IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RAYTHEON CONSTRUCTORS Employer Below-Appellant,	)	
v.	)	C.A. No. 02A-05-008 HLA
DANIEL J. KIRK Employee Below-Appellee.	)	

Date Submitted: January 24, 2003
Date Decided: April 24, 2003

ORDER

UPON EMPLOYER'S APPEAL FROM INDUSTRIAL ACCIDENT BOARD DECISION

AFFIRMED IN PART, REVERSED IN PART

Nancy Chrissinger Cobb, Esq., and Christopher T. Logullo, Esq., Chrissinger & Baumberger, Three Mill Road, Suite 301, Wilmington, DE 19806. Attorneys for Employer Below-Appellant.

Matthew M. Bartkowski, Esq., Kimmel, Carter, Roman & Peltz, P.A., P.O. Box 1158, Bear, DE 19701. Attorney for Claimant Below-Appellee.

ALFORD, J.

On this 24th day of April 2003, upon consideration of the Appeal filed by the Raytheon Constructors ("Appellant"), the answering brief filed by Daniel J. Kirk ("Appellee") and the record of the proceedings below, it appears to the Court that:

PROCEDURAL HISTORY

On June 19, 2000, Appellee, filed a Petition to Determine Compensation Due. On October 31, 2000, the Industrial Accident Board ("Board") found that Appellee had developed plantar fasciitis in his left foot, which was substantially caused by the cumulative detrimental effect of his work at Raytheon. Appellee was awarded total disability from November 11, 1999, until September 8, 2000. Appellant filed a timely appeal on November 20, 2000, to the Superior Court regarding this decision, however, Appellant did not file an opening brief and thus the appeal was dismissed on March 21, 2001.

On November 11, 2001, Appellee filed a Petition to Determine Additional Compensation Due, seeking partial disability from September 9, 2000, ongoing, and payment of $3,950.00 out-standing medical expenses. A hearing was held on March 7, 2002 and the record was left open until April 1, 2002, to permit additional argument by the parties. On April 17, 2002, the Board found that Appellee should be awarded temporary partial disability at the weekly rate of $588.67, attorney's fees of $3,200.00 and medical witness fees. The outstanding medical expenses had been raised previously, in conjunction with the Board's

hearing on October 20, 2000. Thus, the Board determined that the issue had already been addressed and this was not the proper forum for raising it again.

On May 15, 2002, Appellant appealed the Board's decision to the Superior Court for the State of Delaware on the dual grounds that: (i) the Board failed to address the issue of whether Appellee's present restrictions were the result of a work related condition, and (ii) the Board erred as a matter of law when it awarded temporary partial disability benefits in excess of the total disability rate.

STATEMENT OF FACTS

Appellee was a boilermaker for approximately thirty years. This is a heavy-duty commercial job that requires a lot of lifting, rigging, climbing and assembling. Appellee was affiliated with a local union and was assigned to work for Appellant beginning in June of 1999 and left due to disability in late October 1999. Appellee has diabetes which is controlled with oral medication and diet. Appellee was born with a congenital deformity of his feet, known as pes cavus. This is a medical term for an unusually high arch in the foot. It predisposes one to a condition called plantar fasciitis. The plantar fascia is a band that begins at the base of the heel and runs under the arch of the foot to the toes. When the fascia becomes inflamed or irritated, it is called fasciitis.

On October 31, 2000, the Board ruled that Appellee's lengthy work hours and strenuous climbing activities were a substantial cause of the development of plantar fasciitis

in his left foot. Although, at some point previously, Appellee had experienced a stress fracture of the heel, this was ruled out as a contributing factor to his disability.

Appellee continues to be treated by John Walter, D.P.M. of Philadelphia, Pennsylvania since October 2000. Appellee experiences pain with walking and wears orthotic devices in his shoes everyday and foot splints every night. He had three cortisone injections in 2001. Appellee performs daily balance and stretching exercises, and uses Lidoderm patches on his feet everyday. Appellee states that he cannot lift anything heavy, or stand for long periods of time. He was last seen by Dr. Walter on September 21, 2001, at which time he was experiencing constant pain in both feet and ambulating with a cane.

In his October 5th, 2001, deposition Dr. Walter stated that Appellee's present signs and symptoms of pain are consistent with his initial diagnosis of chronic plantar fasciitis. He also stated that Appellee's diagnosis of diabetes has little implication on his plantar fasciitis. Appellee developed problems in his right foot beginning in August, 2000. Dr. Walter testified that once pain develops in one foot, it is common to compensate with the other foot and thus develop the same condition in both feet. Thus, Appellee was diagnosed with the same condition in both feet with the left worse than the right.

At the hearing held on March 7, 2002, Dr. Leo Raisis testified by deposition for Raytheon. Dr. Raisis examined Appellee twice. He does not believe that Appellee has plantar fasciitis, but rather degenerative arthritis of the midfoot. However, Dr. Raisis did

agree that Appellee is restricted to sedentary employment. Both Appellee's and Appellant's doctors agree that Appellee is unable to work as a boilermaker and that he is capable only of sedentary type employment. Thus, the Board found that Appellee met his burden to show that he is partially disabled due to Appellee's employment over a thirty year period, and the Board awarded him temporary partial disability at the weekly rate of $588.67.

STANDARD OF REVIEW

When reviewing a decision of the Industrial Accident Board, the Court's role is to determine whether there is substantial evidence to support the Board's decision.[1] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] The Court may only overturn the Board's decision when there is no satisfactory proof in support of its factual findings.[3] Furthermore, because the Court does not sit as the trier of fact, it will not substitute its judgment for that of the Board's.[4]

ANALYSIS

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[1] *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 65, 67 (1965); *Stoltz Management Company v. Consumer Affairs Bd.*, Del. Supr., 616 A.2d 1205, 1208 (1992); *Histed v. E.I. duPont de Nemours*, Del. Supr., 621 A.2d 340, 342 (1993); *Groff v. J.C. Penny Company, Inc.*, Del. Super., C.A. No. 98A-07-018, Toliver, J. (Jun. 18, 1999) (Order at 4).

[2] *Olney v. Cooch*, Del. Supr., 425 A.2d 610, 614 (1981).

[3] *Johnson*, 213 A.2d at 67.

[4] *Id.* at 66.

Issue I: Whether Appellee's present restrictions were the result of a work related condition

Appellant contends that Appellee's injuries and present symptoms are not premised upon substantial evidence and were not caused by his employment, thus Appellee should not receive temporary partial disability benefits. Appellant maintains that the Board did not address their contention that Appellee's present restrictions are not the result of his employment at Raytheon.

In its April 17, 2003, decision, the Board states in pertinent part:

> It was found at a previous hearing that Claimant was totally disabled by the cumulative detrimental effect of plantar fasciitis, from November 11, 1999 through September 8, 2000. That decision predicted this claim for partial disability. Both Claimant's and Raytheon's doctors now agree that Claimant is unable to return to work as a boilermaker. Both also agreed Claimant is capable only of sedentary-type employment. Therefore I find Claimant has met his burden to show that he is partially disabled. 19 *Del. C.* § 2325.

Appellee argues that the issue of causation has already been established by the Board's previous decision on October 31, 2000, and if Appellant desired to allege causation, the appropriate forum would have been an appeal of that decision. Appellee points out that Appellant did in fact appeal that decision, but chose not to proceed with the appeal. Thus, Appellee argues that the issue of causation has already been established and the Appellant is attempting to re-litigate an issue which has been rendered a final judgment.

The Court finds that the causation issue was determined not only in the Board's first decision of October 31, 2000, but also in the second decision of April 17, 2002. Clearly, the first decision attributed Appellee's plantar fasciitis to his employment with Raytheon and Appellant chose not to complete the appeal process of that decision. As Appellee points out that would have been the proper forum in which to contest causation.

In preparation for the April 17, 2002, decision, the Board heard testimony from Appellee, Dr. John Walter, Dr. Robert Tyrell, Jose Castro (vocational expert), Jocelyn Langrehr (vocational expert) and Dr. Leo Raisis. Additionally, the Board allowed the record to remain open until April 1, 2002, in order for the parties to present any additional argument. The Board considered and discussed the medical expert testimony in relationship to Appellee's present condition. The Board considered that the previous Board had predicted the fact that this claim for partial disability would occur. Thus, the Board expected a continuation of Appellee's claim. The Board was required to sort through challenging and complicated medical testimony. The Court may not substitute its judgment for that of the Board's. The Court is not the trier of fact. The Court did not hear the witnesses and may not now determine the credibility of the witnesses. In each decision the Board indicates the complexity and difficulty of the case. The Court finds that the Board properly decided the issue of causation, that there is a nexus between Appellee's current condition and his employment at Raytheon.

Appellant further argues that any conclusion by the Board that Appellee's restrictions are a result of a work related condition, is not based on substantial competent evidence. Appellant contends that the Board ignored their causation arguments and "concluded that the present day work restrictions are the result of a prior compensable aggravation of a pre-existing condition."[5] Appellant further argues, that "[i]f that is the case, the Boards' decision is not based upon substantial competent evidence."[6] Appellant supports this allegation by pointing out that both Dr. Raisis and Dr. Walter agree that Appellee has bilateral foot pain. Appellant further states that Appellee is showing signs and symptoms of bilateral tarsal tunnel syndrome and bilateral metatarsal joint pain, and that neither doctor relates these symptoms and syndromes to Appellee's employment at Raytheon. However, this is an incorrect assertion. Dr. Walter relates Appellee's pain and symptoms directly to his occupation and states that they occurred while Appellee was working as a boilermaker. The Board's April 17, 2002, decision clearly states that neurological exam was negative for tarsal tunnel syndrome. Additionally, although as Appellant points out, neither doctor relates Appellee's right foot pain to his employment at Raytheon, Dr. Walter states that it is an expected compensation injury. Appellee is compensating due to the pain in his left foot,

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[5]Appellant's Opening Brief at 9.

[6]*Id.*

which has already been determined to be caused by his employment at Raytheon. He describes this as a compensatory natural mechanism.

Further, Dr. Walter testified that Appellee's symptoms are classic for the diagnosis of plantar fasciitis. Only Dr. Raisis, Appellant's expert, testified that Appellee's symptoms arise from degenerative arthritis of his midfoot. The Board considered and discussed each expert's opinion. The Court finds that the Board did not ignore Appellant's causation argument, as Appellant maintains.

Appellant further argues that because Appellee continues to have pain three years after the initial plantar fasciitis diagnosis, that it is therefore not plantar fasciitis and it is unrelated to his employment at Raytheon. However, as Dr. Walter notes in his deposition, Appellee presents with classic plantar fasciitis symptoms. Dr. Walter states that Appellee may need surgery in the future as his symptoms are not abating with the less conservative treatment. Although conservative measures are usually successful, Appellee has not responded well and continues to present with plantar fasciitis symptoms.

The Court finds that there is enough relevant evidence that a reasonable person would accept as adequate to support the conclusion that Appellee's plantar fasciitis is related to his employment at Raytheon. The Court may only overturn the Board's decision when there is no satisfactory proof in support of its factual findings. The Court finds that the evidence was

sufficient for the Board to find that Appellee's injury was causally related to his employment at Raytheon. Further fact finding is not necessary.

Issue II. Calculation of Temporary-Partial Benefits

Appellee has conceded that pursuant to title 19, section 2325 of the Delaware Code that the correct method to calculate temporary partial disability is two-thirds of the difference between the Appellee's average weekly wage and his return to work wage and this section requires that the figure cannot exceed the state maximum allowed by law at the time of the accident. Therefore, the maximum amount of temporary partial disability allowed to Appellee under section 2325 is $434.68. This error of the Board is ministerial, and both parties agree on the matter, thus the Court reverses this part of the lower court's decision to reflect the correct temporary partial disability rate in the amount of $434.68 from September 9, 2000 and ongoing.

For the forgoing reasons the decision of the Industrial Accident Board is hereby **AFFIRMED IN PART, REVERSED IN PART** - as to the amount of weekly disability payments, which should now be in the amount of $434.68, in order to comply with title 19, section 2325 of the Delaware Code**.**

IT IS SO ORDERED.

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ALFORD, J.

Original: Prothonotary's Office - Civil Div.