IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELECTRIC HOSE & RUBBER CO. & DRAVO CORPORATION,	)	
Employers-Appellants,	)	
v.	)	C.A. No. 02A-08-016
ALBERT NAI,	)	
Claimant-Appellee,	)	

Date Submitted: January 23, 2004
Date Decided: February 6, 2004

On Appeal From A Decision of The Industrial Accident Board. **AFFIRMED.**

Nancy Chrissinger Cobb, and Christopher T. Logullo, Chrissinger & Baumberger, Wilmington, Delaware for Appellant, Liberty Mutual Insurance.

Beth H. Christman, Casarino Christman & Shalk, P.A., Wilmington, Delaware for Appellant, Fireman's Fund Company.

Thomas C. Crumplar, and David A. Arndt, Jacobs & Crumplar, Wilmington, Delaware for Appellee, Albert Nai.

SLIGHTS, J.

I.

This appeal arises from a decision of the Industrial Accident Board ("the Board") dated June 13, 2002. The litigation before the Board involved the Appellee, Albert Nai's, alleged exposure to asbestos while employed at Appellant, Electric Hose and Rubber Company ("Electric Hose"), a hose manufacturing plant located in Wilmington, Delaware. Mr. Nai contracted mesothelioma, a form of cancer caused by asbestos exposure, and died in March of 2001.[1] Because mesothelioma is an occupational disease with a long latency period, the Board used the "last injurious exposure" doctrine to determine liability for workers' compensation purposes. The Board found that Mr. Nai was last exposed to disease-causing asbestos in 1976 while employed by Electric Hose. Pursuant to the "last carrier rule," the Board assigned liability for workers' compensation benefits to Electric Hose's insurance carriers in 1976, Fireman's Fund Insurance Company ("Fireman's Fund") and Liberty Mutual Insurance Company ("Liberty Mutual") (collectively, "Appellants").[2]

Fireman's Fund and Liberty Mutual, on behalf of their insured, argue that the Board's decision regarding the timing of Mr. Nai's last injurious exposure was not

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[1]Hereinafter, when the Court refers to Mr. Nai's claim, it is referring, in fact, to the derivative claim brought by his widow.

[2]Fireman's Fund was the insurance carrier from June 30, 1975 to June 30, 1978. Liberty Mutual was the insurance carrier from September 1, 1963 to September 1, 1964, as well as from September 1, 1968 to June 30, 1978.

supported by substantial evidence, and that the Board abused its discretion when it refused to grant Appellants' request for a continuance in order to obtain Mr. Nai's Social Security documentation. The main issues on appeal are: (1) did the Board abuse its discretion in refusing to grant a continuance, and (2) was the Board's determination that Mr. Nai's last injurious exposure to asbestos occurred in 1976 while employed at Electric Hose supported by substantial evidence? For the reasons that follow, the Board's decision is **AFFIRMED**.

II.

Mr. Nai filed a petition to determine compensation due against former employers Dravo Corporation and Electric Hose in February of 2001, alleging that he was exposed to asbestos during his employment with both companies. Dravo Corporation was a ship manufacturing company during World War II, although it is unclear from the record exactly what Mr. Nai did there. While at Electric Hose, he was employed as a hose inspector. Mr. Nai died in March of 2001 from malignant mesothelioma, a form of cancer caused by asbestos exposure. Thereafter, Mr. Nai's widow filed a petition for additional compensation due against Dravo and Electric Hose, seeking certain factual determinations and compensation for a number of expenses. The claims were later narrowed to include only requests for funeral expenses and a "finding of compensability."

The Board first addressed the matter on September 13, 2001 to provide guidance to the parties regarding scheduling and other case management issues. On May 23, 2002, the Board addressed the parties' cross motions to compel production of documents (unrelated to this appeal) by determining that the motions were not ripe for decision. The Board also consolidated several of the petitions for presentation at one hearing. In a decision dated June 4, 2002, the Board declined to rule on the admissibility of potentially late-produced documents, specifically Mr. Nai's Social Security records, deferring its decision until the documentation was actually received and produced by Mr. Nai. The Board also determined that an issue concerning expert testimony was moot, and permitted Mr. Nai's son to testify although he was not previously listed as a witness.

The hearing took place on June 4, 2002. At the outset of the hearing and for the first time, counsel for Liberty Mutual moved for a continuance on the ground that the absence of Social Security documentation in the record precluded an accurate determination of Mr. Nai's work history. The Board denied the continuance.

