IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

YOUNG LUMBER COMPANY,	)	
	)	
Employer-Below/	)	
Appellant,	)	
	)	
	)	
v.	)	C.A. No. 02A-08-014 CHT
	)	
	)	
WILLIAM HORNE,	)	
	)	
Employee-Below/	)	
Appellee.	)	

OPINION AND ORDER

On The Claimant's Appeal from the Decision of the Industrial Accident Board

Submitted: January 21, 2003
Decided: April 30, 2003

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TOLIVER, Judge

STATEMENT OF FACTS & NATURE OF PROCEEDINGS

This is an appeal from the decision of the Industrial Accident Board (hereinafter "Board") arising out of injuries suffered by the Claimant-Below/Appellee, William Horne, while employed by the Employer-Below/Appellant, Young Lumber Company ("Young Lumber"). Mr. Horne claimed that he sustained injuries to his neck, both upper extremities and wrists from the cumulative detrimental effects of his work as a forklift operator. He filed a petition to determine compensation due on March 7, 2002, alleging an onset of problems as of November 13, 2000[1], and seeking ongoing total disability benefits beginning August 7, 2001[2].

Young Lumber conceded that Mr. Horne's carpal tunnel problems were related to his work activities. However, they argued that his neck and headache complaints were not. In the alternative, Young Lumber contended that Mr. Horne was not

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[1] On November 14, 2000, Mr. Horne sought treatment for increased neck pain from jarring he experienced while riding the forklift over potholes in the lumberyard. At that visit, he indicated a "severe episode" had occurred the day before.

[2] On or around this date, Mr. Horne suffered a major flare-up of his symptoms, and he sought treatment at the Christiana Hospital emergency room.

entitled to ongoing partial disability benefits. That position was based on Young Lumber’s contention that Mr. Horne had refused a job Young Lumber offered within his work restrictions and at his forklift operator’s rate of pay.

In November of 2000, Mr. Horne had been employed by Young Lumber for approximately seven and a half years as a forklift operator. His duties included transporting lumber among various areas of the lumberyard, which had a paved surface pitted with numerous potholes. Mr. Horne’s forklift was originally outfitted with air-inflated tires, but these were replaced with hard rubber tires in June 2000. The new tires provided decreased shock absorption, and, as a result, Mr. Horne experienced exaggerated jarring every time his forklift ran over one of the yard’s potholes.

On November 13, 2000, Mr. Horne experienced a particularly jarring pass over a pothole, and he was forced to leave work that day due to severe neck pain. He sought treatment on November 14, 2001 with Dr. David Messinger, who

indicated in his notes that a "severe episode" had occurred to Mr. Horne the day before.[3] Dr. Messinger ordered an x-ray and prescribed muscle relaxers and pain relievers, and Mr. Horne returned to work the next day.

Mr. Horne worked without incident until August 6, 2001, when he suffered a major flare-up of his symptoms and presented to the Christiana Emergency room. He complained of arm and hand numbness[4] for the preceding three days, as well as headache and neck pain over the preceding eight months. Since that emergency room visit, Mr. Horne has had ongoing medical and chiropractic treatment, which he relates back to the November 13, 2000 incident.

The Board held a hearing on July 12, 2002. Mr. Horne testified on his own behalf. His current treating physician, Dr. Azhar H. Khan, submitted testimony by deposition.[5]

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[3] Transcript of June 26, 2002 Deposition of Azhar H. Khan, M.D. at 44.

[4] Mr. Horne's arm and hand numbness were diagnosed as carpal tunnel syndrome. That affliction is not the subject of this appeal.

[5] Dr. Khan took over Mr. Horne's treatment in October 2001. Prior to that, Mr. Horne was under the care of Dr. Messinger.

Appearing on behalf of Young Lumber were Jack D. West, Jr., Michael Barrett and Kevin Doran.[6] Shelly Palmer, a vocational consultant and rehabilitative specialist retained by Young Lumber, also appeared. Dr. John B. Townsend submitted testimony on Young Lumber's behalf by deposition.

A decision was issued on July 26, 2002. The Board accepted the opinion of Dr. Khan over that of Dr. Townsend as to a causal connection between Mr. Horne's employment and his head and neck pain. It also found credible Dr. Khan's opinion that Mr. Horne had been incapable of all work since August 7, 2001, but noted that Dr. Khan's June 6, 2002 deposition testimony indicated Mr. Horne could return to work with "light to sedentary duty restrictions."[7] The Board therefore determined that Mr. Horne was entitled to total disability benefits for a closed period spanning from August 7, 2001

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[6] Mr. West was Mr. Horne's supervisor until July 2001, and Mr. Barrett filled that role between July and August 2001. Mr. Doran was the chief financial officer of Young Lumber.

[7] Industrial Accident Board Decision in the matter of William Horne v. Young Lumber Company, I.A.B. Hearing No. 1195896, July 26, 2002 at 11.

until the date of its decision. It was at that point in time, the Board concluded, that Mr. Horne was put on notice that he was able to return to restricted work duties, and he was awarded partial disability benefits from that point forward. That portion of the award was based upon the difference between what he could receive in wages from the work Dr. Kahn deemed him capable of performing, and that which he was earning on the date he was injured pursuant to 19 Del. C. §2325.

Young Lumber timely appealed the Board's decision, and filed its opening brief on November 6, 2002. Young Lumber argues that there is not substantial evidence in the record to support the Board's findings that Horne's headaches and neck pain were related to his operation of a forklift, and that even if the record did substantiate such a conclusion, Dr. Khan restricted Mr. Horne from his forklift job only, not employment as a whole. Young Lumber also claims that the Board erred in giving Mr. Horne partial disability benefits

given his refusal of a restricted duty position offered him, which they contend his physician agreed he could perform.

In his November 26, 2002 response, Mr. Horne contends the Board's determination that his headaches and neck pain were related to his employment was based on substantial evidence. He also argues that Dr. Khan did indeed completely disable him from employment. Finally, he maintains that because Young Lumber failed to substantiate its claim that Mr. Horne improperly refused a restricted duty position at the company, the Board's award of partial disability benefits was legally correct. That which follows is the Court's response to the issues so raised.

DISCUSSION

This Court is bound by the Board's findings if they are supported by substantial evidence and absent abuse of

discretion or error of law.[8] "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] It "is more than a scintilla and less than a preponderance" of the evidence.[10] This Court does not weigh the evidence, determine questions of credibility or make its own findings of fact.[11] This Court's function is to determine if the evidence is legally adequate to support the factual findings below.[12] The Court's review of alleged errors of law is plenary.[13] An evaluation of the Board's decision in light of these standards requires this Court to affirm that decision.

In support of its first argument, Young Lumber raises two contentions. Initially, Young Lumber alleges that Mr. Horne's

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[8] Ohrt v. Kentmore Home, 1996 Del. Super. LEXIS 356 at 8.

[9] Anchor Motor Freight v. CBoardattoni, 716 A.2d 154, 156 (Del. 1998); and Streett v. State, 669 A.2d 9, 11 (Del. 1995).

[10] City of Wilmington v. Clark, 1991 Del. Super. LEXIS 118 at 6.

[11] Johnson v. Chrysler, 213 A.2d 64, 66 (Del. 1965).

[12] 29 Del. C. §10142(d).

[13] Brooks v. Johnson, 560 A.2d 1001 (Del. 1989).

headache and neck problems existed prior to November 13, 2000 and that there is no history of injury on that date. It then goes on to suggest that the date the injury is alleged to have occurred is contradicted by the medical records. An examination of the record fails to support either of these allegations.

While Mr. Horne may have characterized the frequency of his neck pain as a "couple of times a week"[14] in the years before November 2000, he also indicated that the pain took the form of sinus headaches and sporadic neck pain, and that he took over the counter pain medication to alleviate his symptoms.[15] However, after the November 13, 2000 incident, Mr. Horne characterized his neck pain as "severe" and "constant," sought medical treatment, and was prescribed Clinirol, an anti-inflammatory medication. Mr. Horne's wife also reported a dramatic increase in her husband's occurrence

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[14] Transcript of July 12, 2002 hearing at 28-29.

[15] Id. at 28-30, 43.

of neck pain and headaches.

In addition, the nursing assessment sheet Mr. Horne filled out in August of 2001 at the Christiana Hospital emergency room indicates that he had suffered from neck pain for the "past eight months."[16] Though this does not constitute a definitive reference to November 2000, simple mathematical calculations intimate that Mr. Horne's neck pain began in earnest at the end of the year 2000. Moreover, both Dr. Messinger's patient history and the August 2001 emergency room notes indicate that there was an onset of one or more symptoms in or around November of 2000.

The fact that Dr. Khan appears to have given conflicting testimony as to whether any of Mr. Horne's medical records described the occurrence of an injury in November 2000 does not militate against the Board's finding that Mr. Horne's injuries did become manifest on that date. On direct examination, Dr. Khan agreed that Dr. Messinger's notes

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[16] Id. at 11.

indicate that when he saw Mr. Horne on November 14, 2000, Mr. Horne complained of neck pain and headaches, and a "severe episode" on the previous day (November 13).[17] On cross-examination, Dr. Khan testified that there was nothing "within anyone's medical records that references an event in November of... 2000,"[18] but also testified that Dr. Messinger did a fairly poor job of documenting patient histories at length.[19] Both of these lines of questioning occurred while Dr. Khan had Dr. Messinger's notes in front of him.

The Court is certainly at a loss as to the conflicting interpretations offered of those notes. However, as stated *supra*, the Court's role is not to weigh the evidence, determine questions of credibility or make its own findings of fact. The Board determined which portions of Dr. Khan's testimony to accept and which to reject, which it was free to

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17 Transcript of June 26, 2002 Deposition of Azhar H. Khan, M.D. at 8.

18 Id. at 38.

19 Id. at 37.

do.[20] The Board also had before it the medical record and the testimony referred to above which it was also empowered to evaluate and deal with in a similar fashion. It did exactly that and as a result, the Court finds that the Board had substantial evidence upon which to base its determination that Mr. Horne suffered a compensable injury on November 13, 2000 which resulted in increased occurrences of headache and neck pain.

Young Lumber's second argument is that Dr. Khan did not disable Mr. Horne from employment completely, only from his duties as a forklift operator. As a result, Young Lumber argues that Mr. Horne should not have been considered by the Board to be totally disabled through the date of the hearing. The Court disagrees, and finds ample evidence in the record upon which the Board could have based its opinion. First, Young Lumber points to Dr. Khan's acknowledgment of Mr. Horne's ability, as of the date of his June 26, 2002

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[20] *See* DiSabatino Brothers, Inc. v. Charles J. Wortman, 453 A.2d 102 (Del. 1982).

deposition, to return to very restricted employment. The Court does not concur that an opinion coaxed from a physician in a deposition setting should serve as retroactive notice to a claimant that he should have pressed that physician for permission to return to work. Dr. Messinger issued a total disability certificate to Mr. Horne on August 22, 2001 that indicated that Mr. Horne was unable to work, and that his date of return to work was undetermined. Dr. Khan reissued a total disability certificate on April 1, 2002. Mr. Horne could reasonably have assumed that his disability status would be modified by his treating physician at the appropriate time. To the extent that Young Lumber relies on Morales v. St. Francis Hospital,[21] Roberts v. Dunkin Donuts[22] and Gilliard-Belfast v. Wendy's[23] in support of its position, that reliance is misplaced.

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[21] 2002 Del. Super. LEXIS 127.

[22] Industrial Accident Board Decision in the matter of Dorothy Roberts v. Dunkin Donuts, I.A.B. Hearing No. 1146159, June 6, 2001.

[23] 754 A.2d 251 (Del. 2000).

Morales is distinguishable from the case at bar because the employer's physician explicitly released her to light duty work. Mrs. Morales had knowledge of this release well before the employer filed its petition for Termination of Benefits, yet she made a unilateral decision not to return to work because of her subjective complaints of pain and her inability to speak English. The Board in that case accepted the employer's doctor's opinion over that of Mrs. Morales's doctor because the latter failed to explain why he disabled her altogether rather than from certain types of employment.

Similarly, in Roberts v. Dunkin Donuts, one of the examining physicians informed Ms. Roberts that she was able to return to a light duty position. Again, it was only Ms. Roberts' subjective feelings of pain, as well as differing physician opinions on her readiness to rejoin the work force, that prevented her from seeking employment. And again, the Board accepted the opinion of the doctor who had released her to light duty, and rejected the opinion of the doctor who

provided no explanation for his ongoing conclusion of total disability.

Finally, in Gilliard-Belfast, Ms. Belfast's treating physician told her not to work before pending surgery because to do so would jeopardize her condition.[24] The employer's physician disagreed as to her ability to work pre-surgery, and the Court concluded that forcing an injured worker to choose between risking further injury or risking loss of compensation by not returning to work placed that worker in an intolerably untenable position.[25]

Here, Mr. Horne was never officially released back to work, light duty or otherwise, by any physician. It is only at the time of the depositions of Drs. Khan and Townsend that either opined Mr. Horne was able to return to work. The Board then accepted Dr. Townsend's opinion that Mr. Horne was ready to return to a restricted duty position, and that Mr. Horne

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[24] Id. at 252.

[25] Id. at 253.

was on notice of those opinions once the Board's decision was issued. Prior to that, Mr. Horne had no reason not to rely on Dr. Khan's certification of total disability. As a result, the instant case is distinguishable from the cases discussed *supra*, and the Board's decision to reduce Mr. Horne's compensation to partial disability benefits as of the date of its decision is not as arbitrary as Young Lumber would have the Court believe.

Young Lumber's final allegation is that the Board erred in awarding Mr. Horne partial disability benefits, since Dr. Khan agreed at his deposition Mr. Horne would have been able to perform the restricted duty position offered by Young Lumber, a position which Young Lumber contends Mr. Horne refused. This argument is also without merit. First, Mr. Horne was never questioned about this "alleged" offer at the hearing before the Board, and the only evidence of the existence of the position or that an offer had been made was

limited to the testimony of Messrs. Barrett and Doran.[26] Second, no authority has been cited which imposed a duty on Mr. Horne to investigate whether he would be allowed to assume the light duty/clerical job that Young Lumber offered, especially in light of Dr. Kahn's determination regarding the extent of his disability up to that point in time. Moreover, the fact that Dr. Khan's opinion in that regard had changed was not revealed until his deposition was taken on June 26, 2002, and Young Lumber concedes that the position, a temporary one, was no longer available at the time of the hearing before the Board.[27] Accordingly, the Board's resolution of this issue must stand.

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[26] Transcript of July 12, 2002 hearing at 75-77, 82-84.

[27] Id. at 77. Interestingly, the position was designed to last, according to Mr. Doran, no more than two months at the most. Id. at 83-84.

CONCLUSION

Based upon the foregoing, the decision of the Industrial Accident Board is supported by substantial evidence and is free of legal error. It must therefore be, and hereby is, **affirmed.**

IT IS SO ORDERED.

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Toliver, Judge