2006 WL 1381628
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.

DAIMLERCHRYSLER
Employer–Below Appellant,
v.
Kathy M. WEST Claimant–Below Appellee.

C.A. No. 05A–08–006 MJB.
|
Submitted: Feb. 10, 2006.
|
Decided: May 19, 2006.

On appeal from the Industrial Accident Board. **AFFIRMED**.

Attorneys and Law Firms

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OPINION AND ORDER

BRADY, J.

Procedural History

***1** This is an appeal from a decision of the Industrial Accident Board ("Board"). The issue is whether Kathy West ("Claimant") is entitled to additional compensation due to a recurrence of temporary total disability from December 17, 2002 through May 14, 2004. A hearing on the merits took place before the Board on July 6, 2005. A decision was rendered by the Board on July 25, 2005 granting Claimant temporary total disability benefits for the period sought. The Board granted Employer's request for an offset against sickness and accident disability payments made by Employer. The Board also awarded an attorneys' fee of $3,500 and a medical witness fee to Claimant. Employer filed an Appeal on November 14, 2005. This is the Court's opinion and order on Appeal.

Standard of Review

The Court has a limited role when reviewing a decision by the Industrial Accident Board. If the decision is supported by substantial evidence and free from legal error,[1] the decision will be affirmed.[2] Substantial evidence is evidence that a reasonable person might find adequate to support a conclusion.[3] The Board determines credibility, weighs evidence and makes factual findings.[4] This Court does not sit as the trier of fact, nor should the Court substitute its judgment for that rendered by the Board.[5] Only when there is no satisfactory proof in support of a factual finding of the Board may this Court overturn it.[6] The Board's legal interpretations are subject to plenary review. "In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below."[7]

Facts

On August 9, 2000, Claimant was injured in an accident while working for Employer as an inspector performing a new vehicle test. When Claimant stepped on the gas of the car, it went out of control and ran into another vehicle and a pole because the car did not have any brakes.[8]

In a Board Order dated December 3, 2002 Claimant was found to have compensable injuries to her neck and back and awarded a limited period of total disability that ended on September 28, 2000.

On August 11, 2000 Claimant sought treatment with her primary care provider, Dr. Narinder Singh ("Dr.Singh").[9] Dr. Singh diagnosed Claimant with headaches, acute sprain/strain cervicodorsal and lumbosacral spine, more on the right side than left side, fibromyalgias, stress and anxiety.[10] Dr. Singh issued Claimant a disability note at that time.[11] Claimant continued to treat with Dr. Singh until January 2001 and Dr. Singh continued to issue disability slips to Claimant during that time.[12] Claimant testified she stopped treating with Dr. Singh in January 2001 because he would give her prescriptions for pain, but would not take steps to resolve her symptoms.[13] At that time, Claimant switched to a new

primary care physician, Dr. Sokoloff. Claimant also treated with several other physicians for a variety of ailments related to the injury.[14]

***2** In December 2002 Dr. Sokoloff referred Claimant to Dr. Craig Sternberg ("Dr.Sternberg") for pain management.[15] Dr. Sternberg is board certified in physical medicine and rehabilitation[16] and through an EMG study, found Claimant suffered from neck and low back pain and acute right C5 radiculopothy.[17] Dr. Sternberg testified these results confirmed that there was some nerve injury and they explained the pain that radiated from the neck down the right arm of Claimant and her perception of weakness.[18]

Dr. Sternberg issued Claimant total disability slips from January 2003 until June 2004, but testified he would have given Claimant a disability slip on her first visit to him in December 2002 because her symptoms were present at that time.[19]

In January 2003 Claimant suffered injuries in an unrelated motor vehicle collision. Dr. Sternberg did not change his diagnosis of Claimant as a result of the collision.[20]

Claimant stopped treating with Dr. Sternberg in June 2004 because she violated her treating contract with him by testing positive for cocaine.[21] Dr. Sternberg testified that when he stopped treating Claimant he did not believe she had reached maximum medical improvement.[22]

Dr. Jeffrey S. Meyers ("Dr.Meyers") examined Claimant on behalf of Employer on August 24, 2004 and stated Claimant was able to return to work in a limited sedentary level with a ten (10) pound lifting restriction.[23]

Applicable Law

"The term recurrence is used in common parlance to describe the return of a physical impairment, regardless of whether its return is or is not the result of a new accident. As applied in most workmen's compensation cases, however, it is limited to the return of an impairment without the intervention of a new or independent accident ."[24] The Board found a recurrence of total disability and awarded Claimant compensation. The Board reasoned that the primary changes in Claimant's condition since her initial total disability benefits ceased on September 28, 2000, were not previously diagnosed by treating physicians, but were related to the work incident in August 2000.[25]

Employer argues the Board erred in two respects. First, that the Board erroneously relied on *Gilliard–Belfast v. Wendy's, Inc.,*[26] when it determined Claimant was entitled to rely on the advice of her treating physician to remain out of work. Second, that the Board's decision granting Claimant compensation for a recurrence of total disability is not based on substantial evidence. The Court addresses these contentions below.

