Henry C. Davis, Esq.
Henry Clay Davis III, P.A.
1203 E. Market Street
P.O. Box 744
Georgetown, DE 19947

Erik C. Grandell, Esq.
Heckler & Frabizzio
919 North Market Street #1300
P.O. Box 128
Wilmington, DE 19899-0128

Date Submitted: August 13, 2002
Date Decided: October 29, 2002

RE: ***Martin Mermelstein v. Lewes Citizens Senior Center, Inc.***
C.A. No. 01A-12-002 -RFS

Dear Counsel:

This is my decision on Martin Mermelstein's ("Claimant") appeal of the Industrial Accident Board's ("Board") decision denying an award of total disability benefits and declining to calculate the compensation rate. The Board's decision is reversed for the reasons set forth herein.

STATEMENT OF FACTS

On November 2, 2000, Claimant fell while working as a van driver for the Lewes Citizens Senior Center, Inc. ("Employer"). As a result of the fall, Claimant sustained injuries to his left knee. Claimant promptly notified Employer and continued to work as a van driver. Claimant did not miss any work as a result of this injury. Claimant received treatment from Dr. David Sopa ("Dr. Sopa") for his knee injury. During Claimant's visits on November 6 and 20, 2000, Dr. Sopa recommended a conservative course of treatment for Claimant.

At a Lewes Citizens Senior Center Board meeting on January 18, 2001, Employer

decided to terminate Claimant's employment. Claimant was notified the next day by telephone that his employment was terminated due to complaints from passengers that he was speeding, making passengers late for appointments and failing to assist passengers in carrying packages. Claimant's termination was confirmed by letter dated January 25, 2001.

On January 24, 2001, Claimant visited Dr. Sopa who reconfirmed conservative treatment and suggested that Claimant get an MRI. At an appointment on February 14, 2001, Claimant again sought treatment for his knee injury from Dr. Sopa who reviewed the MRI report indicating a possible strain of the posterior cruciate ligament. Dr. Sopa assumed that Claimant was still working as a van driver for Employer. Based upon Claimant's examination and the MRI report, Dr. Sopa issued a total disability slip instructing Claimant not to work for one month. Dr. Sopa saw Claimant again on April 11, 2001 and ordered Claimant to avoid repetitive bending, kneeling and climbing at work and suggested that Claimant should return to his office every four to six months as needed.

On April 18, 2001, Claimant filed a Petition to Determine Compensation Due ("Petition"). The Board conducted a hearing to determine the merits of the Petition on October 26, 2001. Employer acknowledged that Claimant was injured in an industrial accident. However, Employer denied medical expense and disability responsibility. Following the hearing, the Board awarded medical expenses and attorney's fees to Claimant but denied his claim for total disability benefits. The Board noted that Claimant was not given any work restrictions until after he was terminated. The Board also found that Dr. Sopa issued the total disability slip while under the mistaken belief that Claimant was still working as a van driver. Based on these findings, the Board did not award total disability benefits. Since the Board determined that

Claimant was not entitled to total disability benefits, it declined to calculate the compensation rate. Claimant appealed the Board's decision.

ISSUES PRESENTED

The first issue is whether the Board erred in holding that Claimant failed to sustain a claim for total disability benefits. The second issue is whether the Board erred in failing to determine the compensation rate.

DISCUSSION

A. Standard of Review

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's 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), and to review questions of law *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); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super.), *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 Corp.*, 312 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. Total Disability Benefits

The Board erred as a matter of law in rejecting Claimant's request for total disability

benefits. Here, Claimant's knee injuries resulted from his industrial accident as conceded by Employer. The only issue is whether that injury rendered Claimant temporarily totally disabled. Total disability exists when a person is required to disobey a physician's orders in order to resume working. *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251, 254 (Del. 2000).

In this case, it is undisputed that Dr. Sopa issued Claimant a total disability slip prohibiting Claimant from working for one month. The fact that Claimant may have been physically capable of performing sedentary work duties is not relevant to the determination of eligibility for total disability benefits. *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d at 254. *See also Happy Harry's Discount Drugs v. McGraw*, Del. Super., C.A. No. 00A-12-004, Gebelein, J. (Oct. 10, 2001) (Mem. Op.) (emphasizing that the actual capabilities of the Claimant are irrelevant when there is a no work order from a physician); *Hughes v. Genesis Health Ventures*, Del. Super., C.A. No. 99A-11-003, Ridgely, J., (June 28, 2001) (ORDER) (stating that the no work order is controlling). Although Dr. Sopa later acknowledged that Claimant may have been able to perform light duty work, Dr. Sopa nonetheless issued a no work order based on the results of the MRI and Claimant's complaints. Dr. Sopa felt that Claimant needed time to heal and would exacerbate his injury by working.

In this regard, Claimant did not advise Dr. Sopa that his job was terminated. The doctor assumed work was still available and thought his left leg was using foot controls (presumably a clutch) whereas the van had an automatic transmission. Yet, part of Claimant's responsibilities were to assist seniors by carrying their packages and helping them get in and out of the van. These tasks required the use of his left leg, and the record does not support a finding that Dr. Sopa's diagnosis would have been different depending on the particular use of the left leg. His

impaired physical incapacity from the accident was partially involved in his job termination.

