IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

RODOLFO LOPEZ,	:	
	:	C.A. No. 07A-02-004 WLW
Claimant Below-Appellant,	:	
	:	
v.	:	
	:	
MOUNTAIRE FARMS,	:	
	:	
Employer Below-Appellee.	:	

Submitted: April 1, 2008
Decided: August 4, 2008

ORDER

Upon Appeal of a Decision of the
Industrial Accident Board.
Remanded.

Walt F. Schmittinger, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Claimant Below - Appellant.

John W. Morgan, Esquire and Robert J. Deary, Esquire of Heckler & Frabizzio, P.A., Wilmington, Delaware; attorneys for the Employer Below - Appellee.

WITHAM, R.J.

Before the Court is Appellant/Claimant Rodolfo Lopez's ("Appellant" or "Mr. Lopez") appeal of the Industrial Accident Board's ("IAB" or "Board") January 31, 2007 decision in the case of *Lopez v. Mountaire Farms*, IAB Hearing No. 1235509. The decision forfeited Mr. Lopez's total disability benefits until he submits for examination with his Employer's medical doctor. The record does not demonstrate substantial evidence that Appellant failed to show good cause for failing to keep his appointments. This matter is *remanded* for further proceedings. The Board also found that there was no past, present or future obligation to pay benefits, yet the record is unclear as to whether there is an existing Agreement and if so, whether it has been honored. This matter is also *remanded* for further proceedings.

Background

Appellant was employed by Mountaire Farms ("Employer") from November 1997 to April 2003. During this employment, he sustained two hernias, one in March 2000 and another in 2002, from repeatedly lifting heavy objects while working. Employer acknowledges the compensability of the work-related injury. He underwent surgery in March 2001 and again in January 2003. He filed a Petition to Determine Compensation Due on July 28, 2003 and the injury was acknowledged as compensable. Appellant received total disability benefits from January 14, 2003 to March 3, 2003 and from April 21, 2003 to September 25, 2003.

On October 26, 2005, Appellant alleged that he required a second hernia repair and filed a Petition to Determine Additional Compensation Due seeking preapproval for exploratory surgery. On May 8, 2006, after a hearing, the Board issued a Decision

finding that the proposed surgery and subsequent total disability period are compensable. Employer learned by a letter dated September 22, 2006 that Dr. Abboud conducted the surgery on August 16, 2006. With the letter, Employer received a copy of the operative report but no medical documentation concerning any disability status or return to work capability.

Employer, through its legal counsel, informally sought medical documentation supporting Appellant's allegation of total disability status. After no response, Employer issued a Request for Production on December 13, 2006, seeking any written documentation that set forth the specifics of Appellant's status. Again, they did not receive a response.

Employer scheduled a defense medical examination (DME) with Dr. Morris, to take place on January 16, 2007, in order to determine Appellant's medical and work status, and sent notice to Appellant on January 3, 2007. Appellant did not attend the examination, he did not provide notice that he would be absent, and he did not provide an explanation. Employer sought a reimbursement of Dr. Morris' no-show fee in the amount of $250. Employer also requested a Legal Hearing, which was held on January 31, 2007.

At the hearing, Employer requested that the Board recognize that there is no claim to ongoing total disability benefits because there has been no medical documentation to support it, and that Employer had voluntarily paid total disability despite the absence of documentation. Counsel for Appellant explained to the Board that Mr. Lopez's absence was due to a family emergency requiring him to be in

Oklahoma to care for his daughter's children while she addressed an urgent matter and that Appellant was unable to confirm whether he could attend the DME rescheduled for February 13, 2007. He recommended that a DME be scheduled in Oklahoma, which was denied.

Decision of the IAB

The IAB signed Employer's prepared Order. The record does not contain a separate statement on the Board's findings of fact. According to the Order, the salient findings of the Board include that Appellant suffered a compensable industrial accident while employed with Mountaire Farms; that the Board granted Appellant's Petition to Determine Additional Compensation Due as to proposed exploratory surgery and subsequent total disability; that Appellant had the surgery and now fails or refuses to produce any written documentation setting forth his specific capabilities and/or restrictions; that on December 28, 2006, Employer voluntarily forwarded to Appellant's attorney total disability Agreements for execution by Appellant and settlement funds for distribution to Appellant; and continued to issue ongoing total disability benefits pursuant to this Agreement. Additionally, the Board found that Appellant failed to report to the DME arranged by Employer, and it was properly noticed. Finally, they found that Appellant's failure or refusal to produce written documentation setting forth his medical status has substantially prevented Employer from completing its investigation and evaluation.

The IAB then ordered that Appellant's benefits be forfeited from the date of the previously scheduled examination until he submits for examination; that within seven

days of the Order Appellant must provide written documentation of his medical status from his surgeon; that Employer is entitled to be reimbursed $250 for the "no show" fee incurred from Dr. Morris; and that Appellant must appear for Dr. Morris' rescheduled appointment. Finally, the Board recognizes that Employer "has not been, is not now, and will not be under any future obligation to pay," and that any payments made to Appellant for total disability benefits during the period starting with his surgery date of August 16, 2006 until Appellant submits the requested written documentation is recognized as voluntary.

Standard of Review

The Supreme Court and this Court repeatedly emphasize the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether substantial evidence supports the agency's decision.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4]

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[1] *Johnson v. Chrysler Corporation*, 213 A.2d 64, 66-7 (Del.1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del.1960).