Several witnesses testified on Mr. Nai's behalf at the hearing. Paul Bonk, a former coworker, testified that he was employed by Electric Hose from 1961 to 1976. Mr. Bonk worked with Mr. Nai inspecting hoses. He testified that Mr. Nai worked at Electric Hose before 1961 and was still employed at Electric Hose when Mr. Bonk

was laid off in 1976. He further stated that Mr. Nai worked in close proximity to steam lines and vulcanizers that contained or were insulated with asbestos. He recalled that people would repair the insulation on the steam lines, ovens and heaters, and that the plant was dirty and "there was dust all over." To the best of his memory, the process of removing and replacing insulation continued until he left in 1976, although he could not say definitely. Mr. Bonk believed that he personally had been exposed to asbestos in his work area at Electric Hose until 1973. In a prior deposition unrelated to these proceedings, Mr. Bonk acknowledged that he could not recall whether he would have been exposed to asbestos at Electric Hose from 1973 to 1976. At the hearing in this matter, however, he testified that he believed asbestos was still present at the Electric Hose facility through 1976.

Ronald Noronowicz was a former machinist at Electric Hose from 1969 to 1971. Although he did not directly use asbestos-containing products, he testified that asbestos was used to cover some of the machinery, and that the pipefitters were in charge of applying it and taking it off. The pipefitters sometimes worked in the same area as the inspectors. According to Mr. Noronowicz, outside contractors frequently worked on various projects throughout the plant, and one of those contractors used asbestos-containing products. He referenced several other asbestos-containing products utilized at the plant including block insulation and asbestos tape. He further

recalled that the plant was dusty. He did not have an independent recollection of Mr. Nai.

Edward Kline, a former industrial insulator, also testified for Mr. Nai. He performed maintenance work at the Electric Hose plant during the summers of 1969 and 1970, and again in 1971 and 1973. He described the insulation at the plant as being "all over the machine or all over the floor." He recalled that the insulation was deteriorated and wrapped with asbestos tape, which he characterized as "dusty material." Mr. Kline testified that asbestos was being released into the work environment while he was there in 1973.

Dr. Gerald L. Abraham, a medical expert retained by Mr. Nai, also testified at the hearing. Based on the examination of Mr. Nai's autopsy slides and medical records, he concluded that Mr. Nai's occupational exposure to asbestos caused his mesothelioma and eventual death. Dr. Abraham testified that the latency period for mesothelioma is thirty years on average, but can be as short as ten years or as long as sixty years. He stated in his report that Mr. Nai worked at various jobs from approximately 1943 until 1974, but could not say for certain the date of Mr. Nai's last exposure to asbestos. He opined that if Mr. Nai was exposed to asbestos anywhere from 1974 to 1979, then the exposure would have contributed to his mesothelioma.

Mrs. Nai testified. She recalled that her husband worked at Electric Hose from approximately 1949 to 1954, then briefly undertook another business venture before returning to Electric Hose in approximately 1955. Mrs. Nai assumed that Mr. Nai worked at Electric Hose through 1975 because she had found company newsletters from that year referring to her family. She had no independent recollection of whether her husband worked for Electric Hose in 1976 or not. She was fairly certain that her husband was not working at Electric Hose as of 1977.

Mrs. Nai was unable to comment on the extent to which her husband may have been exposed to asbestos at the Electric Hose plant. She did testify that whenever her husband would come home from Electric Hose, his clothes were always dirty, although she could not say that the "dirt" was asbestos dust. She stated that her husband was subsequently employed as a baker and in the produce department at Pathmark. She did not suspect that he was exposed to asbestos at the bakery, because it was a "new building." She did not know whether he was exposed to asbestos at Pathmark.

Paul Hopkins was called as a witness on behalf of Electric Hose and Dravo. He was employed by Electric Hose in the technical department until 1977. He stated that asbestos was used at the Electric Hose plant to insulate the steam pipes and vulcanizers, but he was not aware of any asbestos exposure to the workers at the

plant. He also was not aware of any attempt to remove the asbestos up until he left in 1977. According to Mr. Hopkins, he would walk through the plant every day and would observe that it was kept clean. Mr. Hopkins did not recall steam pipes in the "immediate proximity" of the inspection stations.

In a decision dated June 13, 2002, the Board found that: (1) Mr. Nai was exposed to asbestos while working at Electric Hose, but not while at Dravo Corporation; (2) Mr. Nai's last injurious exposure took place in 1976; and (3) Fireman's Fund, as the worker's compensation carrier for Electric Hose in 1976, was obligated to provide workers' compensation benefits to Mr. Nai's estate as a result of Mr. Nai's exposure to asbestos. The Board awarded funeral expenses, medical witness fees and limited attorney's fees. Subsequently, Fireman's Fund filed a Motion for Reargument, asking the Board to reconsider or, in the alternative, postpone its June 13, 2002 decision until Mr. Nai's Social Security records could be obtained and submitted to the Board. Fireman's Fund also alleged that Liberty Mutual shared responsibility because its coverage was implicated during the relevant time period. The motion was granted with respect to Liberty Mutual's liability but denied with respect to the other claims.[3] This appeal followed.

[3]Liberty Mutual has not appealed the Board's determination that it would share coverage with Fireman's Fund to the extent Mr. Nai was exposed to asbestos at Electric Hose in 1976.

III.

The Appellants argue that the Board was obliged to determine the date that Mr. Nai was last exposed to the element (asbestos) that caused his injury before it could determine whether Electric Hose owed benefits. The Appellants assert that, according to the witness testimony and Mr. Nai's statements to treating physicians, the evidence of record barely supported a finding that Mr. Nai was exposed to asbestos up until 1973. No competent evidence supported the Board's finding that exposure continued through 1976. The Appellants point to the fact that Dr. Abraham originally concluded that Mr. Nai was exposed to asbestos through 1974. He never extended the exposure date to 1976. The Appellants contend that the Board's selection of 1976 as the date of Mr. Nai's last "known" exposure was not supported by competent evidence and is an incorrect application of the law.

The Appellants also assert that the Board abused its discretion when it failed to grant a continuance for the parties to obtain the Social Security records. In light of the witnesses' mixed testimony regarding Mr. Nai's term of employment with Electric Hose and the varying conditions at the plant on certain dates, they contend that the documentation could have been outcome determinative in that the records could have assisted the parties and the Board in pinpointing exactly when Mr. Nai worked at Electric Hose (and elsewhere). Consequently, the Board should have

granted the request for a continuance.

Mr. Nai asserts that he met his burden of proving that it was more likely than not that he was exposed to asbestos while working at Electric Hose. Furthermore, Mr. Nai insists that a continuance was not warranted in this case because the Appellants had adequate notice of the hearing: thus, the eleventh-hour request for a continuance was untimely.

In the course of examining the merits of this appeal, the Court requested the parties to supplement the record with Mr. Nai's Social Security records, which had been received by Liberty Mutual pursuant to an order of the Board compelling production issued subsequent to the hearing.[4] The Court notes anectdotecally that these records appear to indicate that the Board was correct in their determination that Mr. Nai worked at Electric Hose until 1976, and the Appellants appear now to concede this point.[5] The records also reveal that, subsequent to his employment at

[4]On December 19, 2002, the Board granted Appellants' motion to compel production of Mr. Nai's Social Security records. These documents apparently are relevant to future litigation before the Board. Mr. Nai filed a motion for reargument which was denied on July 8, 2003. On October 15, 2003, the Appellants received a signed authorization to release the records, which were obtained by the Appellants and produced to the Court.

[5]*See* D.I. 38 (Letter from Liberty Mutual's counsel dated December 30, 2003); D.I. 36 (Letter from Liberty Mutual's counsel dated January 16, 2003: "With respect to the issue as to the date of Mr. Nai's last employment with Electric Hose & Rubber, Liberty Mutual agrees that the Social Security records do indicate that Mr. Nai's last date of employment was sometime in calendar year 1976.")

Electric Hose, Mr. Nai was employed briefly at two previously unknown locations.[6] The Appellants request a remand to determine whether Mr. Nai was last exposed to friable asbestos while working at these newly discovered jobs.

Mr. Nai vigorously opposes remand. He claims that the request for a continuance was without "good cause" as required by the Workers' Compensation Rules because Appellants did not request these records until May of 2002, approximately one month before the hearing.[7] He argues that the Board correctly denied the continuance in the interest of expediency and that most of this appeal is moot because the records are only relevant to the dates of his employment, not to determining when his last injurious exposure to asbestos occurred.

IV.

At the outset, the Court must determine whether the Board abused its discretion in refusing to grant the continuance. A discretionary ruling by an administrative body will not be set aside unless that decision is unreasonable or capricious.[8] The party

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[6]The supplemental briefing regarding the Social Security records indicates that Mr. Nai was employed at Levdel, Inc. in 1977 and Speakman Company in 1977 and 1978.

[7]D.I. 37 (letter from Mr. Nai's counsel dated January 23, 2004) at 2.

[8]*In re Kennedy*, 472 A.2d 1317, 1331 (Del. 1984).

challenging the Board's decision bears the burden of proof.[9] The scope of the Board's discretion in deciding whether to grant or deny a continuance is governed by statute.[10] Section 2348(h) provides that "[r]equests for continuance may be granted only upon good cause."

The Board did not abuse its discretion when it denied the Appellants' request for a continuance. Unlike most employees, Mr. Nai could not present any record of his employment at the hearing because he had died more than a year before. Mr. Nai's counsel attempted to obtain the documentation from the appropriate authorities,[11] as well as from Electric Hose itself, but to no avail. Accordingly, Mr. Nai's counsel attempted to recreate his client's employment history through witness testimony and circumstantial evidence. For their part, in support of their application for a continuance, the Appellants failed to provide the Board with any explanation of their efforts to obtain the Social Security records. Instead, on the day of the hearing, in the midst of a room full of witnesses ready to testify, the Board was confronted

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[9] *Atwell v. The Delaware Violent Crimes Compensation Board*, 1994 Del. Super. LEXIS 642, at *9-10 (citations omitted).

[10] DEL. CODE ANN. tit. 19, § 2348 (2003)("section 2348").

[11] *See* D.I. 15, Ex. 5 (letter from Liberty Mutual's counsel acknowledging that "[Mr. Nai's counsel] have both stated on the record...that your office has made multiple attempts to obtain the social security earning statements for Mr. Nai...you advised, on more than one occasion, that your office had been in contact with Senator Biden's office asking for Senator Biden's help in obtaining these records on an expedited basis.")

with the Appellants' spontaneous request for a continuance.[12] At that point, the Board had no indication that the Social Security records would ever be produced and, therefore, it denied the continuance and proceeded with the hearing in its discretion.

The Court recognizes that the Social Security records provide further evidence of Mr. Nai's employment, and they likely would have been of some significance to the Board. But the decision to deny the continuance was appropriate at the time it was made given the information available. The Court agrees with the Board's position that its task is to "hear and weigh...the *evidence presented* in order to secure a just, speedy and inexpensive determination..."[13] No abuse of discretion occurred.

V.

Next, the Court turns to the merits of the Board's decision to grant compensation. Appellate review by the Court of factual determinations made by administrative agencies is limited to determining whether the agency's decision is

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[12]The issue of Social Security records came before the Board for the first time on May 30, 2002, but this stemmed from the Appellants' concern over the possibility that the records would be late-produced by Mr. Nai without an opportunity for response. *See* Board Order dated June 5, 2002 ("Claimant has unsuccessfully sought records from the Social Security Administration that could help establish the dates of Claimant's employment...[t]here is concern that Claimant may still receive the Social Security documentation at the last minute, giving the representatives of the employers insufficient opportunity to respond."). The Appellants did not request a continuance at that time.

[13]Board's Order on Appellant's Motion for Reargument dated July 30, 2002 (emphasis added)(citing DEL. CODE ANN. tit. 19, § 2301A (2002)).

supported by "substantial evidence."[14] "Substantial evidence" means such relevant evidence as a reasonable mind "might accept as adequate to support a conclusion."[15] It calls for "more than a scintilla but less than a preponderance" to support the finding.[16] The burden, of course, lies with the appellant to show that the Board's findings are not supported by substantial evidence.[17] On appeal, questions of law are reviewed *de novo*.[18]

When assessing the quality of the evidence, the Court will not weigh evidence, determine credibility issues, or make its own factual findings.[19] The function of reconciling inconsistent testimony and determining credibility is reserved for the Board alone.[20] The Court will not reverse the Board simply because it might have reached a different conclusion if presented with the same evidence in the first

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[14] *Atkinson v. Delaware Curative Workshop*, 2001 Del. Super. LEXIS 4, at *5 (citations omitted).

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

[16] *Hines v. Delaware Recyclable Products*, 2003 Del. Super. LEXIS 340, at *10 (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[17] *Lake Forest School District v. Richard DeLong*, 1988 Del. Super. LEXIS 265, at *2, *aff'd* 558 A.2d 297 (Del. 1989)(citations omitted).

[18] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998)(citing *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994)).

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

[20] *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1995)(citing *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1106 (Del. 1988)).

instance.[21] The "substantial evidence" standard of review contemplates a degree of deference to the Board's factual conclusions and its application of those conclusions to the appropriate legal standards.[22] When factual determinations are at issue, the Court must consider the experience and specialized competence of the Board and of the purposes of the Workers' Compensation Act.[23]

It is well established that the Workers' Compensation Act exists to provide prompt payment of benefits without regard to fault, and to relieve employers and employees of civil litigation.[24] In cases involving an occupational disease with a long latency period, such as mesothelioma, the time of onset is "practically impossible" to ascertain.[25] The "last injurious exposure" and "last carrier" rules allow the Board to designate a precise date for attachment of liability based on the totality of the evidence.[26] The "last injurious exposure" rule provides that, in the case of an

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[21] *Diamond Materials v. Manganaro*, 1999 Del. Super LEXIS 274, at *5-6 (citations omitted).

[22] *Hall v. Rollins Leasing*, 1996 Del. Super. LEXIS 407, at *9 (citing DEL. CODE ANN. tit. 29, § 10142(d)).

[23] *James Julian, Inc. of Delaware v. Testerman*, 740 A.2d 514 (Del. Super. Ct. 1999).

[24] *Lake Forest,* 1988 Del. Super. LEXIS 265, at *12 (citing *Champlain Cable Corp. v. Mergenthaler*, 479 A.2d 835, 840 (Del. 1984)).

[25] *Id.* at *7 (citing *Champlain*, 479 A.2d 835; *Alloy Surfaces Company v. Cicamore*, 221 A.2d 480 (Del. 1966)).

[26] *See id.* at *10-11.

occupational disease caused by prolonged exposure to a harmful substance during successive employments, the employer whose work site caused the most recent exposure to asbestos is liable for compensation benefits.[27] The "last carrier" rule assigns liability to the insurance carrier responsible for coverage at the time of the employee's last exposure to the disease-causing substance.[28]

The burden rested on Mr. Nai to show that he was last exposed to harmful, disease-causing asbestos in 1976 while employed at Electric Hose. "Harmful exposure" means that: (1) Mr. Nai and the asbestos-containing product(s) were contemporaneously in the same place, and (2) the asbestos was friable.[29] Friable asbestos is "any material containing more than 1 percent asbestos by weight, that hand pressure can crumble, pulverize or reduce to powder when dry, or is already dry and pulverized."[30]

There was ample testimony at the hearing that asbestos was present in the Electric Hose plant, specifically in the form of insulation for steam pipes and vulcanizers.[31] Asbestos insulation for pipes is generally recognized as being in a state

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[27] *Id.* at *9 (citations omitted).

[28] *Id.* at *10 (citing *Cicamore*, 221 A.2d at 487).

[29] *Id.* at *4-5.

[30] *Id.* at *5 (quoting DEL. CODE ANN. tit.16, § 7802(5)).

[31] Transcript of June 4, 2002 hearing ("Tr.") at 44-46, 51-52, 77-79.

where asbestos fibers are likely to be released.[32] Despite Mr. Hopkins' assertions to the contrary, the Board heard persuasive, corroborated testimony about the plant being dirty and dusty, all offered as the witnesses described the asbestos located at the plant. The Board reasonably could conclude that Mr. Nai worked in close proximity with friable asbestos, based upon: (1) Mr. Bonk's belief that, as a fellow hose inspector, he personally was exposed to asbestos in his work area, (2) his testimony that Mr. Nai also worked in close proximity to the steam lines and vulcanizers, and (3) Mr. Noronowicz's testimony that the pipefitters, who were in charge of applying and removing asbestos covering, sometimes worked in the same area as the inspectors and were themselves exposed to asbestos. And it is undisputed that asbestos exposure causes mesothelioma. Thus, the Board's conclusion that Mr. Nai was exposed to friable asbestos at the Electric Hose plant was supported by substantial evidence.

The inquiry then turns to timing: (1) was asbestos present at Electric Hose in 1976, and, if so (2) was Mr. Nai employed at Electric Hose in 1976? In answering both of these questions in the affirmative, the Board was persuaded by witness testimony.[33] The Court concludes that this testimony provides substantial evidence

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[32] *Lake Forest*, 1988 Del. Super. LEXIS 265, at *6 (citations omitted).

[33] Board's decision dated June 13, 2002 ("Board's decision") at 12 ("[The Board] is convinced from the testimony of Bonk and Mrs. Nai that [Mr. Nai] worked at Electric Hose from

to support the Board's conclusion that friable asbestos was present in the Electric Hose plant in 1976. Mr. Bonk believed that asbestos was still in the plant as of 1976 when he left and, to his knowledge, there had been no effort to remove it.[34] He described the steam lines as being old and broken down.[35] According to Mr. Bonk, the asbestos would crack and break off.[36] He recalled in-house mechanics repairing the pipes after 1973 when outside contractors were no longer used.[37] Mr. Noronowicz and Mr. Kline corroborated much of this testimony. And Mr. Hopkins testified that he was unaware of any attempt to remove the asbestos up until 1977.[38]

The Appellants argue that Mr. Nai was not employed at Electric Hose in 1976 because medical records relied upon by Dr. Abraham, as well as his report, estimate the dates of Mr. Nai's employment as ranging from "approximately 1943 [to] approximately 1974."[39] At the hearing, however, Dr. Abraham indicated that the

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before 1961 until at least 1976."); *id.* at 14 ("The Board found the testimony of these witnesses was sufficient to place [Mr. Nai] into close proximity to friable asbestos from 1961 through at least 1976.").

[34]Tr. at 44-45.

[35]*Id.* at 23.

[36]*Id.* at 46.

[37]*Id.* at 49.

[38]*Id.* at 211.

[39]D.I. 13, Ex. H.

latency period for asbestos was "often thirty years or more," and that he did not know for a fact that Mr. Nai was exposed to asbestos in any particular year.[40] Dr. Abraham acknowledged that the exposure could have contributed to mesothelioma if it ended in 1975, 1976, 1977 or 1979.[41] The record clearly indicates that a wide range of "last exposure" dates would yield the same conclusion.

Notwithstanding Dr. Abraham's conclusions, other testimony of record supports the Board's finding that Mr. Nai was employed at Electric Hose in 1976.[42] Mr. Bonk maintained that Mr. Nai was still at Electric Hose in 1976,[43] and Mrs. Nai believed that he was there in 1975 but not in 1977.[44]

In making its determination, the Board addressed Mr. Nai's post-Electric Hose employment history. It did not believe that Mr. Nai was exposed to asbestos while employed at the bakery, based on the testimony of Mrs. Nai and Dr. Abraham.[45] It found no evidence of exposure while Mr. Nai was at Pathmark.[46]

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[40]Tr. at 119-20.

[41]*Id.* at 122-23.

[42]The Court has not considered the late-produced Social Security records in reaching this conclusion, as these records were not provided to the Board.

[43]*Id.* at 30.

[44]*Id.* at 173, 178.

[45]Board's decision at 15.

[46]*Id.*

In the absence of meaningful documentation, the Board's decision was based primarily on the testimony of witnesses and circumstantial evidence. The Court will not evaluate the credibility of these witnesses or weigh the evidence on one point against another; this duty rests solely within the discretion of the Board itself.[47]

Finally, the Court must address the Appellants' argument that the Board applied the incorrect legal standard. Specifically, the Appellants seize on the choice of language adopted by the Board and argue that the identification of Mr. Nai's last "known" exposure to asbestos is improper. The Court cannot locate any evidence to support the Appellants' contention that the wrong legal standard was applied. Factual determinations are based on the evidence presented -- this is implicit in the fact-finding process. Every time the Board confronts an issue, it makes a conclusion based on the evidence provided by the parties. And that is precisely what it did in this instance. Specifically, the Board made a determination regarding the date of Mr. Nai's last exposure to asbestos based on the evidence *known* to the Board through the presentations of the parties, *i.e.*, it determined "the last *known* exposure." The Board does not have to justify its conclusion by excluding all other possible sources of asbestos exposure; its obligation was to determine whether the preponderance of the

[47] *See Blake v. State of Delaware*, 2002 Del. LEXIS 162, *4 (Del. 2002) (citing *Johnson*, 213 A.2d at 66).

evidence supported Mr. Nai's contention that the last injurious exposure occurred at Electric Hose. The Court concludes that there has been no misapplication of the "last injurious exposure" rule.

Based on the foregoing, the decision of the Board is **AFFIRMED**.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to the Prothonotary.