IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JOAN WEST,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 06A-10-001-RFS
	)	
WAL-MART, INC.	)	
	)	
Appellee.	)	

MEMORANDUM OPINION

Upon Appeal from the Industrial Accident Board.
Affirmed in Part. Reversed and Remanded in Part.

Submitted: May 9, 2007
Decided: August 29, 2007

Walt F. Schmittinger, Esquire, and Magnolia Solano, Esquire, Schmittinger & Rodriguez, P.A., Dover, Delaware, Attorneys for Appellant.

Michael R. Ippoliti, Esquire, Wilmington, Delaware, Attorney for Appellee.

STOKES, Judge

This is an appeal from the September 7, 2006 decision of the Industrial Accident Board (hereinafter "Board"), granting Joan West (hereinafter "Claimant") medical expenses for a work-related injury, but denying partial disability benefits. Claimant now appeals, in part, the decision of the Board, seeking to reverse the denial of partial disability benefits, and, also, to obtain an award of attorneys' fees and medical witness fees. For the reasons set forth below, the Board's decision is upheld with respect to the denial of partial disability benefits, and reversed and remanded with respect to awards of attorney's fees and medical witness fees.

STATEMENT OF FACT

The underlying facts of this matter were fully stated in this Court's March 31, 2006 decision, involving the same parties. *See West v. Wal-Mart, Inc.*, 2006 Del. Super. LEXIS 158 (Del. Super. Mar. 31, 2006). The Court's factual recitation is repeated here for completeness.

Claimant was injured in a compensable work-related accident in March 2001. Her employer was Wal-Mart, Inc. (hereinafter "Walmart"). Claimant suffered a herniated disc and received workers compensation benefits. On September 28, 2004, Claimant filed a Petition to Determine Additional Compensation Due against Walmart, asking for partial disability benefits and unpaid medical expenses relating back to her injury.

Claimant underwent lumbar fusion surgery on February 4, 2002. Eight months later, in October of 2002, a bone scan indicated that the fusion may have failed. The recommendation to the Claimant was to undergo further surgery in 2003. However, Claimant failed to do so. At some point

around February of 2003, Claimant had a stroke.[1] In April of 2003, she had an appointment with Doctor Edward Quinn, her treating physician. He noted that at this time, Claimant had recovered from her stroke for the most part, was ambulatory with the help of a cane and neurologically intact. The x-rays from that appointment showed that the fusion appeared to have solidified. At this point, Dr Quinn released Claimant to light duty work with back precautions. The precautions included no prolonged standing, walking, sitting, stooping or bending and no running, jumping or twisting. Dr. Quinn did not put any restrictions on the number of hours Claimant could work when he released her to work in April of 2003. However, Claimant did not return to work in April 2003, nor did she return in the months immediately following.

Claimant did not actually return to work until March 2004. In the eleven months between her release and her return to work, Claimant continued to receive worker's compensation benefits from Wal-Mart. When these benefits were terminated by Wal-Mart, Claimant then returned to work. At this point, Claimant's treating physician limited the number of hours that Claimant could work for the first two months of her return based on, in his words, "her deconditioned status only."

Claimant had an open ended benefits agreement with Wal-Mart relating to this compensable work accident which was finally terminated by Wal-Mart effective March 8, 2004.

In March 2004, Claimant returned to Dr. Quinn and was reexamined. The objective physical examination was essentially the same as it had been eleven months beforehand. However, the major

[1] There is apparently some discrepancy as to when the stroke occurred. Claimant states that the stroke occurred on February 14, 2003. Tr. 34-36. The medical records introduced in the case pertaining to the stroke are from Dr. Quinn's transcribed notes, from an April 2003 appointment, which state that the stroke occurred on October 14, 2003. Both sides acknowledge that this must be an error. Notwithstanding the discrepancy, all sides seem to agree that Claimant had "recovered from the stroke, for the most part" by the time of the April 2003 appointment, as is stated by Claimant's attorney, referencing his conversation with Claimant's treating physician. Tr. 16, quoting Dr. Quinn Deposition at 15.

change was subjective. In March 2004, Claimant reported considerable improvement in her condition from eleven months before, and told Dr. Quinn that she was ready to go back to work. At this point Dr. Quinn released her to return to work on a progressive basis, to consist of four hours for the first month, six hours for the second month, and full time after eight weeks. His concern was that Claimant was deconditioned from having been out of work for so long, and that going from zero to eight hours would be difficult for her.[2]

On February 14, 2005, the Board conducted an evidentiary hearing on Claimant's Petition to Determine Additional Compensation Due. Claimant was requesting, at that time, payment of over $1,200.00 in medical bills and a period of partial disability from March 9, 2004 until some reasonable time period thereafter. Testifying on behalf of Claimant, by deposition, were Dr. Thomas Volatile and Dr Edward Quinn. Dr Volatile, an orthopedic surgeon, largely deferred to and agreed with Dr. Quinn on relevant recommendations and findings. In fact, Dr. Volatile only saw the Claimant two times and stated that he was unaware that her injuries were work-related until just prior to his deposition.

The Board's February 28, 2005 decision denied the Claimant's Petition. In the decision, Claimant's credibility was called into question. Also, the Board concluded that Claimant could have returned to work in April of 2003 and simply chose not to do so. In the Board's words, Claimant "offer[ed] no explanation as to why she failed to obey the doctor's instructions to return to work except to say that Dr. Quinn never informed her that she could work." Ex. B of Opening Br. of Claimant Below-Appellant at 5.

[2] During Dr. Quinn's deposition the following exchange took place:

Q: [Save] for her deconditioned state, there was no medical reason as a result of her work injury or the sequelae associated with the surgery that she couldn't work on a full-time basis?

A: It was her deconditioned status only.

Furthermore, the Board denied Claimant the right to recover any of the roughly $1,200.00 allegedly owed for medical expenses. The Board stated that "multiple invoices were submitted but the Board [was] unable to discern what treatment was provided for what disorder by what provider and for what reason." Ex. B of Opening Br. of Claimant Below-Appellant at 6. It was added that the "Board is certainly not tasked nor inclined to page through the invoices and figure this out." *Id.*

Claimant appealed the Board's February 28, 2005 decision to the Superior Court on December 30, 2005. The Court's March 31, 2006 opinion reversed and remanded the matter back to the Board. It was found that the Board had neglected its function by not adequately addressing the medical bills submitted. Additionally, the Board was instructed to consider the case law of *Gilliard-Belfast v. Wendy's*, 754 A.2d 251 (Del. 2000) and *Mackert v. Grotto's Pizza,* IAB Hearing No. 1231323 (May 27, 2004) with regard to the issue of partial disability benefits.

Upon remand, the parties chose not to present additional evidence or argument to the Board. In its second opinion, dated September 7, 2006, the Board acknowledged that documentation had been produced as to the medical expenses incurred. Consequently, the Board found in favor of Claimant for $1,233.16 in medical expenses.

On the matter of temporary partial disability benefits, the Board found the case *sub judice* to be distinguishable from the two cases cited by the Superior Court. The Board reasoned that in *Gilliard-Belfast* the Court had found that a claimant could rely on the advice of a treating physician regarding the *inability* to work until the Board resolves the conflict. Ex. A of Opening Br. of Claimant Below-Appellant at 2. In the present matter, the Board concluded that "Claimant was released to work by her treating physician, so she was not placed in the 'untenable position' of ignoring her treating physician's instructions." *Id.*

Similarly, the Board found the present case to be distinguishable from *Mackert*, which applied the *Gilliard-Belfast* principles. The Board stated that "[i]n *Mackert*, the claimant was released to work part-time by her treating physician from the beginning; whereas in the case at hand, Claimant's treating physician released her to work full-time, she ignored the release for eleven months and did not work, and then sought another work note for part-time work that gradually increased to full-time work." Ex. A of Opening Br. of Claimant Below-Appellant at 2. Since Claimant caused the increased work restrictions by ignoring her doctor's instructions, the Board concluded that Wal-Mart should not be held responsible for the increased wage loss. *Id.*

The Board's second decision has now been appealed to this Court. Appeal is, however, limited to the Board's denial of temporary partial disability benefits, and its failure to award medical witness fees and attorney's fees.

STANDARD OF REVIEW

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law, and a determination of whether substantial evidence exists to support the Board's findings of fact and conclusions of law. *Histed v. E. I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 Del. Super. LEXIS 9, at *2 (Del. Super. Jan. 13, 2003). Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (citation omitted). It is more than a scintilla but less than a preponderance of the evidence. *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988). In conducting its review, this Court is

not to engage in the practice of judging witness credibility or weighing the evidence proffered; those functions are reserved exclusively for the Board. *Id.* at 1106.

Questions of law are reviewed de novo. *McDonalds v. Fountain*, 2007 Del. Super. LEXIS 175, at *3 (Del. Super. May 30, 2007). Absent error of law, the standard of review for a Board's decision is abuse of discretion. *Opportunity Ctr., Inc. v. Jamison*, 2007 Del. LEXIS 236, at *6 (Del. May 24, 2007). The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances." *Willis*, 2003 Del. Super. LEXIS 9, at *2-3 (citation omitted).

DISCUSSION

A. Partial Disability Benefits

19 Del. C. § 2325 provides a structure by which partially disabled employees may recover benefits due to their work-related injuries. Delaware Courts have found repeatedly that an injured employee claiming disability benefits is justified in relying on his or her treating physician's instructions regarding work restrictions. *See, e.g., Gilliard-Belfast v. Wendy's Inc.*, 754 A.2d 251, 254 (Del. 2000); *Wade Insulation, Inc. v. Visnovsky*, 773 A.2d 379, 382 (Del. 2001). "[A] person 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." *Gilliard-Belfast*, 754 A.2d at 254; *See also*, *Mackert v. Grotto's Pizza*, IAB Hearing No. 1231323 (May 27, 2004) ("According to the Supreme Court, Claimant has the right to rely on her treating physician's instructions to only work twenty hours per week" (citation omitted)); *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 879 (Del. 2003) ("The Claimant's general right to rely upon his treating

physician's total disability opinion, especially while a Board award or agreement is in effect, means that the Claimant had no obligation to either return to work on a limited basis with the Employer or to look for other employment until the Board makes that determination.").

Claimant asserts that the Board erred when it denied her temporary partial disability benefits as of March 9, 2004, the date her treating physician, Dr. Quinn, issued a work note releasing her to return to work for four hours daily the first month, six hours the second month, and gradually increasing her hours to fully duty. Claimant believes she was entitled to rely upon the March 9 work order, and, consequently, is entitled to an award of partial disability benefits.

As the above referenced case law indicates, persons claiming disability benefits are entitled to rely upon their treating physician's orders not to work. Claimant relies upon this precedent in arguing her claim; however, Claimant's assertions paint only a partial picture of what has transpired.

The Court observes that in the Board's September 7, 2006 Order it was noted that the Court's decision in *Gilliard-Belfast* and the Board's decision in *Mackert* were distinguishable from the matter *sub judice.* The distinction is the result of the specific orders given by the treating physicians to each of the respective claimants. The Claimant in the current case was instructed by Dr. Quinn that in April of 2003 she was able to fully return to work. Conversely, in *Gilliard-Belfast* and *Mackert* the claimants were given instructions *not* to fully return to work right away. This distinction forms the basis of the Board's denial of benefits.

The Board found credible evidence that Claimant was given instructions by Dr. Quinn, her treating physician, to fully return to work in April of 2003.[3] Since the Court is not to engage in the

[3] The Board determined that Dr. Jerry Case, an orthopedist testifying on behalf of Wal-Mart, did not disagree with Dr. Quinn regarding Claimant's ability to work in 2003. Furthermore, the Board did not give weight to Dr. Case's opinion that Claimant was severely disabled because those findings were based on the subjective complaints of Claimant. Claimant was not viewed as credible by the Board, and, consequently

practice of judging witness credibility or weigh the evidence proffered this factual finding will not be disturbed. The Court's role is limited to a determination of whether or not substantial evidence exists to support the determinations that have already been made by the Board. Consequently, the Board's determination is controlling and April of 2003 becomes the measuring point for the Court's analysis. For this reason, the Board's determination that the later, gradual, return to work order of March 2004 is of no consequence is without legal error.

Claimant also argues that under the so called "eggshell plaintiff rule," sometimes referred to as the "eggshell skull rule," she is entitled to recover disability regardless of how much of her condition was caused by her stroke and heart condition and not her work-related injury. Claimant's assertion is an overstatement. It is true that "[a] preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). However, "[t]he 'but for' definition of proximate cause in the substantive law of torts finds equal application in fixing the relationship between an acknowledged industrial accident and its aftermath." *Id.*

The Board did not find that there were underlying or later created health problems that were exacerbated or produced by the 2001 work-related accident. In fact, Claimant acknowledges in her brief to this Court that "these medical issues [heart condition and stroke] *are not related to her work accident*." Opening Br. of Claimant Below-Appellant at 11. The work accident need not be the sole cause or even a substantial cause of any later injuries, but there must be some causal connection between the two. *See Reese*, 619 A.2d at 910. Because the Claimant was fully released to work in

neither were Dr. Case's findings that were based upon Claimant's impressions of her condition.

April of 2003, and because no causal link was shown between the work injury and other health conditions, the Board properly denied Claimant an award of partial disability benefits.

B. Attorney's Fees

19 Del. C. § 2320(10)(a) states:

> A reasonable attorney's fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party.[4]

Reasonable attorney's fees are mandatory and must be awarded by the Board to a successful claimant. *Jepsen v. State*, 2005 Del. Super. LEXIS 73, at *6 (Del. Super. Feb. 24, 2005). While the fees are mandatory, the Board does retain broad discretion in determining the reasonableness of the attorney's fees requested. *Id.*

In its September 7, 2006 opinion, the Board did not address an award of reasonable attorney's fees. Considering the procedural posture of the case, the Court does not believe that the Board knowingly denied an award of attorney's fees, but rather, inadvertently overlooked the issue altogether. Notwithstanding the reason for such omission, the Board committed legal error in failing

[4] Effective January 17, 2007, the Delaware General Assembly added the following language to 19 Del. C. § 2320(10)(a):

> In order for the Board to award a fee under this section, counsel for an employee shall submit to the Board an Attorneys' Fee Affidavit in a form prescribed by or substantially in compliance with Board rules, along with a copy of the written fee agreement signed by the employee. Any fee awarded to an employee under this subsection shall be applied to offset the fees that would otherwise be charged to the employee by his attorney under the fee agreement.

The Board issued its decision in this matter on September 7, 2006. For that reason, the later inserted language does not govern the rights of the parties.

to award reasonable attorney's fees to the Claimant. Claimant was awarded $1,233.16 in medical expenses, and, consequently, she is a successful claimant within the purview of 19 Del. C. § 2320(10)(a). This entitles Claimant to an award of reasonable attorney's fees within the Board's sound discretion.

C. Medical Witness Fees

19 Del. C. § 2322(e) provides:

> The fees of medical witnesses testifying at hearings before the Industrial Accident Board in behalf of an injured employee shall be taxed as a cost to the employer or the employer's insurance carrier in the event the injured employee receives an award.

Much like an award of reasonable attorney's fees, the award of reasonable medical witness fees is mandatory and must be awarded by the Board to a successful claimant. *Jepsen*, 2005 Del. Super. LEXIS 73, at *6. The Board also has broad discretion in determining the reasonableness of medical witness fees and may decline to award certain witness fees should the Board determine that the number of witnesses called was unreasonable or that the testimony provided by such witnesses was redundant or cumulative. *Id.*

Claimant did receive an "award" within the bounds of 19 Del. C. § 2322(e) when the Boarded awarded $1,233.16 in medical expenses. *See Christiana Hilton v. Martinez*, 752 A.2d 1167 (Del. 2000) (finding claimant had received award when Board ordered the payment of medical bills). The Board's September 7, 2006 opinion gave only passing reference to the issue of medical witness testimony. That reference in its entirety is as follows:

> The Board also finds again that Dr. Volatile summarized Dr. Quinn's treatment records and deferred to Dr. Quinn regarding the total disability period. As for Dr. Case's opinion, the Board finds that he did not disagree with Dr. Quinn's

> opinion regarding Claimant's ability to work in 2003. Dr. Case indicated that Claimant was severely disabled based on her subjective complaints; however, the Board found that Claimant was not credible, so her subjective complaints are also not credible.

Ex. A of Opening Br. of Claimant Below-Appellant at 3. The Board's statement is too summary and does not consider Dr. Quinn's work.[5] An award of medical witness fees is mandatory. The Board must address the issue and determine what a reasonable award would be within its sound discretion.

CONCLUSION

Considering the foregoing, the decision of the Industrial Accident Board concerning the denial of partial disability benefits is affirmed. However, the Board's decision fails to adequately address the issues of reasonable attorney's fees and reasonable medical witness fees. The decision is reversed and remanded on these two issues for further proceedings in accordance with this Court's decision.

IT IS SO ORDERED.

cc: Prothonotary's Office

[5] Dr. Quinn was the principal medical provider for Claimant.