In *Gilliard–Belfast v. Wendy's, Inc.,* the Delaware Supreme Court held a worker is entitled to rely on a "no work" order of a treating physician.[27] A worker is not obligated to try to work against physician advice. The Court stated any other holding would place injured workers in an untenable position:

> If a treating physician's order not to work is followed, the claimant risks the loss of disability compensation if the Board subsequently determines that the claimant could have performed some work. Conversely, if the treating physician's order not to work is disregarded, a claimant who returns to work not only incurs the risk of further physical injury but also faces the prospect of being denied compensation for that enhanced injury.[28]

***3** Employer argues this case is distinguishable from *Gilliard–Belfast* because there is conflicting medical testimony regarding Claimant's ability to work and Claimant's treating physician, Dr. Sternberg, testified that "in retrospect," he believes Claimant could have worked with some restrictions.[29] Therefore, Employer argues, Claimant is not entitled to total disability because there is no conflict between the opinions of Claimant's treating physicians that Claimant should have gone back to work with restrictions.

The Court does not accept Employer's interpretation of *Gilliard–Belfast. Gilliard–Belfast* stands for the rule of law that an injured worker can rely on a treating physician's advice not to work. That is exactly what Claimant did in this case. Dr. Sternberg issued Claimant total disability slips, and testified he did not inform Claimant she could return to work in a sedentary position with a lifting restriction.[30] The fact that Dr. Sternberg believes "in retrospect" Claimant could have returned to work with restrictions does not make Claimant's reliance on his advice any less reasonable.

Employer next cites the Superior Court decision of *Peden v. Dentsply International,*[31] for the rule that "... in instances where the parties never had an agreement, or a Board decision, that the claimant was totally disabled for any period of time and the medical experts were in disagreement over whether he was totally disabled, *Gilliard–Bellfast* did not apply and the issue of total disability became an issue of fact for the Board to decide."[32] However, *Peden* relied heavily on *Flax v. State,*[33] which has since been limited to the facts of that case by the Delaware Supreme Court.[34] In *Delhaize America, Inc. v. Baker,* the Supreme Court reaffirmed *Gilliard–Belfast,* stating:

> The holding in *Flax* is limited to its facts, and does not control the result here. The *Gilliard–Belfast* rule applies to any claimant, whether the parties agree that the claimant is disabled or not. Simply stated, if a claimant is instructed by his treating physician that he or she is not to perform *any* work, the claimant will be deemed to be totally disabled during the period of the doctor's order. This rule assumes that the doctor acts in good faith, and does not extend beyond the time that the Board decides whether the claimant is disabled as a matter of fact.[35]

The Board's reliance on *Gilliard–Belfast* was appropriate. The rule in *Gilliard–Belfast* appears to be the current state of the law in Delaware and it was reasonable for Claimant not to work during the period Dr. Sternberg issued her total disability slips.

Employer next argues the decision of the Board was not supported by substantial evidence. Employer claims the Board rested its decision on inaccurate and mischaracterized evidence.[36] Employer argues because the evidence was inaccurate and mischaracterized, the Court should not give deference to the Board's findings on credibility of witnesses.[37]

***4** As a basis for this argument, Employer first points out that Claimant tested positive for cocaine while she was treating with Dr. Sternberg and that Dr. Sternberg testified cocaine use could heighten or lower a person's sensitivity to pain.[38] Because Dr. Sternberg's diagnosis of Claimant and his issuance of disability notes were partially based on her subjective complaints of pain, Employer argues the cocaine use could have had an effect on that diagnosis. The Board concluded this argument was a "red herring."[39] The Court agrees. The testimony of Dr. Sternberg regarding the effect of cocaine use on pain sensitivity is inconclusive. There is no evidence in this record from which the Court can determine the cocaine use of the Claimant had any effect on her subjective complaints of pain. In addition, there is independent evidence that Claimant suffered from a disabling injury that precluded her from working. Since September 2000, when Claimant was no longer receiving disability payments, Claimant's condition worsened. She was diagnosed with cervical radiculopathy and a C5/6 disc herniation after a March 2002 MRI.[40] This diagnosis was confirmed by a January 3, 2003 EMG performed by Dr. Sternberg.[41] There is no evidence of a previous diagnosis in this regard by any other treating physician prior to that time.

Dr. Sternberg and Employer's expert Dr. Meyers both related Claimant's symptoms back to the August 2000 work incident.[42] Therefore, under the substantial evidence standard, a reasonable person could come to the conclusion that independent medical evidence, apart from Claimant's subjective complaints of pain, shows a recurrence of total disability.[43]

Employer next argues that because Dr. Sternberg testified that his initial examination of Claimant was "pretty close" to the notes of Dr. Singh (who had released Claimant to a sedentary position with a lifting restriction) Dr. Sternberg's testimony is inconsistent with the Board's determination of a recurrence of total disability.[44]

While neither the Board, nor this Court is capable of determining what Dr. Sternberg specifically meant by stating his diagnosis of Claimant was "pretty close" to that of Dr. Singh, Dr. Sternberg's opinion was that Claimant was totally disabled from work. Claimant was entitled to rely on that determination.[45] The Board chose to find Dr. Sternberg credible and believable. Based on the documented medical ailments from which Claimant suffered, there was substantial evidence for the Board to find she had suffered a recurrence of a total disability and it was reasonable for Claimant to rely on Dr. Sternberg's issuance of total disability slips.

Employer next argues there is a strong inference Claimant sought treatment from several medical providers until she found one that would write her total disability slips. There is no direct evidence to support the possible "inference" Employer proffers. This argument goes to a credibility determination, and that is left to the sound discretion of

the Board. The standard to reverse a Board decision must be based on evidence much more compelling than mere inference. The Board found the testimony of Dr. Sternberg that Claimant suffered a recurrence of total disability credible and believable.[46] In addition, by rule in *Gilliard–Belfast,* Claimant was entitled to rely on that opinion. The Court accepts the Board determination of Dr. Sternberg's credibility and affirms its holding of Claimant's recurrence of temporary total disability.

***5** There is substantial evidence in the record to indicate Claimant had a recurrence of total disability from December 17, 2002 through May 14, 2004.

Conclusion

For the reasons set forth herein the decision of the Industrial Accident Board is AFFIRMED.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2006 WL 1381628

Footnotes

1 *General Motors Corp. v. Freeman,* 164 A.2d 686, 688 (Del.1960).
2 *Sirkin and Levine v. Timmons,* 652 A.2d 1079 (Del.Super.Ct.1994).
3 *Oceanport Indus. Inc. v. Wilmington Stevedores, Inc.,* 636 A .2d 892, 899 (Del.1994).
4 *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66–67 (Del.1965).
5 *Id.* at 66.
6 *Id.* at 67.
7 *General Motors Corp. v. Parker,* 1999 WL 1240820 (Del. Super .).
8 IAB Hearing No. 1173408 Transcript at 5.
9 *Appellee Opening Brief* Exhibit 1 (Dr. Singh Deposition) at 9.
10 *Dr. Singh Deposition* at 11.
11 *Id.*
12 *Id* at 22.
13 *Claimant/Appellee Opening Brief* at 2; IAB Hearing No. 1173408 Transcript at 23.
14 Claimant treated with Dr. King mainly for low back pain and he referred her to Dr. Bose for injections. Dr. Delport also gave Claimant injections in the right side of her neck. During Claimant's treatment with Dr. Sternberg, he recommended she also treat with Dr. Katz, an orthopedic spine surgeon. Dr. Katz provided Dr. Sternberg with a report stating he wanted to do a nerve block procedure on Claimant. Claimant had some nerve blocks done by Dr. Chiang. *See Sternberg Deposition* at 14, 16; IAB Hearing No. 1173408 Transcript at 25; *Claimant/Appellee Opening Brief* Exhibit 3 (Dr. Grossinger Deposition) at 13.
15 IAB Hearing No. 1173408 Transcript at 5.
16 *Employee/Appellee* Exhibit 2 (Dr. Sternberg Deposition) at 3.
17 *Dr. Sternberg Deposition* at 9.
18 *Id* at 10.
19 *Id* at 8.
20 *Id* at 12.
21 *Id* at 46.
22 *Id* at 21–22.
23 IAB Hearing No. 1173408 Transcript at 65.
24 *Disabitino & Sons, Inc. v. Facciolo,* 306 A.2d 716, 718 (Del.1973).
25 IAB Hearing No. 1173408 Decision at 14.
26 754 A.2d 251 (Del.2000).
27 *Id* at 253.
28 *Id.*

29 *Employer/Appellant Opening Brief* at 10.
30 *Dr. Sternberg Deposition* at 51.
31 2004 WL 2735461 (Del.Super.).
32 *Employer/Appellee Opening Brief* at 10.
33 852 A.2d 908 (Del.2004).
34 *Delhaize America, Inc. v. Baker,* 880 A.2d 1047 (Del.2005).
35 *Id.*
36 *Employer/Appellant Opening Brief* at 12.
37 *Id* at 12–13.
38 IAB Hearing No. 1173408 Transcript at 19.
39 IAB Hearing No. 1173408 Decision at 15.
40 IAB Hearing No. 1173408 Decision at 14.
41 *Id.*
42 *Id.*
43 In this same line of argument Employer also references alleged abuse of percocet by Claimant and euphoric and inappropriate behavior at a visit to Dr. Sternberg. For the same reasons outlined in the body of the opinion, these allegations are not determinative of whether Claimant suffered a recurrence of total disability because they are only possibly relevant to Claimant's subjective complaints of pain. Because there is independent medical evidence of the recurrence of total disability, this argument is unavailing.
44 *Employer/Appellant Opening Brief* at 13.
45 *See Gilliard–Belfast v. Wendy's, Inc.,* 754 A.2d 251 (Del.2000).
46 IAB Hearing No. 1173408 Decision at 16–17.

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