IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARY ROBINSON,	)	
	)	
Employee-Appellant,	)	
	)	C.A. No. 02A-07-011 WCC
	)	
v.	)	
	)	
AUTOMODULAR ASSEMBLIES,	)	
	)	
Employer-Appellee.	)	

Submitted: April 28, 2003
Decided: July 31, 2003

O R D E R

Appeal from Industrial Accident Board. Remanded.

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CARPENTER, J.

This 31st day of July, 2003, after consideration of Mary Robinson's ("Claimant") appeal from the decision of the Industrial Accident Board ("Board") it appears that:

1. On May 1, 2000, Claimant was injured in a job-related accident while working for Automodular Assemblies ("AA" or "Employer"). Her injury occurred when she stepped up onto a lift to take trigger plates out of a box and twisted her back when she attempted to avoid falling while descending. Subsequently, Claimant and Employer entered into an Agreement as to Compensation (the "Agreement") at which point AA began to pay her compensation for total disability effective May 2, 2000. This Agreement acknowledged her injury as a lumbar sprain. On February 13, 2002, AA filed a Petition to Terminate Benefits, alleging that Claimant was no longer totally disabled. A hearing was held before the Board on June 14, 2002. The Board found in favor of the Employer, for which Claimant now appeals.

2. During the hearing, Claimant testified that she initially received treatment from her family physician, Dr. Leonard A. Hershon, for her injury before being referred to several other doctors for her injury.[1] After the accident Dr. Hershon

[1] Following the accident she was first examined by her family physician Dr. Leonard Hershon. Because of her complaint of back pain, he recommended an MRI, which showed some bulging disks but no herniated disks. She was then referred to Dr. Gopez who did not believe surgery was necessary. Subsequently, she came under the care of Dr. Glassman. *See* Transcript at 50 (hereinafter "Tr. at ___").

diagnosed fibromyalgia as resulting from the accident.[2] Then in December 2000, Claimant was referred by Dr. Hershon to Dr. Labowitz, a rheumatologist, because of his knowledge of fibromyalgia. Claimant has since continued treatment with him as well as taking daily medication. She testified that she has also received treatment from Dr. Alan M. Seltzer, a psychiatrist, for depression which the doctors indicated is related to the fibromyalgia. She stated that she had no history of depression prior to the accident and that her condition has not improved. She stated that the pain was initially from the neck to the low back, but has since spread throughout her body. It was disclosed that prior to the accident she had occasional back pain.[3] However, as of January 2001, she testified that she was fine and was not in any pain and was not taking any medication for her back. Claimant further stated that she has no recollection of complaining of back pain to Dr. Hershon in January, February or March of 2000.

3. Employer presented a Labor Market Survey performed by Robert Stackhouse, a vocational consultant. Mr. Stackhouse testified that he identified twelve positions within the restrictions provided by Dr. Case, Employer's medical expert. In this survey, he concluded that Claimant was capable of sedentary to light duty

[2] A subsequent physician, Dr. Glassman, has also mentioned fibromyalgia and referred her to Dr. Irene Fisher for pain management. *See* Tr. at 19-21.

[3] Claimant also has had problems with her gallbladder which caused back pain. For this she took several medications and ultimately had her gallbladder removed in December 1999. Her back pain ceased following the surgery.

positions with an avoidance of repeated standing, sitting, bending and twisting and lifting limited to fifteen to twenty pounds.[4] However, none of the possible places of employment were aware of Claimant's condition of fibromyalgia.

4. Dr. Jerry Case testified by deposition as Employer's medical expert. Dr. Case examined Claimant on September 25, 2000,[5] at which time his examination revealed some limitation in her low back but no spasm or loss of sensation. He subsequently diagnosed low back strain as a result of the work accident. He next examined Claimant on May 6, 2002, when she had reported that the pain had spread throughout her entire body, specifically of pain in her neck, her entire back and both arms and legs. At this examination he had reviewed additional medical records from the treating doctors. His exam revealed limited range of motion in the back, but no spasm or loss of sensation as well as some other symptoms, but found no history of a new injury. He stated that his diagnosis remained the same except for the additional diagnosis of rheumatoid arthritis and noting a history of fibromyalgia. However, he testified that these additional diagnoses were not related to the May 1, 2000 work

[4] These restrictions were placed by Dr. Case, but Mr. Stackhouse had no information from Claimant's medical expert Dr. Labowitz to take into consideration. However, he did have a report from Dr. Seltzer that Claimant was unable to work, but was unaware of Dr. Gopez and Dr. Glassman's opinion on Claimant's ability to work, and had not spoken to Claimant herself. *See* Tr. at 47-48.

[5] He had received a history of the work related accident and subsequent medical treatment. *See* Tr. at 49-51.

accident. He stated that rheumatoid arthritis is a systematic disease and not related to the trauma and that the diagnosis of fibromyalgia was in no way related to the industrial accident. He opined that Claimant is capable of full-time sedentary to light duty work with restrictions as a result of the work accident. He believes that the only injury she sustained as a result of the work accident was to her back, and testified that he believes that the widespread pain preexisted the work injury because the medical records indicate that Claimant had complained of pain in the neck and back for two months prior to the work accident.[6]

5. Dr. Case testified that he reviewed the labor market survey and, taking into consideration only the low back injury, opined that Claimant is capable of performing the positions in the survey. Dr. Case stated that he would not expect a back injury to spread over the entire body, up the spine to her neck, both arms and legs, and stated that to him it did not make sense physiologically. However, on cross-examination, Dr. Case agreed that he does not treat fibromyalgia, that it is not within his medical speciality and that he has not reviewed any literature on the subject. He did acknowledge that he reviewed Dr. Glassman's report which included impressions of fibromyalgia and is aware that fibromyalgia is within the field of expertise of Dr.

[6] Claimant testified that she has no recollection of complaining of back pain to her family doctor in January, February and March of 2000.

Labowitz, Claimant's medical expert.

6. Dr. Russell Labowitz testified by deposition as Claimant's medical expert. Dr. Labowitz began treating her in December 2000, at which time his initial impression was rheumatoid arthritis. This diagnosis changed to fibromyalgia when Claimant developed tender points more consistent with fibromyalgia. He stated that it was not unusual for someone with rheumatoid arthritis to develop into what is known as secondary fibromyalgia. On cross-examination, Dr. Labowitz agreed that fibromyalgia can be caused by non-traumatic events, and also stated that he did not review any of Claimant's medical records that pre-dated the work accident and that he had no knowledge of whether she had complained of diffuse pain prior to the work accident. Dr. Labowitz also agreed with Employer that there is disagreement in the medical world as to whether fibromyalgia can be caused by trauma. He opined that Claimant was unable to work due to her fibromyalgia and that it was his opinion that the fibromyalgia is related to the May 2000 industrial accident. He noted that it is difficult for patients with fibromyalgia, and taking the degree of pain medication that she was on, to stay in one position for any length of time without becoming stiff and achy.

7. On appeal from the Industrial Accident Board, the function of the Superior Court is to determine whether the Board's decision is supported by

substantial evidence and free from legal error.[7] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[8] The Court is not the trier of fact nor has the authority to weigh evidence, determine questions of credibility, or make its own factual findings and conclusions.[9] Rather, this Court merely determines if the evidence is legally adequate to support the Board's factual findings.[10] Weighing the evidence and determining questions of credibility, which are implicit in factual findings, are functions reserved exclusively for the Board.[11] "In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below, resolving all doubts in its favor."[12]

8. Claimant makes two arguments as to how the Board erred. First, she contends that the Board erred in ruling that the Employer met its burden because she

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[7] *Devine v. Advanced Power Control, Inc.*, 663 A.2d 1205, 1209 (Del. Super. Ct. 1995) (citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. Ct. 1985)).

[8] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del. 1994).

[9] *Johnson v. Chrysler Corp.*, 213 A.2d 64 (Del. 1965).

[10] DEL. CODE ANN tit. 29, § 10142(d) (1997).

[11] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1106 (Del. 1988); *Conner v. Wells Fargo*, 1994 WL 682486 (Del. Super. Ct.).

[12] *General Motors Corp. v. Guy*, 1991 WL 190491 (Del. Super. Ct.) (citation omitted).

claims the Employer must first show that Claimant is not suffering from fibromyalgia, a new injury alleged by Claimant, and that as Employer's expert was not an expert in fibromyalgia, the Board was compelled to find for her. Second, Claimant contends that the Board erred in accepting the testimony of the Employer's medical expert concerning the Labor Market Survey.

9. What makes this case difficult is the erroneous manner in which it transpired procedurally. The record reflects that the Claimant and Employer entered into an Agreement as to Compensation, whereby it appears that the agreed-upon injury suffered by the Claimant following the industrial accident was the lumbar strain. Subsequently, Employer sought to terminate benefits and coincident with this, Claimant claimed to have developed a new injury, fibromyalgia. It appears the Claimant does not dispute that the agreed upon lumbar strain has sufficiently healed to allow her to return to work in some capacity. Recognizing that this would make it difficult to challenge the Employer's termination petition, the Claimant has asserted a new cause for her disability, *i.e.*, fibromyalgia. However, instead of formally presenting that issue to the Board, the Claimant has attempted to bootstrap this new claim to the Employer's termination petition and then boldly assert that the Employer has the obligation to prove her ability to work with this new medical claim.

