

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

WILLIAM RHODES,	)	
	)	
Appellant,	)	C.A. No.: 09A-04-005 RRC
Claimant Below	)	
	)	
v.	)	
	)	
DIAMOND STATE PORT COPORATION,	)	
	)	
Appellee,	)	
Employer Below.	)	

Submitted: November 2, 2009  
Decided: January 22, 2010

On Appeal from a Decision of the Industrial Accident Board.

**AFFIRMED.**

**ORDER**

Richard T. Wilson, Esquire, Law Offices of Peter G. Angelos, Wilmington, Delaware, Attorney for Appellant

Francis X. Nardo, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, Attorney for Appellee

COOCH, J.

This 22nd day of January, 2010, upon consideration of Employee's appeal from a decision on the Industrial Accident Board ("the Board"), it appears to the Court that:

1. William Rhodes (“Employee”) worked as a forklift operator at the Port of Wilmington from 1987 until October 19, 2006.<sup>1</sup> In early December of 2006, Employee was diagnosed with lung cancer, and he ultimately died of that cancer on December 21, 2006.<sup>2</sup>

On October 1, 2007, a Petition to Determine Compensation Due was filed against Diamond State Port Corporation (“Employer”) by Employee’s representative. This petition sought to relate Employee’s lung cancer to his possible exposure to asbestos while working at the Port of Wilmington.

On September 8, 2008, a hearing was held before the Board to determine whether Employee’s lung cancer was related to his alleged exposure to asbestos. At the hearing, Employee’s representative called several witnesses to testify about Employee’s work conditions.

Additionally, Orn Eliasson, M.D., M.P.H. testified (by deposition) on behalf of Employee.<sup>3</sup> Dr. Eliasson held numerous certifications including a Masters Degree in Public Health.<sup>4</sup> Dr. Eliasson is also a certified “B-reader,” and, as such, had special training “to review x-rays to determine the existence or non-existence of changes consistent with occupational exposure

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<sup>1</sup> Op. Br. at 3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

to such things as asbestos, coal, and silica.”<sup>5</sup> Dr. Eliasson concluded that Employee’s lung cancer was related to his asbestos exposure.<sup>6</sup>

Dr. Eliasson further testified that the records showed the existence of “friable asbestos” at the Port of Wilmington and that “any person working . . . in 1995 or 1996 would be exposed to medically significant amounts of asbestos and that [] would contribute to a lung cancer diagnosed in 2006.”<sup>7</sup> Although Dr. Eliasson conceded that Employee was a chronic smoker, he maintained his opinion that Employee’s lung cancer was caused by exposure to asbestos.<sup>8</sup>

In contrast, Dr. Albert Rizzo testified (by deposition) that Employee’s lung cancer was not causally related to his exposure to asbestos.<sup>9</sup> Dr. Rizzo is not a certified B-reader, but “is board certified in pulmonary, critical care and sleep medicine. His private practice consists of treating patients with various lung diseases, including those caused by smoking and asbestos exposure.”<sup>10</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3-4.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

<sup>9</sup> Ans. Br. at 2.

<sup>10</sup> *Id.*

Dr. Rizzo testified that “Mr. Rhodes had two potential risk factors for lung cancer – cigarette smoking and occupational exposure to asbestos.”<sup>11</sup> Dr. Rizzo noted that Employee had a forty year habit of smoking two packs of cigarettes per day.<sup>12</sup> Dr. Rizzo stated that this habit significantly increased the possibility of developing lung cancer and ultimately opined that the type of cancer displayed by Employee was consistent with cigarette smoking.<sup>13</sup> He further testified that “if Mr. Rhodes’ lung cancer had been caused by occupational exposure to asbestos, he would have expected to find evidence of pleural thickening and/or scarring of the lung tissue, also known as interstitial fibrosis.”<sup>14</sup>

2. On March 19, 2009, the Board denied Employee’s petition. In its decision, the Board determined that “Claimant has not demonstrated that he was exposed to asbestos while working at the Port of Wilmington for the State of Delaware. Further, even if the Board assumes without holding that Claimant was exposed to asbestos . . . the Board accepts Dr. Rizzo’s opinion that . . . Claimant’s lung cancer was caused by cigarette smoking.”<sup>15</sup>

3. Employee’s representative has now filed an appeal with this Court arguing (1) that the Board “abused its discretion” by ignoring relevant

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3.

<sup>15</sup> Decision of the Industrial Accident Board at 17.

evidence, and, (2) that the Board committed a legal error when it misapplied precedential authority.

In support of these contentions, Employee argues that there was unrefuted evidence that Employee was exposed to asbestos, and the Board “abused its discretion” by basing its opinion on the testimony of Dr. Rizzo.<sup>16</sup> Employee posits that only a certified B-reader such as Dr. Eliasson could determine whether Employee’s lung cancer was caused by asbestos.<sup>17</sup>

Employee also argues that the Board misapplied legal precedent because the Board incorrectly applied the “last injurious exposure” rule.<sup>18</sup> Employee asserts that his exposure to asbestos while working for Diamond State was the last known exposure to asbestos and that exposure caused him injury.<sup>19</sup> Thus, Employee concludes that he is entitled to compensation.

In response, Diamond State argues that the Board’s decision was based on substantial evidence and that there was no “abuse of discretion.”<sup>20</sup> Diamond State asserts that Employee did not meet his burden of proof in

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<sup>16</sup> Op. Br. at 15.

<sup>17</sup> Reply Br. at 2.

<sup>18</sup> Op. Br. at 17.

<sup>19</sup> *Id.*

<sup>20</sup> Although Employee’s opening brief recites the “substantial evidence standard,” Employee’s arguments seem to suggest that the Board “abused its discretion” in selecting one expert’s testimony over the other.

establishing that he was exposed to asbestos and that the asbestos exposure caused his lung cancer.<sup>21</sup>

Additionally, Diamond State argues that the Board did not misapply legal precedent in its decision because it correctly applied the “last injurious exposure” rule.<sup>22</sup> Diamond State argues that Employee never sufficiently proved he was “exposed” to asbestos and, even if he were to prove exposure to asbestos, that exposure was not “injurious.”<sup>23</sup>

4. While the Superior Court is empowered to review findings of the Industrial Accident Board, the scope of review is narrow.<sup>24</sup> “The function of the reviewing Court is limited to determining whether substantial evidence supports the Board's decision regarding findings of fact and conclusions of law and is free from legal error.”<sup>25</sup> Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion.<sup>26</sup>

“When reviewing a decision on appeal from an agency, the Superior Court does not weigh the evidence, determine questions of credibility, or

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<sup>21</sup> Ans. Br. at 10-11.

<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.*

<sup>24</sup> *Craig v. Synvar Corp.*, 233 A.2d 161 (Del. Super. Ct. 1967).

<sup>25</sup> *Holowka v. New Castle County Bd. of Adjustment*, 2003 WL 21001026, at \*3 (Del. Super.).

<sup>26</sup> *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del.1994).

make its own factual findings.”<sup>27</sup> The Board acts as the trier of fact.<sup>28</sup> The Board is entitled to “resolve conflicts in testimony and issues of credibility.”<sup>29</sup> However, the acceptance or rejection of evidence must be set forth by the Board in an adequate manner to allow a proper appellate review.<sup>30</sup>

This Court reviews questions of law *de novo*.<sup>31</sup> “Absent error of law, the standard of review for a Board's decision is abuse of discretion.”<sup>32</sup> “An administrative board abuses its discretion in admitting or excluding evidence where its decision exceeds the bounds of reason given the circumstances, or where rules of law or practice have been ignored so as to produce injustice.”<sup>33</sup>

In reviewing a decision of the Board, this Court must look at the record in a light most favorable to the prevailing party.<sup>34</sup> Although this Court might have reached a different conclusion than the Board in the first

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<sup>27</sup> *Holowka*, 2003 WL 21001026, at \*3.

<sup>28</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>29</sup> *Holowka*, 2003 WL 21001026, at \*3.

<sup>30</sup> *Barnes v. Panaro*, 238 A.2d 608, 610 (Del. 1968).

<sup>31</sup> *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989).

<sup>32</sup> *Medrano v. State, Dept. of Labor, Workers Compensation Fund*, 2009 WL 5177147, at \* 1 (Del. Super.).

<sup>33</sup> *Bolden v. Kraft Foods*, 2005 WL 3526324, at \*3 (Del. Supr.).

<sup>34</sup> *E.I. DuPont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1046-47 (Del. Super. Ct. 2004).

instance, a decision of the Board must be affirmed if it is supported by substantial evidence.<sup>35</sup>

5. Here, there is substantial evidence in the record to affirm the Board's decision. It was Employee's burden at the hearing to establish that the Employer's working conditions produced his lung cancer.<sup>36</sup> The Board found that the testimony of Employee's witnesses did not establish that he was exposed to asbestos and ultimately accepted Dr. Rizzo's testimony regarding causation. This Court will not disturb the Board's findings of fact because the Board appropriately articulated the reasons for its findings in its decision.

In this case, Dr. Rizzo testified that Employee smoked two packs of cigarettes per day, which "equates to eighty-pack years in medical terms[,] and stated that Employee's lung cancer was "consistent with cigarette smoking."<sup>37</sup> Although Employee argues that Dr. Eliasson was more qualified to render an opinion because he was the only certified B-reader called to testify, the Board was permitted to accept the testimony of Dr. Rizzo. Dr. Rizzo's testimony provided the Board with substantial evidence

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<sup>35</sup> *Brogan v. Value City Furniture*, 2002 WL 499721, at \*2 (Del. Super. Ct. 2002).

<sup>36</sup> *Anderson v. General Motors Corp.*, 442 A.2d 1359, 1361 (Del. 1982).

<sup>37</sup> Ans. Br. at 2.



to determine that Employee's lung cancer was not caused by exposure to asbestos.

Additionally, the Board found that the testimony of the other witnesses did not establish that Employee was exposed to asbestos while at work. The Board did not find Employee's witnesses credible and ultimately found their testimony "vague."<sup>38</sup> The Board has discretion to weigh the evidence and draw inferences from that evidence. The Board did not "abuse its discretion" simply because it found the evidence of Employer more credible than the evidence presented by Employee.

6. Employee has also argued that the Board misapplied the legal precedent established by this Court in *Lake Forest School District v. DeLong* because the Board did not correctly apply the "last injurious exposure" rule.<sup>39</sup> The "last injurious exposure" rule "provides, generally, that where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments,

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<sup>38</sup> Decision of the Industrial Accident Board at 14-15 ("Further, the testimony of Mr. Knight and Mrs. Rhodes provides no support for the conclusion that Claimant was exposed to asbestos . . . Mrs. Rhodes vaguely testified that she visited Claimant . . . [but] did not describe any work activities that may have resulted in Claimant's exposure to friable asbestos. . . Mr. Knight also vaguely recalled some pipes covered with insulation being removed . . . [but] there is no evidence that Claimant was involved in the pipe removal [.]").

<sup>39</sup> 1988 WL 77665 (Del. Super.).

the most recent employer where the worker was exposed is liable for the entire award.”<sup>40</sup>

Here, the Board never found that Employee was exposed to asbestos or that the exposure, if it occurred, was injurious. Thus, despite Employee’s contentions, the “last injurious exposure” rule does not apply in this case because the Board did not find that Employee had an “occupational disease.”

7. This Court holds that the Board did not commit legal error in failing to apply the “last injurious exposure” rule. Additionally, this Court is required to examine the Board’s decision in a light favorable to the prevailing party. Although this Court may have, in the first instance, accepted the testimony of one expert over another, under the standard of review that this Court must apply, this Court cannot substitute its own opinion on credibility for that of the Board. Thus, the Board did not abuse its discretion in accepting the testimony of Dr. Rizzo. The decision of the Board is **AFFIRMED**.

**IT IS SO ORDERED**

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Richard R. Cooch

oc: Prothonotary  
cc: Industrial Accident Board

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<sup>40</sup> *Id.* at \* 3. See also *Delpizzo v. Agilent Techs.*, 2004 WL 2827906, at \* 7-8 (Del. Super.).