IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PUBLISHER'S CIRCULATION FULFILLMENT	)	
	)	CIVIL ACTION NUMBER
	)	
Employer/Appellant	)	02A-05-002-JOH
v.	)	
	)	
WALTER HUMBER	)	
	)	
Employee/Appellee	)	

Submitted: January 21, 2003
Decided: April 17, 2003

MEMORANDUM OPINION

Upon Appeal from the Industrial Accident Board -
REVERSED** and **REMANDED

Raymond W. Cobb, Esquire, Wilmington, Delaware, attorney for appellant

Gary S. Nitsche, Esquire, of Weik Nitsche & Dougherty, Wilmington, Delaware, attorney for appellee

HERLIHY, Judge

Claimant Walter Humber was an employee of Publishers Circulation Fulfillment when he sustained a work related injury on August 18, 2000. At that time, he was delivering newspapers for Publishers in his car when he was struck from behind while stopped at a red light. Publishers admitted compensability and reached an agreement with him to pay total disability from August 19, 2000, through October 27, 2000.

Humber petitioned the Industrial Accident Board claiming a recurrence of injury on October 27, 2000, and seeking a prospective award of additional compensation from that date. Prior to the accident, Humber had at least nine severe accidents, including motor vehicle accidents, work accidents, an assault and a fall. The Board found Humber to be forthright and convincing and was persuaded by the testimony of his expert, Dr. Ross Ufberg, that the August 18, 2000, accident aggravated the injuries previously suffered and it found a recurrence of injury on or after October 27, 2000.

Since Humber's agreement to compensation expired, to receive benefits thereafter, there had to have been a recurrence of injury after its expiration. A recurrence of injury means a return of impairment without an intervening independent accident. While the Board said Humber suffered a recurrence, its opinion makes no finding of a recurrence after the expiration of the compensation agreement. Nor is there any substantial evidence to support a finding of recurrence after that expiration. The Board's decision is, therefore, REVERSED.

Facts

At the time of the accident, Humber was fifty years old and had been working for Publishers for five months as an assistant manager. He was delivering newspapers in his car when he was struck from behind while stopped at a red light on Route 4 at the Route 7 intersection. The impact was severe enough to blow out all of the car windows. He was taken to the emergency room by ambulance. The next day he saw his family physician, who recommended that he see Dr. Ross Ufberg, a specialist who had already been treating Humber for previous, unrelated, but similar, injuries.

Humber was rather fragile and was working on the edge of, if not beyond, his physical capabilities at the time of the accident. He had undergone cervical fusion in 1988 and suffered another cervical disc herniation in 1993 as a result of a work injury. He suffered another herniation after a 1996 motor vehicle accident. Humber underwent surgery for his right shoulder after a fall in 1990. Dr. Ufberg first saw Humber in August of 1999, after an August 1998 motor vehicle accident. That accident also caused him to undergo leg surgery and Dr, Ufberg was treating him for that as recently as three days before the accident at issue in this case. All in all, Humber had work accidents in 1993 and 1994, motor vehicle accidents in 1983, 1996, 1998 and 1999, was injured in a robbery in 1989 and fell down stairs in 1998.

The August 18, 2000, accident was characterized by the Board to be "the straw that broke the camel's back."[1] The biggest difference in Humber's condition is the limitation placed upon the type and amount of physical activity he can now tolerate. Humber has not returned to work since his accident because he developed renal failure, which now requires dialysis three times per week. He also continues to have neck and back pain, pain in his testicles and pain down his left leg. Humber is unable to do any lifting whatsoever. Dr. Ufberg had prescribed Percocet.

Publishers admitted compensability for this accident and entered into an agreement with Humber which provided that he would be paid total disability from August 19, 2000, through October 27, 2000. Upon its expiration Humber filed a petition claiming a recurrence of total disability from October 27, 2000, and seeking compensation through June 11, 2001.[2] The Board was persuaded by the testimony of Humber, finding him to be forthright and convincing. It accepted the testimony of his expert, Dr. Ufberg, who opined that the August 18, 2000, accident aggravated those prior injuries and caused his departure from the workforce. The Board also awarded Humber medical expenses and attorney's fees.

Standard of Review

[1] Bd. Dec. at 3.

[2] The Board's Findings of Fact mistakenly says June 11, 2000.

On appeal from an administrative agency, this Court's review of its factual findings is very limited. The function of the reviewing Court is to determine whether substantial evidence supports the agency's decision[3] and is free from legal error.[4] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[5]

Discussion

The burden is upon the claimant to show recurrence after total disability benefits have terminated.[6] Humber's agreement terminated on October 27, 2000. That is the date his petition for additional compensation due claims there was a recurrence and from which additional compensation was prospectively sought.

The Board awarded Humber additional compensation from October 27, 2000, to June 31, 2001, finding a recurrence to have occurred. While it uses the word "recurrence," its findings of fact failed to identify what happened on October 27th to qualify as a recurrence. The Board's finding of recurrence, which necessarily would have to have been after the termination agreement expired, is, beneath the veneer, a finding that a recurrence occurred on August 18, 2000.

Title 19 *Del. C*. §2347 governs the Board's review and modification of agreements and awards. It provides in relevant part:

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[3] *DiSabatino Bros., Inc. v. Wortman,* 453 A.2d 102, 105 (Del. 1982).
[4] *Morgan v. Anchor Freight, Inc.,* 506 A.2d 185, 188 (Del. Super. Ct. 1986).
[5] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).
[6] *McGlinchey v. Phoenix Steel Corp.,* 293 A.2d 585, 587 (Del. Super. Ct. 1972)

> On the application of any party in interest on the ground that the incapacity of the injured employee has substantially terminated, increased, diminished or recurred or that the status of the dependent has changed, the Board may at any time, but not oftener than once in 6 months, review any agreement or award.
>
> On such review, the Board may make an award ending, diminishing, increasing or renewing the compensation previously agreed upon or awarded, . . . and shall state its conclusions of facts and rulings of law. . ..

There are, therefore, four bases for modification of a disability agreement; those are that the incapacity has (1) increased, (2) diminished, (3) terminated or (4) recurred.[7] The first three bases are inapplicable to this case because Humber's benefits agreement was voluntarily terminated. That leaves only the fourth basis, namely recurrence, but there was no change in his condition when or after the agreement terminated.

There are two cases which have dealt with similar circumstances. In *Bradley v. Waco Scaffolding & Equip.*,[8] Bradley appealed from a decision of the Board denying his petition for additional compensation due. The Board found that prior to the filing of the petition, Bradley had voluntarily terminated his total disability benefits and had not contested the employer's Petition to Review Compensation Agreement. On appeal, this Court found:

> Neither doctor testified that there was a change in the claimant's condition between the time he voluntarily terminated his temporary total disability benefits and the filing of the petition to the Board. Without such a change, as the Board correctly held, no finding could have been made that Bradley had suffered a recurrence.[9]

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[7] *See Brokenbrough v. Chrysler Corp.*, 460 A.2d 551, 552-53 (Del. Super. Ct. 1983).
[8] Del. Super., C.A. No. 97A-02-19, Cooch, J. (Dec. 8, 1997).
[9] *Id.* at 6.

The second case, *West v. Ponderosa Steak House,*[10] is strikingly similar to this one. In that case, Ponderosa filed a motion to affirm a decision of the Board denying West's petition to determine additional compensation due starting from the day after a voluntary compensation agreement ended. West fell when exiting her employer's kitchen and she stated that her lawyer advised her to sign certain agreements as to compensation as well as accompanying receipts, even though she believed that she was still 100% disabled. Ponderosa's expert testified that he could not find a physical reason for West's complaints as to pain and attributed it to psychological overlay unrelated to the fall. The Board found Ponderosa's expert persuasive and held that West did not meet her burden of showing that she suffered a change in circumstances warranting reinstatement of total disability benefits beginning one day after the end of benefits paid under a voluntary agreement. On appeal, this Court held:

> Neither doctor testified that Claimant's condition changed between the time she signed the Agreements as to Compensation and the filing of the Petition to Determine Additional Compensation Due. Without such a change, the Board could not possibly make a finding that Claimant suffered a recurrence. Therefore, the Board's decision to deny Claimant's Petition to Determine Additional Compensation Due of total disability is affirmed.[11]

The reasoning of *West* and *Bradley* apply with equal force to this case. The Board had before it no evidence of any change in Humber's condition between October 26, the time when the compensation agreement expired, and October 27, 2000, the time from which the

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[10] Del. Super., C.A. No. 97A-02-005, Graves, J. (May 13, 1998)(citations omitted).
[11] *Id.* at 9-10.

Board awarded further compensation due. Without such evidence of a change of circumstances, the Board could not possibly find a recurrence.

The evidence before the Board may have supported a recurrence, or more accurately an aggravation, on August 18th, the date of the original accident. That evidence came from Dr. Ufberg, who also testified that Humber improved during the period covered by the voluntary agreement. But there was no evidence before the Board of any recurrence at or near the end of the period covered by the agreement and clearly none on the date from which Humber's petition sought compensation, October 27, 2000.

The Court's holdings in *West* and *Bradley* are reaffirmations of this Court's holding in *McGlinchey* as applied after the expiration of the voluntary agreement. Humber's evidence failed to do meet the *McGlinchey* requirement.

There is no question he presented a compelling situation. Dr. Ufberg did note that Humber was delivering bundles of newspapers during his treatment for earlier injuries. This was something the doctor said he should not have been doing. The Board, looking at his extensive history of accidents and injuries, described him as "extremely unlucky."[12] It described him as "fragile" and working at the "zenith" of his capabilities on August 18, 2000.[13] A lesser person, it said, would have stayed home and collected Social Security and partial disability benefits from a prior accident.[14]

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[12] Bd. Dec. at 5.
[13] *Id.*
[14] *Id.*

Based on the Board's characterization, Dr. Ufberg's testimony and that of Humber, there is no doubt he presented a sympathetic figure; perhaps, one deserving of an award of disability benefits. But the Board's decision regrettably betrays loss of focus. It was influenced by compelling sympathy to overlook that it could only award Humber benefits if he showed a recurrence after the expiration of the voluntary agreement. As irresistible as Humber's overall history may have been, the Board cannot act on sympathy.[15]

There remains another troubling aspect to this case, however. While Dr. Ufberg said he improved from August 18 to October 27, 2000, Humber was still unable to work. There is a clear tension in this case between the abrupt end of Humber's benefits in October 2000 and the general purposes of Delaware's worker's compensation laws. These are to be given liberal construction.[16] But that construction cannot be stretched beyond the breaking point to find a recurrence where none existed or at a point in time not appropriate for such a finding. The Court is also concerned that finite-in-time compensation agreements similar to the one in this case may become traps for the unwary and operate to deprive claimants of just compensation.

In finding recurrence on October 27, 2000, the Board's decision lacks substantial evidence and by implicitly finding it to have occurred on August 18, 2000, it erred as a matter of law.

Conclusion

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[15] *See Delaware Olds, Inc. v. Dixon,* 367 A.2d 178 (Del. 1976).
[16] *Children's Bureau v. Nissen,* 29 A.2d 603, 609 (Del. Super. Ct. 1942).

For the reason stated herein, the decision of the Industrial Accident Board is **REVERSED** and **REMANDED.**

IT IS SO ORDERED**.**

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J.