10. Under Delaware law, the burden of proving a change in condition is on

the party asserting the change through a petition for review.[13] "A party seeking to modify an award by subsequent review bears the burden of establishing by a preponderance of the evidence that the award should be modified."[14] In scenarios such as this, where an employer and an injured employee agree to compensation, and such an agreement is approved by the Board, the agreement shall be final and binding until modified pursuant to section 2347, which provides for subsequent modification or review of an award upon petition of any party of interest.[15] When any employer seeks to end paying disability benefits, it would proceed by filing a Petition to Terminate Benefits in which the employer has the burden of proving by a preponderance of the evidence that the claimant is no longer totally disabled and will not suffer an economic loss.[16] However, the disabilities the employer must address are those either agreed to pursuant to section 2344 or those injuries found by the Board pursuant to 2345. As the diagnosis of fibromyalgia was not the injury agreed to and previously approved by the Board, the real issue on the termination petition was whether the Claimant had sufficiently recovered from the lumbar strain to allow her to return to work. What

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[13] *DeAngelo v. Del Campo Bakery*, 1990 WL 74300 at *3 (Del. Super. Ct.) (citation omitted).

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

[15] *See* DEL. CODE ANN. tit. 19, § 2344 (Supp. 2002).

[16] *See Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975).

should have happened here is that when Claimant was aware of the new disability, she should have filed a Petition to Determine Additional Compensation Due under title 19, section 2347. Had Claimant filed such a petition to modify the prior agreement approved by the Board, both parties could have prepared the appropriate evidence, retained experts for the injuries newly claimed, and the Board could have conclusively decided the viability of the claim of fibromyalgia. Then with this established, the Employer, knowing conclusively which injuries needed to be addressed, could clearly present to the Board its Petition to Terminate Benefits.[17] Unfortunately the procedural mess created by the intermingling of the termination of benefits with an alleged new disability has created a situation where it is unclear whether the parties either recognized or met their respective burdens or whether the Board addressed the issues fully and fairly. The Court notes this was not the fault of the Board but the failure of the parties to place the litigation in an appropriate litigation posture to resolve their disputes.

[17] Without a logical presentation of such issues to the Board, the parties are confused as to the burden each must address and equally important, the precise issues that are in dispute. It is obvious that such a circumstance existed in this case and continued in this appeal.

11. The Court finds the only appropriate remedy is to remand this case back to the Board so that the parties may proceed in a proper procedural manner so that the new injury can be addressed by the Board with the appropriate expert testimony and relevant evidence.[18] To be clear, if the Employee wants to assert that she continues to be disabled from her work-related accident but such disability arises from a different diagnosis than originally agreed to by the parties, it is her obligation, and burden, to petition for a modification. The parties should then be given an opportunity to retain medical testimony in the appropriate areas of expertise with everyone fully aware of the new claim. If the Board rules the fibromyalgia is related to the accident and the Employer then wants to terminate the disability payments claiming the Employee can still perform particular work, the burden will shift to the Employer to establish that in spite of the fibromyalgia condition, the job market is accessible to the Employee. If the Board finds the fibromyalgia is not related to the accident, we are back to where the case was originally with presentation of work ability related to the lumbar strain. It is only with this logical presentation that this issue can appropriately be litigated.

[18] Furthermore, by taking this action, Appellant's second issue on appeal is moot.

12. As such, this case is remanded to the Board with the following directions:

(a) The Claimant shall have 30 days from the date of this Order to file a petition to amend compensation based upon the new diagnosis of fibromyalgia;

(b) If such petition is filed, the Board should establish appropriate deadlines for discovery and presentation of the issue to the Board;

(c) If the Board subsequently finds that the fibromyalgia condition was related to the work accident, then its decision shall also establish a reasonable period of time for the Employer to determine whether they desire to petition for termination of benefits based upon this new finding by the Board. If such a petition is filed by the Employer, the Board decision in this litigation shall become final and subject to appeal only after the termination petition has been decided. If the Employer does not meet the deadline or decides not to file a Petition for Termination of Benefits, the Board decision regarding the modification of benefits will become final and subject to appeal;

(d) If the Board finds that the fibromyalgia condition is unrelated to the work accident, the Board should then also determine the Employer's present

Petition to Terminate Benefits recognizing that it only relates to the lumbar strain disability. Under this scenario, only when the termination petition has been decided will the matter be final and subject to appeal.

13. The Court does not typically give as specific and detailed instructions to the Board and the parties as it has above. However, the Court finds this case is in such procedural quagmire that it was the only way it could insure a logical and just result. For the foregoing reasons, the matter is REMANDED back to the Industrial Accident Board, and shall proceed in a manner consistent with the instructions provided herein. IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.