29 A.3d 246 (Table)
Unpublished Disposition
(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')
Supreme Court of Delaware.

Robert ROBBINS,
Claimant Below, Appellant,
v.
HELMARK STEEL,
Employer Below, Appellee.

No. 229, 2011.
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Submitted: Aug. 24, 2011.
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Decided: Sept. 26, 2011.

Synopsis

Background: Workers' compensation claimant appealed decision of Industrial Accident Board (IAB) that denied petition for additional worker's compensation benefits. The Superior Court, New Castle County, affirmed. Claimant appealed.

Holdings: The Supreme Court, Jack B. Jacobs, J., held that:

[1] claimant presented insufficient evidence to establish that "no-work" order was issued by claimant's treating physician, and thus *Gilliard–Belfast* rule did not apply, and

[2] substantial evidence supported IAB's conclusion that there had no worsening of claimant's condition.

Affirmed.

West Headnotes (3)

[1] Workers' Compensation Incapacity for Work or Employment in General

Workers' compensation claimant presented insufficient evidence to establish that "no-work" order was issued by claimant's treating physician, and thus *Gilliard–Belfast* rule, which states that claimant is entitled to disability benefits based on treating physician's "no-work" order, did not apply in claimant's proceeding to obtain additional worker's compensation benefits regarding leg injury, though treating physician's note stated that claimant was "permanently disabled"; claimant failed to call treating physician as a witness to explain whether he intended to state that claimant had permanent impairment to his leg or that claimant would need to be placed on permanent light-duty work restrictions. 19 West's Del.C. § 2326.

2 Cases that cite this headnote

[2] Workers' Compensation Hip, Leg, and Foot Injuries

Substantial evidence supported conclusion of Industrial Accident Board (IAB) that there had been no worsening of workers' compensation claimant's condition and thus that claimant had not suffered recurrence of total disability, and therefore claimant was not entitled to additional worker's compensation benefits regarding his leg injury, though doctor stated that claimant was "most suited for medium-duty work" after examining claimant when claimant sought additional benefits, not after examining claimant following accident; evidence indicated that claimant had been performing heavy-duty work at time of second examination, not first examination, and only change that doctor noted regarding claimant was that claimant had begun having difficulty working in cold, damp conditions.

[3] Workers' Compensation Recurrence of Disability

To establish a recurrence of total disability in his proceeding to obtain additional worker's compensation benefits regarding leg injury, claimant was required to show that there had

been a return of an impairment without the intervention of a new or independent accident.

1 Cases that cite this headnote

Court Below: Superior Court of the State of Delaware, in and for New Castle County, C.A. No. 09A–09–005.

Before HOLLAND, BERGER and JACOBS, Justices.

ORDER

JACK B. JACOBS, Justice.

***1** This 26th day of September 2011, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Robert Robbins ("Robbins), the claimant-below appellant, appeals from a decision of the Superior Court affirming the Industrial Accident Board's ("IAB") denial of additional worker's compensation benefits for his leg injuries. Robbins claims that (i) the IAB and Superior Court misapplied the *Gilliard–Belfast*[1] test for total disability benefits; and (ii) the IAB's decision was not supported by substantial evidence. We conclude that the IAB's decision is supported by the record, is free from legal error, and that the Superior Court properly upheld the IAB's decision. We therefore affirm.

2. On June 11, 1999, Robbins was employed as a welder for Helmark Steel ("Helmark") when a crane lifting a 4,000–lb steel beam malfunctioned, dropping the beam on his legs. Robbins suffered serious injuries that required multiple surgeries to install metal rods and screws in his legs. He received workers' compensation benefits for a limited period of disability, as well as for permanent partial impairment of 41% and 25% to his left and right legs, respectively.

3. After the accident, Robbins continued to work in the steel, pipefitting and welding industries as a welder. He returned to Helmark Steel to work in a light-duty position, but left that position about 2001 or 2002 to work at a painting facility in Florida. Robbins returned to Delaware in 2004, and began employment with General Marine Industrial Services ("General Marine") as a pipefitter and welder on barges on the Delaware River.

4. In October 2008, Robbins visited Dr. Yezdani for treatment of his stiff and achy legs, which had caused him to miss some work. Robbins also feared that he was in danger of losing his job at General Marine, and that he might fall at work. October marked the start of the "cold season" and those conditions exacerbated Robbins' leg pain because of the breeze coming off the bay. Robbins worked "on and off" from October 2008 to February, 11 2009, at which point Robbins claims Dr. Yezdani ordered him not to return to work. Since then, Robbins has not returned to work at General Marine, nor has he sought employment elsewhere.

5. On February 9, 2009, Robbins petitioned the IAB for additional worker's compensation based on a claimed recurrence of total disability. The IAB heard testimony on June 18, 2009 from Robbins and his wife. Robbins testified he had not sought work since February 11, 2009 because he understood that Dr. Yezdani had "totally disabled him from all forms of work." Robbins did not call Dr. Yezdani as a witness at the hearing, either in-person or by deposition, however; nor did Robbins offer a copy of his physician's "no-work" order into evidence. Dr. Yezdani's March 2009 records, which were presented at the IAB hearing, noted only that Robbins was "permanently disabled," would be on pain medication for the remainder of his life, and had not been able to work in "his usual occupation" for about a year.

***2** 6. The only medical testimony presented at the IAB hearing came from Dr. John Townsend, who opined that based on his examination of Robbins and his review of Robbins' medical records, Robbins had not suffered a recurrence. Townsend, who had examined Robbins in 2000 after the 1999 accident, stated that his 2009 examination of Robbins "was about the same as it had been in the year 2000, and that his pain complaints were pretty much the same as well." Townsend also opined that there had been no notable worsening of Robbins' condition and that he did not believe Robbins was "totally disabled from any and all employment."

7. After the hearing, the IAB concluded that Robbins had not suffered a recurrence, and thus, was not totally disabled. The IAB stated that it was "not convinced that Dr. Yezdani meant [Robbins] could not work in any capacity" on the basis of the medical records presented at the hearing, particularly "in light of the large amount of evidence to the contrary." Therefore, the *Gilliard–Belfast* rule—that a claimant is entitled to disability benefits based on a treating physician's "no-work" order[2]—did not apply, because Dr. Yezdani had not actually issued a "no-work" order. The IAB

acknowledged that Robbins may be restricted with respect to his preferred occupation, but it found that he was able to work in some capacity and that his condition had not changed since the last period of total disability in 2000. Therefore, the IAB denied Robbins' petition.

8. On appeal from a decision of an administrative agency, the reviewing court must determine whether the agency ruling is supported by substantial evidence and is free from legal error.[3] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[4] The appellate court's review of questions of law is *de novo*.[5]

[1] 9. Robbins first contends that the *Gilliard–Belfast* rule should apply based on Dr. Yezdani's recorded statement that Robbins was "permanently disabled." Robbins interpreted that statement to mean he could not return to work in any capacity. Robbins also asserts that he met his burden of proving a recurrence of temporary total disability, because Dr. Townsend opined that Robbins should be placed on work restrictions to which he was not subject when Dr. Townsend first examined him in 2000.

10. In *Gilliard–Belfast,* this Court held that a claimant "who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."[6] Therefore, a claimant "remains disabled from the viewpoint of workmen's compensation so long as [the claimant's] treating physician insists that [the claimant] remain unemployed."[7]

11. For the *Gilliard–Belfast* rule to apply, however, the claimant's treating physician must have ordered the claimant not to perform any work.[8] That is, the claimant's treating physician must have issued a "no-work" order.[9] Here, as the Superior Court noted, "[t]he record does not contain a no-work order or a copy of Dr. Yezdani's records related to [Robbins'] examinations."[10] Rather, the record evidence regarding Dr. Yezdani's alleged "no-work" order consisted solely of Robbins' own testimony and Dr. Townsend's deposition testimony about the contents of Dr. Yezdani's March 11, 2009 medical notes.

***3** 12. The IAB did not err by concluding that evidence was insufficient to establish that Dr. Yezdani had issued a "no-work" order. The IAB found that Dr. Yezdani's use of the phrase "permanently disabled" was "ambiguous as to its meaning" and "not clear in terms of context." Thus, the note could have meant either that Robbins had a permanent impairment to his leg under 19 *Del. C.* § 2326,[11] or that Robbins would need to be placed on permanent light-duty work restrictions. Since Robbins failed to call Dr. Yezdani as a witness to explain what he intended, "[a]ll that the [IAB] had to rely on in this regard was [Robbins'] lay testimony of what the ambiguous note meant as well as Dr. Townsend's speculative interpretation of the note." Because Robbins failed to adduce "definitive evidence" of what work restrictions (if any) Dr. Yezdani had ordered, the IAB was unable to conclude that Dr. Yezdani's March 11, 2009 medical notes were intended as a "no-work" order. Because there was insufficient evidence to establish that a "no-work" order was issued, the IAB and Superior Court correctly declined to apply the *Gilliard–Belfast* rule.

