consider Mr. Rogers' work activities and conclusory reasoning. These credibility determinations are within the province of the Board and this Court will not disturb them absent extreme circumstances. The Court's review of the record satisfies the Court that the Board's decision is supported by substantial evidence.

Conclusion

For the reasons set forth above, the Board's decision is free from legal error and supported by substantial evidence and, as such, the decision is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary
cc: Industrial Accident Board

1 of 1 DOCUMENT

STATE OF DELAWARE, Employer Below–Appellant, v. BETSY STEVENS, Claimant Below–Appellee.

C.A. No. 00A–02–008

SUPERIOR COURT OF DELAWARE, NEW CASTLE

2001 Del. Super. LEXIS 167

January 17, 2001, Assigned
May 15, 2001, Decided

PRIOR HISTORY: [*1] On the State's Appeal from the Decision of the Industrial Accident Board.

DISPOSITION: Appeal by the State of Delaware must therefore denied and decision affirmed.

LexisNexis(R) Headnotes

COUNSEL: J. R. Julian, Esquire, J. R. JULIAN, P.A., Wilmington, DE, Attorney for the Appellant.

Joseph W. Weik, Esquire, WEIK, NITSCHE & DOUGHERTY, Wilmington, DE, Attorney for the Appellee.

JUDGES: Toliver, Judge.

OPINIONBY: Toliver

OPINION:

OPINION AND ORDER

TOLIVER, Judge

The matter before the Court concerns an appeal by the State of Delaware from a decision rendered by the Industrial Accident Board granting workmen's compensation benefits to Betsy A. Stevens, a former employee of the State of Delaware.

FACTS

Ms. Stevens injured her lower back and groin on January 27, 1994, when she slipped on ice during the course of her employment with the Red Clay Consolidated School District. She first received treatment for those injuries from Dr. Carl Smith, but because little improvement resulted from Dr. Smith's treatment, Ms. Stevens eventually sought treatment from Dr. Steven Hershey. Dr. Hershey initially treated her complaints conservatively, but eventually performed surgery on her back to repair a lumbar disc herniation **[*2]** on August 8, 1997.

Several days after returning home from that surgery, Ms. Stevens fell while taking a shower. At that point in time she appeared to have been making progress recovering from the injury and subsequent surgery. The fall interrupted and reversed that progress, exacerbating the injury to her back. Shortly thereafter, Dr. Hershey ordered an MRI n1 of Ms. Stevens' back which revealed a "large extruded recurrent disc rupture." Hr'g Tr. at 42. Further surgery was deemed necessary and was performed by Dr. Hershey on March 17, 1998. Ms. Stevens last treated with Dr. Hershey on October 1, 1998, but has continued treatment since with her family physician, Dr. Domingo Singson.

> n1 Magnetic resonance imaging: An imaging technique used primarily in medical settings to produce high quality images of the inside of the human body.

Ms. Stevens began receiving total disability benefits from the State as of January 28, 1994, the day following her work–related injury. Those benefits were terminated as of October 1, 1997, which **[*3]** was the date that the State determined that she would have returned to work, but for the renewed difficulties she experienced following her fall in the shower in August 1997. On November 9, 1997, Ms. Stevens filed a petition with the Board seeking disability benefits pursuant to *19 Del. C. § 2324*. The State opposed that petition, alleging instead that the ailments suffered by Ms. Stevens were the result of longstanding back problems, not related to the accident she suffered at work. A hearing on the petition was held on January 5, 2000.

Appearing by deposition testimony on behalf of Ms. Stevens were Doctors Steven Hershey and Domingo Singson. Ms. Stevens testified in person. The State re-

lied on the testimony of Doctors Richard J. Morris and Martin Gibbs. Robert Stackhouse, a vocational expert, also testified on behalf of the State.

Dr. Hershey testified that he first examined Ms. Stevens on December 18, 1996. At that time, Dr. Hershey diagnosed her with a lumbar disc herniation and attributed that injury to the 1994 work–related fall. He stated that throughout his treatment of Ms. Stevens, her symptoms continued to worsen. While the fall in the shower **[*4]** exacerbated her symptoms, Dr. Hershey indicated that the fall would have produced no significant injuries absent the work–related injury. He opined that at the time he began seeing her, Ms. Stevens was totally disabled and unable to perform any job until 1998, when he released her to perform light duty work. However, it was his opinion that she could not return to her previous employment with the State.

Dr. Singson began treating Ms. Stevens on March 2, 1999. He testified that Ms. Stevens remains disabled and unable to return to any type of gainful employment. Dr. Singson also confirmed Dr. Hershey's conclusion that Ms. Stevens' back injuries are a result of the work–related injury.

Dr. Morris indicated that he had treated Ms. Stevens on six occasions beginning on February 26, 1994. He noted that Ms. Stevens had been involved in a motor vehicle accident on May 1, 1976 and had fallen at a convenience store on October 12, 1982. He testified that Ms. Stevens suffers from degenerative disc changes and small annular bulges, which he attributes to aging and osteoarthritis, as opposed to the work–related accident about which she complains.

Reference was also made to another incident which **[*5]** Dr. Morris felt was significant. Specifically, Dr. Morris stated that at Ms. Stevens' appointment with him on August 4 or 5, 1995, she claimed that a man grabbed her around the neck as she was leaving the office of the Union Street Insurance Company and attempted to drag her back into that establishment. That action, he testified could have been the cause of Ms. Stevens' right leg numbness. He went on to question the validity of Ms. Stevens complaints, which he opined were exaggerated and completely inappropriate based upon his assessments. Finally, it was his opinion that Ms. Stevens could perform light duty or sedentary work. Dr. Gibbs confirmed that assessment. n2

> n2 Mr. Stackhouse's testimony focused on a labor market survey that he prepared, identifying the availability of, and pay associated with employment openings occurring during Ms. Stevens' disability. This study and his testimony is not relevant to the issues before the Court.

At the conclusion of the hearing, the Board awarded Ms. Stevens total disability **[*6]** for the period of October 1, 1997 to October 1, 1998. Partial disability benefits were also awarded for a loss of earning capacity as well as for medical expenses, expert witness fees and attorney's fees. In reaching its decision, the Board relied primarily upon the testimony of Dr. Hershey. Specifically, in relevant part, it stated:

> . . . Dr. Hershey's testimony is more reliable because he followed Claimant's treatment over a period of time and he performed two surgeries. In addition, the Board finds convincing Dr. Hershey's opinion that discs do not always herniate immediately, but with injury are weakened and, over time, progress to herniation and nerve root irritation. . . .

Stevens v. State, Indus. Accident Bd., Hearing No. 1020170, (Jan. 19, 2000) (Bd. Dec. at 10). The Board found the testimony of Dr. Gibbs to be less convincing because he did not examine Ms. Stevens until after the second surgery. Id. It did not find the testimony provided by Dr. Morris persuasive because his testimony was viewed as misleading and contradictory. Id.

The State first contends that the Board erred as a matter of law by accepting and relying on the testimony of Dr. Hershey. **[*7]** More specifically, it complains that the Board erred because Dr. Hershey's testimony did not meet the requisite level of reliability required under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)* and the Delaware Rules of Evidence, and that his testimony did not constitute substantial evidence which would support the Board's decision. Ms. Stevens counters that the State stipulated to Dr. Hershey's qualifications and did not make timely objections to his qualifications or testimony he rendered. As a result, she contends that the State is precluded from raising the issue on appeal.

The State's second argument is that the Board's factual determinations of the causal relationship between the work–related accident and the surgeries are not supported by substantial evidence. Ms. Stevens, as might be expected, asserts that the necessary quantum of evidence to sustain the Board's decision was placed in the record.

On June 5, 2000, following receipt of the State's opening brief in support of its appeal, Ms. Stevens filed a motion to affirm the Board's decision pursuant to Superior Court Civil Rule 72.1. That motion was subsequently denied by the Court. The **[*8]** briefing was then resumed and

completed. That which follows is the Court's resolution of the issues so presented.

DISCUSSION

When reviewing decisions of administrative agencies on appeal, this Court must determine whether the decision is supported by substantial evidence and free from legal error. *Stoltz Management Co. v. Consumer Affairs Bd., Del. Supr., 616 A.2d 1205, 1208 (1992); State, Dept. of Labor v. Medical Placement Services, Inc., Del. Super., 457 A.2d 382, 383 (1982),* aff'd *Del. Supr., 467 A.2d 454 (1983).* "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Anchor Motor Freight v. Ciabattoni, Del. Super., 716 A.2d 154, 156 (1998); Streett v. State, Del. Supr., 669 A.2d 9, 11 (1995); Olney v. Cooch, Del. Supr., 425 A.2d 610, 614 (1981).*

The first contention to be addressed in the argument by the State that the Board's acceptance of Dr. Hershey's testimony violated the standards for admissibility of scientific evidence articulated by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).* **[*9]** However, whether or not a Daubert analysis was required before Dr. Hershey testified need not be addressed for the purpose of this appeal. The State stipulated to Dr. Hershey as a medical expert and failed thereafter to object to his testimony at the time it was received. The proper time to make objections to an expert's qualifications or proffered testimony is at trial; not on appeal. *Yankanwich v. Wharton, Del. Supr., 460 A.2d 1326 (1983).* Consequently, the only conclusion that can be reached is that there was no legal error and that the State waived the right to pursue this issue on appeal.

As indicated above, the State asserts that Dr. Hershey's opinion does not constitute substantial evidence and that the Board's reliance thereon renders its decision void. It argues that when his treatment of Ms. Stevens commenced, he requested only certain medical records and relied chiefly upon oral assertions of Ms. Stevens concerning the cause of her injuries. Because Dr. Hershey did not base his opinion on Ms. Stevens' complete medical history, the State argues that his diagnosis does not meet the requirements of Daubert, and is therefore unreliable.

However, **[*10]** Daubert is not the standard to which the substance of the Board's decision must be measured. As stated throughout this opinion, that standard is substantial evidence. Stoltz at 1208. "The courts on appeal do not sit as triers of fact to weigh evidence and determine credibility." *DiSabatino Bros., Inc., v. Wortman, Del. Super 453 A.2d 102, 105-106 (1982).* In addition, "the Board is freely authorized to accept opinion testimony of one expert and summarily disregard the opinion testimony of another expert." *Downes v. State, 1992 Del. Super. LEXIS 526,* Del. Super., C.A. No. 92A-03-006, Graves, J. (1992).

In light of the aforementioned, it is clear that the Board was empowered to accept the opinion of Dr. Hershey, in whole or in part, and reject the testimony of the other testifying experts to the extent it deemed appropriate. The Board articulated it reasons for accepting Dr. Hershey's diagnosis and opinions regarding Ms. Stevens' medical condition. Having examined those reasons along with the balance of the record, the Court is satisfied that the Board's reasoning was sufficiently grounded and constitutes substantial evidence. As a result, the State's challenge in this regard must fail. **[*11]**

The remainder of the challenge raised by the State concerns findings by the Board relative to the existence of a causal relationship between the work-related accident and the surgeries. The essence of the State's argument is that the Board's decision is not supported by substantial evidence given the injuries suffered by Ms. Stevens both before and after the work-related accident. Unfortunately for the State, a review of the record before the Board requires a contrary conclusion.

The State cites to *Jordan v. Sears Roebuck & Co., 1995 Del. Super. LEXIS 507,* Del. Super., C.A. No. 95A-05-013-FSS, Silverman J. (Nov. 29, 1995) (ORDER), where the claimant, who was suffering from a congenital knee problem, suffered an injury in a work-related accident to that same knee. The Board held that the pre-existing condition was the cause of the claimant's injuries and not the work-related fall. The State contends that Ms. Stevens' prior injuries are likewise the cause of her back problems and not the work related fall.

The State also cites to *Owen v. State, 1996 Del. Super. LEXIS 482,* Del. Super., C.A. No. 96A-03-001-NAB, Barron, J. (Oct. 17, 1996) (ORDER), where the Board held that an event occurring after the work-related accident was the event that **[*12]** caused the claimant's injury and therefore held the employer was not responsible for the same. The State analogizes the assault on Ms. Stevens to the intervening event in Owen, which it contends absolves the State of liability to Ms. Stevens.

However, the rule of law to be gleaned from these cases is not that when an employer shows the existence of a prior or intervening injury, the reviewing court should overrule a decision in favor of the employer. Rather, the applicable rule of these cases is that the Board *may* find that a prior of intervening event was the cause of the injury, and if supported by substantial evidence, this Court must

affirm the Board's findings. These cases are not controlling and do not require this Court to overrule the Board's decision. Again, the function of this Court is to examine only the evidence presented to the Board and determine whether it is "substantial" and sufficient to support the decision reached. Stoltz at 1208.

In this regard, Dr. Hershey testified that disc herniations are capable of, and often do, become more and more clinically significant over time. It was his opinion that Ms. Stevens did in fact suffer a slight herniation **[*13]** of a lumbar disc in the work–related fall. He asserted that this slight herniation progressed to the point where surgery was ultimately required. Stated differently, according to Dr. Hershey, the work–related accident was the precipitating event, which over time necessitated the first surgery. Moreover, *no* intervening events occurred which could have caused the herniation.

In sum, Dr. Hershey's testimony constitutes substantial evidence upon which the Board could reasonably rely in reaching its conclusion that the work–related fall was the causal factor necessitating the first surgery.

The State also attacks the Board's reliance on Dr. Hershey's opinion that the second surgery is causally related to the work–related accident. Dr. Hershey testified that the work related accident set in motion a string of events that ultimately caused the second surgery. In particular, he testified that without the initial work–related injury, the slip–and–fall in the shower would have been a nonevent. Ms. Stevens' physical condition following the work–related injury and the first surgery, the doctor opined, necessitated the second surgery. This opinion is based on valid reasoning and a rational **[*14]** methodology, and therefore constitutes substantial evidence.

CONCLUSION

For the reasons set forth above, the Court must conclude that the decision of the Industrial Accident Board is free from legal error and supported by substantial evidence. The appeal by the State of Delaware must therefore be **denied** and that decision **affirmed.**

IT IS SO ORDERED.

Toliver, Judge

Caution
As of: Nov 04, 2013

RALPH WILLIS, Claimant-Below, Appellant, v. PLASTIC MATERIALS, CO., Employer-Below, Appellee.

C.A. No. 01A-10-001 JTV

SUPERIOR COURT OF DELAWARE, KENT

2003 Del. Super. LEXIS 9

December 7, 2002, Submitted
January 13, 2003, Decided

PRIOR HISTORY: **[*1]** Upon Consideration of Appellant's Appeal From The Industrial Accident Board.

DISPOSITION: REVERSED and REMANDED.

COUNSEL: Walt F. Schmittinger, Esq., Dover, Delaware, Attorney for Claimant-Below, Appellant.

Erik C. Grandell, Esq., Wilmington, Delaware, Attorney for Employer-Below, Appellee.

JUDGES: VAUGHN, Resident Judge.

OPINION BY: VAUGHN

OPINION

ORDER

Upon consideration of the parties briefs and the record of the case, it appears that:

1. On September 11, 2001, after a hearing, the Industrial Accident Board ("Board") awarded the appellant, Ralph Willis ("claimant"), $ 46,904.22 for medical expenses relating to a work related accident. It also awarded $ 2,580 for his attorney's fees pursuant to *19 Del. C. § 2320(10)*. [1] The claimant has appealed the award of attorney's fees. He contends that the Board abused its discretion by failing to consider all of the factors which it is required to consider under *General Motors Corp. v. Cox* [2] when making an award of attorney's fees. He also contends that the Board abused its discretion by awarding an inadequate amount. The appellee, Plastic Materials Co. ("employer") contends that the Board acted within its discretion in **[*2]** awarding the sum of $ 2,580. It contends that the claimant offered evidence relevant to some of the *Cox* factors but not others and that the Board acted properly in basing its decision upon those *Cox* factors for which the claimant offered evidence.

2. The scope of review for appeal of a Board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law. [3] "Substantial evidence" is

defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [4] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings." [5] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings. [6] The court must give "due account of the experience and specialized competence of the Board and of the purposes of our workers' compensation law." [7] Absent an error of law, the standard of review on appeal is abuse of discretion. [8] An abuse of discretion arises only where the Board's decision has "exceeded **[*3]** the bounds of reason in view of the circumstances." [9]

3. A claimant who receives a compensation award has a statutory right to an award of reasonable attorney's fees. [10] The purpose of the statute is to reduce or eliminate the amount which a successful claimant must use from his or her compensation award to pay legal fees. [11] The Board has discretion in determining the amount of the attorney's fees which it will award, provided it acts in a manner consistent with the purpose of the Worker's Compensation Act. [12] The factors which the Board must consider in deciding upon the amount of an award are set forth in *General Motors Corp. v. Cox*. [13] They are as follows:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) The fees customarily charged in the locality for similar legal services;
>
> (4) The amount involved and the results obtained;
>
> (5) The time limitations imposed by the client or by the circumstances;
>
> (6) **[*4]** The nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) Whether the fee is fixed or contingent;
>
> (9) The employer's ability to pay;
>
> (10) Whether the attorney for the claimant has received or expects to receive from any other source. [14]

This Court has previously held that all factors must be considered. [15]

4. The Board's findings on the issue of attorney's fees in this case, set forth in full, are as follows:

> Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Plastic, pursuant to *19 Del. C. § 2320(g)*. Claimant's attorney attested that he spent 17.2 hours preparing for the hearing, which lasted approximately one hour. His first contact with Claimant was on August 28, 2000. Claimant's attorney has been practicing law in Delaware for over five years. Based on these factors, and on the results obtained, the Board awards one attorney's fee in the amount of $ 2,580. *19 Del. C. § 2320(10)(b)*. [16]

The Board's decision touches **[*5]** on the first, fourth, sixth and seventh factors, although in only summary fashion. It does not appear that the second, third, fifth, eighth, ninth or tenth factors were considered at all.

5. The court cannot exercise its function on appeal if the Board does not make adequate findings concerning each of the *Cox* factors. [17] In several recent cases the court has reversed the Board's decision concerning attorney's fees due to the Board's failure to do so. [18] The Board's failure to consider all of the *Cox* factors is an abuse of discretion which requires reversal in this case as well.

6. The employer's contention that the Board need consider only those *Cox* factors for which the claimant offers evidence has previously been rejected by this

Court, at least by implication, in *Taylor v. Walton Corporation*. [19] In that case the Board's decision discussed some of the *Cox* factors but not others. Specifically, it did not contain any discussion of the eighth, ninth and tenth factors. As to those factors, its decision did state that "no evidence was provided to the Board pertaining to the remaining *Cox* factors and the Board shall not speculate concerning them." In its order **[*6]** remanding the case, however, the court directed the Board to address all factors, including the eighth, ninth and tenth. The Board should do so in this case also.

7. On remand the Board should reassess the award of attorney's fees on the basis of all ten *Cox* factors. The claimant should provide the Board with sufficient information to enable it to do so.

8. The Board's decision on attorney's fees is ***reversed*** and the matter is ***remanded*** for further proceeds consistent with this order.

1 *19 Del. C. § 2320(10)* Attorney's fee. --

a. A reasonable attorney's fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party.

2 *304 A.2d 55 (1973)*.

3 *Robinson v. Metal Masters, Inc., 2000 Del. Super. LEXIS 264 (Del. Super. 2000)*; *Histed v. E.I. DuPont de Nemours & Co., 621 A.2d 340, 342 (Del. 1993)*; *Johnson v. Chrysler Corp., 59 Del. 48, 213 A.2d 64, 66*, 9 Storey 48 (Del. 1965).

[*7]

4 *Olney v. Cooch, 425 A.2d 610, 614 (Del. 1981)*; *Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966)*.

5 *213 A.2d at 66*.

6 *ILC of Dover, Inc. v. Kelley, 1999 Del. Super. LEXIS 573*, at *3 (Del. Super. 1999).

7 *621 A.2d at 342*.

8 *Digiacomo v. Board of Public Education, 507 A.2d 542, 546 (Del. 1986)*.

9 *Floundiotis v. State, 726 A.2d 1196, 1202 (Del. 1999)*; *Lilly v. State, 649 A.2d 1055, 1059 (Del. 1994)*.

10 *19 Del. C. § 2320(10)*.

11 *2000 Del. Super. LEXIS 264*.

12 *Id.* at *7.

13 *304 A.2d 55, 57 (Del. 1973)*.

14 *Id.*

15 *2000 Del. Super. LEXIS 264*.

16 *Willis v. Plastic Materials*, IAB Hearing No. 1050901, at 9 (September 11, 2002).

17 *Taylor v. Walton Corp., 2002 Del. Super. LEXIS 63 (Del. Super. 2002)*.

18 *Id.*; *Woodall v. Playtex Products, Inc., 2002 Del. Super. LEXIS 425 (Del. Super. 2002)*; *Thomason v. Temp Control, 2002 Del. Super. LEXIS 422 (Del. Super. 2002)*; *2000 Del. Super. LEXIS 264*; *Vaughn v. Genesis Health Ventures, 2000 Del. Super. LEXIS 253 (Del. Super. 2000)*.

[*8]

19 *2002 Del. Super. LEXIS 63 (Del. Super. 2002)*.

IT IS SO ORDERED.