Likewise, the existence of an actual job is immaterial. For example, if terminated on March 15, 2001, Claimant would still have received total disability benefits from February 14 to March 15, since Dr. Sopa had advised Claimant not to work at all. The doctor's subjective belief that Claimant was employed is irrelevant. Whatever he thought would be speculative and cannot support the conclusion sought by Employer, i.e., that Dr. Sopa would not have told Claimant to rest and stay home for one month if his unemployed status were known.

Furthermore, Claimant's complaints of pain behind his knee were confirmed by an MRI. The radiologist's report showed a possible strain. Dr. Sopa, an experienced orthopedic surgeon, found abnormalities with the knee and related them to the undisputed accident. Representative testimony on the subject included:

> Q. What was your evaluation of the MRI?
> A. The MRI showed some changes within the knee, which is not uncommon with this age group. It also showed an attenuated or posterior injury to the posterior cruciate ligament. The report indicated that as a possible strain of the posterior cruciate ligament. I saw missing fibers, so I felt it was greater than a strain. The remainder of the knee appeared to be normal. It was what I felt not to be a significant amount of fluid in the knee, but there was some. And there was questionable tears, but the menisci, but that didn't correlate well with the injury pattern. So I did not consider that part of the overall picture.
>
> Q. So even though he had some findings as to meniscal tears, they didn't seems to be causing him any symptoms that you were aware of?
> A. No, I didn't think so.
>
> Q. The cruciate ligament strain or injury that was described, was that consistent with the mechanism of injury he described to you for the November incident?
> A. Yeah. In fact, it fit fairly well because it was a direct strike on the front of the knee which puts tension on the posterior cruciate ligament. It's the classic mechanism of injury for the posterior cruciate.
>
> Q. Would the treatment that you provided be any different if you had known that at

the time that you were first seeing him?

A. No. It really wouldn't have.

* * *

Q. Was that related to the findings on the MRI alone or your clinical examination as well?

A. That was related to the overall picture. The problems he seemed to have performing his job, complaints of his knee, fullness and pain in the posterior aspect of the knee or popliteal fossa, the soreness and tenderness that existed around the patella and patella ligament.

Q. The objective findings on the MRI supported the clinical examinations and history provided you?

A. The MRI was really the most objective piece of evidence and support mechanism of injury. (Emphasis mine)

* * *

Credibility determinations are within the province of the Board. *See Unemployment Ins. Appeal Bd. v. Div. Of Unemployment Ins.*, 803 A.2d 931 (Del. 2002). This Court cannot assume a fact finding role or usurp the Board's function. *Id.* Yet the Board cannot substitute its judgment to nullify objective findings that fully support Claimant's persistent complaints regarding the front and back parts of the knee.[1] Here, there was no contrary medical opinion for the Board to accept. *Compare Scott v. First USA Bank*, Del. Super., C.A. No. 01A-10-003, Alford, J. (April 30, 2002) (Mem. Op.) (accepting the medical opinion of one doctor over another). Nor does this case present a picture where the diagnosis depends solely on subjective complaints that the Board may disregard as unworthy and thereby reject a medical opinion based on them. *Compare Wanzer v. Breslin Contracting Co., Inc.*, Del. Super., C.A. No. 01A-11-005, Carpenter, J. (Sept. 30, 2002) (ORDER) (rejecting medical testimony where it was based entirely

[1]The injury to the front part is conceded. The difference concerned problems with the back of the knee. This diagnosis is a posterior cruciate ligament strain as found by Dr. Sopa.

on claimant's subjective complaints). Unrebutted objective medical evidence simply cannot be ignored. *Pusey v. Natkin & Co.*, 428 A.2d 1155, 1157 (Del. 1981). Although Claimant desired a disability rating, injured persons may fairly seek information, treatment and compensation.

Several closing remarks should be made. It is true that Claimant failed to disclose his job loss with Dr. Sopa. An omission can be deceptive. In litigation, where a witness testifies falsely, the law permits an instruction: false in one thing false in everything.[2] The deceptions, however, must be material and the other evidence may be accepted with corroboration. Assuming Claimant should have told Dr. Sopa that the Lewes Citizens Senior Center had discharged him, that information would not have made a difference given the objective medical evidence. Dr. Sopa's no work order was primarily based on the MRI. The Board's contrary finding was not supported by substantial evidence and is based upon speculation and possibilities which the Board cannot accept. *Sewell v. Delaware River Bay Auth.*, 796 A.2d 655, 664 (Del. Super. 2000).

Moreover, the policy of Worker's Compensation law is to provide complete relief to workers injured in industrial accidents similar to what occurred here. When disabled, the availability of a contemporaneous position does not matter. Claimant cannot be required to disobey Dr. Sopa's order by requiring employment anywhere during the one month recuperation period. Therefore, under the *Gilliard-Belfast* rule, Claimant was totally disabled during that one month period and is entitled to total disability benefits. The Board erred in failing to award total

---

[2]Falsus in uno, falsus in omnibus. "This maxim expresses the general principle of law that where a witness has testified falsely as to some material matter, the jury may be free to disregard that witness' testimony in other respects unless it is corroborated by other proof." *Rogers v. Northeast Utilities*, 692 A.2d 1301, 1303, n. 1 (Conn. App. Ct. 1997).

disability benefits to Claimant for the one month period that Dr. Sopa had directed Claimant not to work.

C. Calculation of the Compensation Rate

Since Claimant is entitled to an award of total disability benefits, the Board must determine the compensation rate in order to calculate the award on remand.

CONCLUSION

Considering the foregoing, the decision of the Board is reversed and remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary