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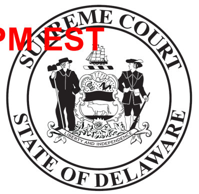

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

Reply Brief of the Claimant Below-Appellant

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<u>Argument</u>

ISSUE 1: The Industrial Accident Board's decision was supported by substantial evidence and free of legal error; the Superior Court erred in reversing the decision of the Industrial Accident Board.

Merits of Argument

The hearing before the Industrial Accident Board in this case turned on whether the Board believed the Claimant's version of events or the Employer's version of events. Specifically, The Claimant's argument was that his work-related low back injury from 2005 gradually continued to worsen, and ultimately resulted in Dr. Uthaman prohibiting him from continuing to work in a heavy duty construction job. Further, Cliamant contended that the events involving the dump truck and the auto accident, and an incident lifting his child and/or camping gear, were insignificant and legally insufficient to break the causal chain between his 2005 work injury and his symptoms, medical treatment and work restrictions in 2012.

The Employer's case was premised on Dr. Piccioni's testimony that the intervening events (the dump truck incident, the auto accident and the lifting/camping incident) were the cause of his current complaints and were legally sufficient to break the causal link between Mr. Whitney's 2005 work

injury and his symptoms, medical treatment and work restrictions in 2012. (As noted, however, Dr. Piccioni's written report had reached the opposite conclusion.) This is inherently a factual question for the Board to resolve.

Evidence to support the Claimant's position included the Claimant's testimony in addition to that of Dr. Uthaman. Mr. Whitney testified that he did not miss any significant time following any of the 2010 incidents (TR-34, 35; A-37, 38). He also testified that he continued working in a heavy, physical, manual labor job. These facts are uncontested. There is also evidence of an MRI performed in 2010 at Dr. Katz's order, that shows no interval change from his prior MRI studies. TR-82; A-85. These uncontested facts support the Board's ultimate conclusion that the 2010 events were immaterial and did not end the continuing causal relationship of Claimant's condition to the work injury. Importantly as well is the fact that the change in Dr. Piccioni's opinion, which was premised on the significance of the 2010 incidents, is invalidated by the Board's findings; that necessarily leaves Dr. Piccioni's *original* opinion, before he considered the impact of the 2010 incidents, as relevant evidence on which the Board could (and did) rely in reaching its conclusion. It is therefore incongruous with the evidentiary record for the Employer to contend that there is no medical evidence to the support the Board's award of benefits.

The foregoing evidence, if accepted by the Board (as it ultimately was), is sufficient to support a conclusion that the Claimant's symptoms, medical treatment and work restrictions continued to be related to the 2005 work injury. The Board so found. The Superior Court's function, as with this Court, is to determine if the Board's decision was supported by substantial evidence. Histed v. A.I. duPont de Nemours & Co., 621 A.2d 340 (Del. 1993). Neither the Superior Court nor this Court weigh evidence or make determinations of credibility on appeal. It is also not for the appellate courts to decide if the Board should have, or even *could* have, reached a contrary conclusion – the appellate court's function is solely to decide if the record evidence supports the conclusion that the Board did, in fact, reach.

Contrary to the Employer's assertion, Claimant does not contend that the Employer must prove an alternative theory of causation in order to defeat the Claimant's claim. From the Board's perspective, the Employer proposed several alternative theories and proffered testimony in support of those theories, but the Board was tasked with resolving the conflicts in the factual and medical testimony and determining whether Claimant's condition continues to be related to the work injury.[1] The Board resolved those conflicts in the Claimant's favor,

[1] The Employer's contention that it did rebut Claimant's allegations (Ans. Br. at p. 13) is inapposite; while the Employer certainly proffered evidence which, *if accepted by the Board* may have rebutted Claimant's allegations, the fact remains that it is for the Board to decide conflicts in the evidence in reaching its conclusions.

and substantial evidence exists in the record to support the Board's determinations. The Board's decision should therefore have been affirmed by the Superior Court.

Employer now obliquely raises a Daubert objection to Dr. Uthaman's testimony in citing to Perry v. Barkley, 996 A.2d 1262 (Del. 2010). Perry was a case involving an automobile accident, in which the trial court excluded the testimony of the Plaintiff's treating doctor because his deposition testimony reflected that the doctor believed that the Plaintiff had had no low back complaints prior to the auto accident in question, when in fact, the Plaintiff had had prior complaints. Id. The trial Court in Perry found that the doctor's "opinion was predicated on a fact which is incorrect, namely, that there were no low back complaints prior to the automobile accident…" Id. This ruling stands in stark contrast to the instant case, in several respects: First, Perry is an automobile accident case (a tort case for negligence in the Superior Court), where the trial judge performs a 'gatekeeper function' under Daubert in order to ensure that the jury, as the finder of fact, hears expert testimony that is based on a proper factual foundation and sound methodology. Price v. Blood Bank of Del., Inc., 790 A.2d 1203, 1210 (Del. 2009). Before the IAB, however, the Board *is* the finder of fact – there is no gatekeeper serving the protective function contemplated by Daubert. Second, factually this case differs from

Perry, in that Dr. Uthaman *did know* of Claimant's prior work-related condition and continuing complaints of low back symptoms from 2005 to the present – he relied on the Claimant's history in this regard, as well as the medical history and diagnostic studies, to conclude that Mr. Whitney's condition continued to be related to the work injury. Further, the alleged events of which Dr. Uthaman was unaware (referred to as the 2010 incidents), were found by the Board to be inconsequential and insufficient to break the causal chain. This is the crucial fact that the Employer's argument misses – had these events been determined by the finder of fact to be significant, the Employer's characterization of these facts as "fundamental" would be apposite. In fact, however, the Board found these events (of which Dr. Uthaman was unaware) to be immaterial. The Employer's continued reliance on the thus discredited and rejected allegations is therefore misplaced, and the Board did not err in relying on Dr. Uthaman's opinion (and for that matter, Dr. Piccioni's original opinion as reflected in his report) that did not rely on those rejected allegations.

The Employer also relies on Miller v. United States, 422 F.Supp 2d 441, 444 (D.Del. 2006) for the proposition that "[r]elying on a history from Claimant, without more, is insufficient to constitute a reliable foundation for the medical expert's opinion." Ans. Brief at 15. Once again, however, Miller is distinguishable on a fundamental level from the instant matter. First, it is a

negligence claim for injuries arising out of a motor vehicle accident, and filed in Federal court. The Court's decision turns on the application of the Federal Rules of Evidence, with particular reference to F.R.E. 702 and 703 regarding the admissibility of expert testimony. The instant matter, in stark contrast to civil litigation in federal court, is an administrative hearing where the rules of evidence are significantly relaxed, and where our courts have recognized a special expertise of the Industrial Accident Board in the subject matter within the purview of its jurisdiction. *See, e.g.,* Glanden v. Land Prep, 918 A.2d 1098, 1102 (Del. 2007); Torres v. Allen Family Foods, 672 A.2d 26, 31 (Del. 1995).[2]

Further, in a civil tort claim for negligence the plaintiff bears the burden of establishing the injury and the causal relationship of the injury, as well as damages – specifically, there is one trial resolving all issues between the parties. This is very much unlike the statutory scheme for workers' compensation cases, wherein multiple petitions filed over time for different types of benefits is specifically contemplated. Once the IAB reaches a decision as to certain issues, those determinations are *res judicata* and not subject to reconsideration unless appealed. GMC v. Morgan, 286 A.2d 759 (Del. Super.Ct. 1971); Foltz v. Pullman, Inc., 319 A.2d 38 (De..Super.Ct. 1974). They become the law of the

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[2] "The Board is not bound by the formal rules of evidence… [and] may relax the rules of evidence and allow the proceeding to be less formal than a trial. … Presumably, the Board, with its background and expertise, is able to evaluate evidence without the restrictions and safeguards imparted by the formal rules of evidence." Id. at 31.

case, and subsequent petitions or hearings may not revisit those issues. Thus, unlike Perry and Miller and the other tort cases cited by the Employer, this case came before the Board at the December 13, 2012 hearing with some issues already determined and not subject to review, a fact overlooked by both the Employer and the Superior Court.

Finally on the issue of Daubert and the admissibility of Dr. Uthaman's testimony, it is notable that the Employer did not argue before the Board that Dr. Uthaman's testimony did not satisfy the Daubert standard of reliability and was thus inadmissible; having failed to raise the issue before the Board, the Employer cannot now raise it on appeal. State v. Stevens, 2001 Del.Super. LEXIS 167 (Del.Super.Ct. 3/15/2001). Stevens is instructive, because it is an analogous case to the instant matter – an employer seeks to contest the Board's reliance on the claimant's treating doctor, following a Board decision for the Claimant. The employer in that case alleges that the claimant's medical testimony is insufficient to support the award and argued that prior and subsequent intervening injuries interrupted causation. Id. at *11. The Court noted that "the rule … 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 [sic.]. Rather, the applicable rule of these cases is that the Board *may* find that a prior [or] intervening event was the cause of the injury,

and if supported by substantial evidence, this Court must affirm the Board's finding." Id. at *12.

At the end of the day, the Employer spends considerable time attacking Dr. Uthaman's credibility, as well as that of the Claimant. However, this Court is not tasked with determining questions of credibility; this Court must determine if the Board's decision is supported by substantial evidence. The Board has resolved the conflicting facts in this case, and the Board's conclusions and award flow logically from the Board's findings of fact.

This Court's most recent pronouncement on the question of deference to the Board's findings is Wyatt v. Rescare Home Care, 2013 Del. LEXIS 591 (Del. 11/20/2013). Wyatt was also an appeal from the Industrial Accident Board, in which the Board had made an award of benefits to the Claimant. The Superior Court reversed the Board's decision on the issue of causation. The Supreme Court reversed the Superior Court on ths issue and reinstated the Board's causation determination. In reaching this conclusion, the Court noted that "[b]oth this Court and the Superior Court may only overturn a factual findign of the Board when there is no satisfactory proof in favor of such a determination…" Id. at *8. The Court "emphasized that the Board is entrusted to find the facts in any given case, and its findings of fact 'must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence

points the other way.'" Id. at *10, *citing* Steppi v. Conti Elec., Inc., 991 A.2d 19 Del. 2010) (TABLE).

The Wyatt case also involved an argument about whether the treating doctor had sufficient and thorough knowledge of the Claimant's history of injury. In a remarkably similar parallel to the instant case, the defense evaluating physician in Wyatt also testified that "if the Claimant's account of the events relating to her injury are true, then the event likely caused the injury." Id. at *12. Dr. Piccioni, the defense evaluating physician in the instant case, has testified effectively the same way – his original opinion was that the current problems are related to the 2005 work injury, but that he subsequently changed his opinion based on the events from 2010. TR-90; A-93. Ergo, if the events from 2010 are immaterial (i.e., the Claimant's account of the events is true), then the present condition continues to be related to the 2005 work injury.

The Board correctly identified the issue presented below, when it noted that the "primary issue spearating the opinions of the medical experts [is] the effect, if any of a June 2010 dump truck incident, an August 2010 motor vehicle accident and a September 2010 lifting event…" Whitney IAB at 20. The Board went on to note that Dr. Piccioni had initially agreed with Dr. Uthaman about the causal relationship between the 2005 work injury and Claimant's present condition, until he subsequently reconsidered his opinion based on the 2010

events. Id. at 21. The Board continued: "in the absence of those events, there is no controversy between the medical experts as to causation." Id. The Superior Court, unfortunately, decided that there was a dispute about something that was not actually in dispute before the Industrial Accident Board – the initial caustaion question had long been settled by prior Board decisions. Further, as far as the parties and the Board were concerned at the hearing, the *only* dispute was whether any or all of these 2010 events were sufficient to cut off a continuing causal relationship. As the Board recognized, Dr. Piccioni had opined that, without the 2010 incidents, the claimant's condition continued to be related to the 2005 work injury. The Superior Court's assumption that the claimant failed to prove continuing causation is itself faulty, because it was not an issue in dispute before the Board. Medically, the doctors were in agreement if the Board found the underlying facts to be that the 2010 incidents were inconsequential; the only dispute was whether the 2010 incidents were, in fact, legally sufficient to end the otherwise continuing causal relationship.

As noted in Claimant's Opening Brief, neither doctor was a first-party witness to the 2010 incidents; that history necessarily comes from the Claimant and the contemporaneous medical records. The Employer seeks to make much of what Dr. Piccioni said about the 2010 incidents and their effects. However, the materiality of the 2010 incidents is not, in the first instance, a question of Dr.

Piccioni's construction of the underlying facts; it is a question for the Board to resolve as to what actually happened and what the effects of each of those events were. This inquiry is necessarily fact-intenstive, and depends not only on what Mr. Whitney said at the hearing, but also what was reflected in the contemporaneous medical records and in the diagnostic studies.

The Employer attempts to construe these facts differently than the Board found them. However, the fact remains that it is for the Board to decide what the facts are, and what inferences are to be drawn from them, by resolving the conflicts in the evidence. The Employer's continued argument that the facts support a contrary conclusion, even if true, does not negate the Board's authority to resolve conflicts and construe the facts as it has in this case, in support of the award of benefits to the Claimant. The Superior Court erred in finding othewise and reversing the decision of the Board. Claimant/Appellant therefore respectfully requests that this Court reverse the decision of the Superior Court and reinstate the Board's award of benefits accordingly.

Conclusion

WHEREFORE, based on the foregoing, and based further on the arguments advanced in the Claimant/Appellant's Opening Brief, the Claimant Below Appellant, Joseph Whitney, by and through his attorneys, Schmittinger & Rodgriguez, P.A., hereby respectfully requests that the Court reverse the decision of the court below that reversed the award of the IAB, and remand this matter for an award of worker's compensation benefits consistent with the statutes and case law referenced above.

Respectfully submitted,

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