[2] 13. Robbins next claims that the IAB erroneously found that he had not met his burden to show by a preponderance of the evidence that he suffered a recurrence of total disability. In support, Robbins argues that his condition had worsened, because after Dr. Townsend examined Robbins in 2009, he opined that Robbins would be "most suited for medium-duty work," a restriction to which Robbins was not subject in 2000. In 2000, Robbins contends, Dr. Townsend found him "capable of working full time, was working full time, and ... anticipated that [Robbins] could continue to perform his job ."

[3] 14. To establish a recurrence of total disability, Robbins must show that there has been "a *return* of an impairment without the intervention of a new or independent accident."[12] "Work restrictions that continue to impair an individual in the same manner do not support a finding that that individual had a recurrence of total disability. If a condition has not changed for the worse, then a no 'recurrence' has occurred."[13] Therefore, neither a "continuation of [an] impairment" nor a "slight change in impairment" will support a finding of recurrence of total disability.[14]

15. Substantial evidence supports the IAB's conclusion that Robbins failed to establish that a worsening of his condition had occurred. Dr. Townsend testified that he examined Robbins in December 2000, after the industrial accident at Helmark Steel. At that time, Robbins reported that he had balance issues, was slow to get moving in the morning, and experienced stiffness. When Dr. Townsend again examined

Robbins in 2009, his medical status "was about the same as it had been in the year 2000, and [Robbins'] pain complaints were pretty much the same as well." Based on his comparison of the results of the two examinations, Dr. Townsend concluded that there was no notable worsening of Robbins' condition between 2000 and 2009.

***4** 16. Robbins' reliance on Dr. Townsend's comment about work restrictions is also misplaced. When Dr. Townsend examined him in 2000, Robbins was not working the same type of heavy-duty pipe fitting and welding job as he had at Marine General in 2009. Rather, in 2000 Robbins was working full-time as a steel inspector. Because there is no evidence that Robbins was working a heavy duty job in 2000, Dr. Townsend's opinion that Robbins should not be working a heavy duty job (which Robbins' job at Marine General is) did not constitute a new work restriction that would signify a change in physical condition.

17. The only difference between Robbins' condition in 2000 and in 2009, the IAB noted, was that around October 2008, Robbins began having difficulty working in cold, damp conditions at his General Marine job. That change, however, was attributable to Robbins working outdoors in the cold weather, near water, during the fall and winter months, and not because of increased physical intensity. Dr. Townsend opined that he would restrict Robbins to medium-duty work, but that is because he believed that "working in cold temperatures would probably be a bad idea," and that those work restrictions would reduce, if not eliminate, the causes for the October 2008 aggravation "because [Robbins] wasn't outside anymore." More importantly, however, Dr. Townsend also testified that he did not believe that Robbins was totally disabled "from any and all employment" and that "[Robbins'] symptoms ha[d] not flared up as of February 2009." Thus, substantial record evidence supports the IAB's conclusion that Robbins had not suffered a recurrence of total disability, because there had been no worsening of his condition.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED.**

All Citations

29 A.3d 246 (Table), 2011 WL 4436762

Footnotes

1 *Gilliard–Belfast v. Wendy's, Inc.,* 754 A.2d 251 (Del.2000).
2 *Gilliard–Belfast v. Wendy's, Inc.,* 754 A.2d 251, 254 (Del.2000).
3 *State Dep't of Lab. v. Med. Placement Serv., Inc.,* 457 A.2d 382, 383 (Del.1982).
4 *Olney v. Cooch,* 425 A.2d 610, 614 (Del.1981)
5 *Betts v. Townsends, Inc.,* 765 A.2d 531, 533 (Del.2000).
6 *Gilliard–Belfast v. Wendy's, Inc.,* 754 A.2d 251, 254 (Del.2000).
7 *Id.* (citing *Malcolm v. Chrysler Corp.,* 255 A.2d 106, 110 (Del.Super.1969)
8 *Delhaize Am., Inc. v. Baker,* 880 A.2d 1047 (Table), 2005 WL 2219227, at *1 (Del.2005) ("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.") (emphasis in original).
9 *Id.*
10 *Robbins v. Helmark Steel,* 2011 WL 1326272, at *1 n. 2 (Del.Super.Ct. Apr.6, 2011).
11 *See* 19 *Del. C.* § 2326.
12 *DiSabatino & Sons, Inc. v. Facciolo,* 306 A.2d 716, 719 (Del.1973) (emphasis added).
13 *Chubb v. State,* 961 A.2d 530, 535 (Del.2008).
14 *Id.*