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RE: ***Delhaize America, Inc. v. Bonnie Baker***
C.A. No. 01A-09-005

Date Submitted: June 17, 2002
Date Decided: September 18, 2002

Dear Counsel:

Pending before the Court is an appeal from an Industrial Accident Board ("Board") decision granting Bonnie Baker's ("Claimant") Petition to Determine Compensation Due. For the following reasons, the Board's decision is affirmed in part and reversed and remanded in part.

FACTS

On October 3, 2000, Claimant fell and injured her back while working as a cashier at a Food Lion grocery store. The supermarket is owned by Delhaize America, Inc. ("Delhaize"). Claimant did not immediately report serious injury and finished her shift. Although the soreness in her back persisted, Claimant continued to work until October 30, 2000. On October 31, 2000, Claimant sought medical treatment at the Atlantic General Hospital in Berlin, Maryland. The hospital diagnosed a potential back strain and referred Claimant to her family doctor for additional treatment.

Thereafter, on November 11, 2000, Claimant visited Lisa Martin, M.D. Dr. Martin ordered an X-ray, an MRI, and a regimen of physical therapy. According to Claimant, Dr. Martin instructed her not to work and referred her to William Moore, M.D., a board certified orthopedic surgeon, on

December 21, 2000. After examining Claimant, Dr. Moore ordered her to remain on "no duty status" pending pain management therapy through another specialist, Dr. Chun. The anticipated treatment was a series of epidural injections to reduce inflammation and lessen pain for what Dr. Moore believed was a nerve root involvement. Although treatment was recommended in December, Delhaize did not approve payment of it until February. Claimant received epidural blocks from Dr. Chun from May through June of 2001.

Following the filing of a Petition to Determine Compensation Due, the Board held a hearing on August 8, 2001. The issues presented at the hearing included whether a compensable injury occurred, claims of total and partial disability, and reimbursement of medical and legal expenses. Claimant presented the testimony of Dr. Moore by way of deposition. Robert J. Varipapa, M.D., a board certified neurologist, testified by deposition on behalf of Delhaize, as did Richard Novotny, a representative of Delhaize, who testified regarding Food Lion's policy to accommodate medical restrictions of its employees. Delhaize also submitted medical records concerning Claimant's treatment by Douglas Bruce, M.D. of Berlin, Maryland. Dr. Martin did not testify.

The Board concluded that Claimant suffers from chronic low back pain that was aggravated by her fall at work on October 3, 2000. In so finding, the Board implicitly rejected Dr. Moore's opinion that the fall caused sciatica through nerve root irritation.

Concerning the Claimant's total disability claim, the Board decided Claimant was capable of gainful employment but was nonetheless disabled as a matter of law for the period October 31, 2000, through July 20, 2001.[1] In pertinent part, the Board reasoned:

> Claimant was told by both Dr. Martin and Dr. Moore not to work. Dr. Moore

[1] Claimant was cleared for part time work on July 20, 2001, by Dr. Moore.

> intended that this "no work" order would remain in place for the brief time it would take Claimant to receive epidural injections. The disability period became prolonged when approval for this procedure was delayed. Under these facts, the Delaware Supreme Court has deemed a claimant totally disabled. "[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." [*Gillard-Belfast v. Wendy's, Inc.*, 754 A.2d 251, 254 (Del. 2000).] Moreover, a recent exception to the *Gillard-Belfast* holding does not apply. In *Wade Insulation, Inc. v. Visnovsky*, [Del. Supr., No. 457, 2000, Berger, J., slip op. at 8 (June 21, 2001),] the Supreme Court deemed *Gillard-Belfast* inapposite where the employee was under no physician's order directing him not to work, where he and his doctor had never discussed the subject, and where, if they had, the doctor would have authorized the employee to start work on a part-time basis. The testimony in this case indicates that Claimant and her doctors discussed her inability to return to work. Applying *Gillard-Belfast*, the Board concludes that Claimant is entitled to total disability benefits for a closed period from October 31, 2000, to July 20, 2001.

Bd. Op. at 13.

The Board declined to award partial disability to Claimant after July 21, 2001, because "[she] has no physical incapacity preventing her from working." Bd. Op. at 14. While certain medical expenses were awarded, epidural injection therapy was found to be unnecessary. Claimant did not have a nerve root complication but suffered from the aggravation of a preexisting injury by her fall. Finally, the Board awarded Claimant reasonable attorney's and medical witnesses fees. Delhaize appeals the Board's conclusions and awards.

ISSUES PRESENTED

The Court must decide the following questions:

1. Is a workers' compensation claimant entitled to total disability benefits although she is later determined to be fit?
2. Did the Board correctly apply the holding of *Gillard-Belfast v. Wendy's, Inc.* in its analysis to the facts of this case?

3. Was Delhaize denied procedural due process to contest the claim?

DISCUSSION

A. *Standard of Review*

The Supreme Court and this Court have emphasized the limited appellate review of the agency findings of fact. The reviewing Court must determine whether the administrative decision is supported by substantial evidence. *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960). Questions of law are reviewed *de novo*. *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del.), *app. dism.*, 515 A.2d 397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler*, 213 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d).

B. *Finding of Total Disability*

Delhaize argues that Claimant may not receive total disability given the finding of fitness for work. Claimant responds that a physician's later opinion regarding Claimant's ability to work is immaterial to Claimant's reliance upon an earlier "no work" order. Her position is persuasive. The relevant question is not whether Claimant was, in fact, totally disabled but whether the law must consider her totally disabled. In this respect, the principal concerns expressed by Delhaize have already been settled by the Supreme Court as follows:

> The precedential effect of [a decision to allow later testimony to negate the validity of a no work order] would place injured workers in a completely 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.

Gillard-Belfast, 754 A.2d at 253.

Here, Dr. Moore ordered Claimant not to work after examining her. No suggestion is made that Claimant misled Dr. Moore regarding the severity of pain she was experiencing. Answering a question as to whether Claimant's condition disabled her, Dr. Moore stated, "I would assume so, because the day I saw her, she was hurting pretty bad." Moore Dep. at 42. Although there was a difference of opinion as to the underlying medical problem, the Board found a preexisting condition was aggravated, noting Claimant was functional for over two years before the fall.[2] The Board's determination that Claimant, in fact, could work notwithstanding the job-related injury, does not preclude a legal determination of total disability. *Gillard-Belfast*, 754 A.2d at 253.

C. *Application of Gillard-Belfast v. Wendy's*

Delhaize challenges the Board's application of the *Gillard-Belfast* rule. Delhaize argues the instant case requires a different result. Specifically, Delhaize asserts that Claimant's situation differs because no one testified that her treating doctor "totally disabled her" pending the outcome of compensable surgery. This Court disagrees. The Supreme Court based its holding in *Gillard-Belfast*

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[2] Naturally, any record of fraud on the Claimant's part would require a different result. Claimant did not reveal a previous period of low back pain to Dr. Moore. The basis of Dr. Moore's restriction was the severity of the pain. Thus, Claimant's particular diagnosis, whether by nerve root irritation or by aggravation is immaterial. Complicated medical issues often require time for the elimination of competing diagnoses, even with a pain syndrome attributed to an accident. *See* Hr'g Tr. at 70-71.

on a finding that the claimant involved would have been disobeying her treating physician if she resumed employment. The holding was not contingent upon any other factual finding. The facts presented to the Board indicate that such was the case here:

> The Board found that both Dr. Martin and Dr. Moore told Claimant not to work. Dr. Moore intended that this "no work" order would remain in place for the brief time it would take Claimant to receive epidural injections. The disability period became prolonged when approval for this procedure was delayed. . . . The testimony in this case indicates that Claimant and her doctors discussed her inability to return to work.

Bd. Op. at 13.

The question presented concerns only the application of law to these findings. The Board correctly interpreted the holding of *Gillard-Belfast*. It appropriately concluded that Claimant was entitled to total disability payments for the period of time for which she was under a "no work" order. *See Hughes v. Genesis Health Ventures*, Del. Super., C.A. No. 99A-11-003, Ridgely, P.J. (June 28, 2001) (finding claimant totally disabled due to issuance of "no work" order despite testimony that claimant was capable of light duty work). *Cf. Joynes v. Peninsula Oil Co.*, Del. Super., C.A. No. 00A-06-001, Witham, J. (Mar. 14, 2001) (distinguishing *Gillard-Belfast* because claimant was not given a *carte blanche* no work order).

The Court notes that Delhaize contributed to the circumstances of which it complains by not asking Dr. Moore to clarify the order, which delayed approval of the therapy. Delhaize cannot escape some responsibility for the prolonged period. In *Gillard-Belfast*, the Supreme Court cautioned that an employer should ameliorate concerns of this nature by taking appropriate action.

As previously indicated, total disability benefits were awarded from October 31, 2000, to July 20, 2001. However, substantial evidence does not support the inclusion of the period before the date of Claimant's first visit to Dr. Moore on December 21, 2000. Dr. Martin did not testify at the

hearing, and Dr. Moore himself testified that, while he believed Dr. Martin had issued a "no work" order, "I don't know that for sure. I assume maybe Dr. Martin did, but I'm not absolutely sure of that fact." Moore Dep. at 42. Claimant was permitted to testify that Dr. Martin instructed her not to work following her office visit but this testimony was hearsay as to the medical basis of the "no work" order. While the rules of evidence before the Board are relaxed, *Morris v. Gillis Gilkerson, Inc.*, Del. Super., C.A. No. 94A-09-006, Lee, J. (Aug. 11, 1995), essential findings must be supported by competent evidence. Moreover, "to rely exclusively upon hearsay or significantly so to make an essential finding is . . . an abuse of discretion." *Anderson v. Wilmington Housing Auth.*, Del. Super., C.A. No. 99A-11-012, Herlihy, J. (Aug. 16, 2000).

In this regard, a hearsay objection to the proffered evidence about Dr. Martin's "no work" order was made below. *See* Hr'g Tr. at 34-35. The objection was overruled to permit Claimant to say an instruction was received for the impact on her. This limited purpose cannot be transformed, however, into a substantive basis that Claimant was diagnosed by Dr. Martin with a condition related to a job injury that required a "no work" order. Accordingly, the finding of total disability is proper only for the "no work" order issued by Dr. Moore from December 21, 2000, to July 20, 2001.[3]

D. *Denial of Due Process*

Delhaize argues that its procedural due process right to contest Claimant's claim was violated. From its perspective, the Board failed to consider the evidence it presented, namely the testimony of Dr. Varipapa. This claim lacks merit. Dr. Varipapa's opinion that injection therapy was unnecessary was part of the Board's findings in favor of Delhaize. His testimony that the back

[3] Even if Dr. Moore had been certain that Dr. Martin had issued a "no work" order, this evidence alone would not support a finding that the order had in fact been issued. *See Irvin H. Whitehouse & Sons v. Stanford*, Del. Super., C.A. No. 00A-02-004, Goldstein, J. (July 11, 2000).

injury was not caused by a herniated disk was also accepted. The Board considered Dr. Varipapa's testimony that the strain or sprain from the fall was superimposed over Claimant's degenerative condition. The fact that the Board did not wholly rely on this evidence is not a denial of due process. The Board is not required to accept everything offered by a particular witness. *See Joiner v. Raytheon Constructors, Inc.*, Del. Super., No. 00A-04-009, Cooch, J. (July 31, 2001). Delhaize also had ample opportunity to present evidence and cross examine the Claimant at the Board's hearing.

Finally, Delhaize argues that its right to contest a later compensation claim for a recurrence of total disability benefits is somehow compromised. The basis by which Claimant was entitled to total disability benefits was the treating physician's issuance of a "no work" order. The Board ruled that Claimant was not factually disabled, and this determination would preclude any future attempt by Claimant to revisit the issue. *See M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513 (Del. 1999).

CONCLUSION

Considering the foregoing, the Court reverses and remands the Board's decision to adjust the period of total disability consistent with this opinion. In all other respects, the Board's decision is affirmed.

IT IS SO ORDERED.

Very Truly Yours,

Richard F. Stokes

cc: Prothonotary's Office