[2] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del.1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del.Super.1986), *app. dism.*, 515 A.2d 397 (Del.1986).

[3] *Johnson v. Chrysler Corporation*, 213 A.2d at 66.

[4] 29 *Del. C.* § 10142(d).

Discussion

The Board appears to have forfeited Appellant's benefits for failing and/or refusing to produce written documentation that sets forth the specific physical capabilities and/or restrictions for the claimant in combination with his failure to appear for his January 16, 2007 examination. This is an inappropriate basis on which to forfeit benefits. Title 19 *Delaware Code* § 2343(a) requires an employee to submit to an examination at reasonable times and places if his employer so requests or if he is ordered to by the Board.[5] In accordance with § 2343(b), benefits may be forfeited only in the instance where a claimant refuses to submit to or obstructs the employer's medical examination.[6]

> The refusal of the employee to submit to the [DME] or the employee's obstruction of such examination shall deprive the employee of the right to compensation under this chapter during the continuance of such refusal or obstruction and the period of such refusal or obstruction shall be deducted from the period during which compensation would otherwise be payable.[7]

The only portion of the Board's decision controlled by the statute is their finding that Appellant "failed to report to [his DME]." Therefore the issue is whether a failure to appear at a single medical appointment rises to the level of a "refusal" to submit to the § 2343(a) requirement?

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[5] 19 *Del.C.* § 2343(a).

[6] *Slater v. Cole*, 541 A.2d 595, 597 (Del.Super. 1988).

[7] 19 *Del.C.* § 2343(b).

In *Slater v. Cole*,[8] claimant allegedly suffered injury to her hand. In response to her Petition To Determine Compensation Due, the employer scheduled a medical examination in Wilmington. Claimant, a resident of Magnolia, Delaware, did not have a car but arranged transportation from a friend. That ride never materialized and she neglected to inform her doctor, her attorney or her employer's counsel. The appointment was rescheduled and again, without notice, she failed to attend. She later testified that her efforts to arrange transportation through Delaware Association of Specialized Transportation failed. The employer was sent a bill from the doctor for both missed appointments, since they had not been properly cancelled. A third appointment was scheduled, and claimant failed to attend and did not give notice. She later testified that she missed it due to poor health. Claimant did not have a telephone or the financial means to pay for transportation. However, she did have access to a payphone and had a gainfully employed daughter and husband (who may or may not have been living with her at the time). The Court found that "the IAB's decision that claimant failed to show good cause for failing to keep three separate appointments is supported by substantial evidence."[9]

Based on the rule exercised in *Slater*, the Court finds that the employer must demonstrate that Appellant "failed to show good cause for failing to keep . . . [his medical examination] appointment[]."[10] Since the Board found only that Appellant

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[8] 541 A.2d 595.

[9] *Slater*,541 A.2d at 597.

[10] *Id.*

failed to appear at a single appointment, and the record does not demonstrate that Appellant had actual notice of that appointment, it is unclear whether the Board found a failure to demonstrate good cause, and the substantial evidence standard is not met. The matter is *remanded* for further proceedings.[11]

Appellant challenges the decision, claiming that termination of benefits cannot occur without a 19 *Delaware Code* § 2347 Petition for Review hearing.[12] The Board's decision does not terminate benefits, it only forfeited them until Appellant submits to a DME, and therefore this argument is moot. However, he indirectly raises the question of whether an Agreement exists. The Board did imply that one does not exist. If there is an Agreement, it may clarify the parties' expectations.

The Board found that a post-exploratory surgery Agreement was never

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[11] The parties agreed to reimburse Employer for Dr. Morris' $250 "no show" fee, and the Court will not disturb that decision.

[12] A Petition for Review can be granted only if there is an existing agreement that could be reviewed. 19 *Del.C.* § 2347. Title 19 *Delaware Code* § 2347 provides in pertinent part that:

> Compensation payable to an employee . . . shall not terminate until and unless the Board enters an award ending the payment of compensation after a hearing upon review of an agreement or award, provided that no petition for review, hearing or an order by the Board shall be necessary to terminate compensation where the parties to an award or an agreement consent to the termination. No petition for review shall be accepted by the Department unless it is accompanied by proof that a copy of the petition for review has been served by certified mail upon the other party to the agreement or award. . . .

19 *Del.C.* § 2347. Unless an agreement did not exist or unless there was a petition for review, Appellant's benefits cannot be terminated. Employer argues that no agreement existed, and therefore a Petition for Review is not required.

executed, that Employer is not under any obligation to pay total disability benefits and that any payments were voluntary, suggesting that there is no existing Agreement. However, the Board's granting of Appellant's Petition to Determine Additional Compensation Due seeking preapproval for surgical authorization for exploratory surgery and total disability benefits infers there is an existing agreement. The nature of this petition is that there is already compensation so that one can seek "additional" compensation, and this compensation would be in accordance with an agreement.[13] This portion of the decision is *remanded* to determine whether there was an existing Agreement between the parties. If there is an Agreement, the burden is on Employer to determine by a preponderance of the evidence that Appellant's total disability has ended or that his compensation should be reduced.[14]

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[13] *See* 19 *Del.C.* §§ 2344, 2347.

[14] *Avon Products, Inc. v. Lamparski*, 293 A.2d 559, 560 (Del. 1972).

Conclusion

Wherefore, the Board's decision is *remanded* to determine the nature of Appellant's failure to submit to the scheduled DME and *remanded* to find whether an Agreement existed and was properly honored.

IT IS SO ORDERED.

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R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution