IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JAMES SCHEERS,	)
	) C.A. No. 02A-05-002 JTV
Claimant Below-Appellant,	)
	)
v.	)
	)
INDEPENDENT NEWSPAPER,	)
	)
Employer Below-Appellee.	)

Submitted: December 18, 2003
Decided: March 31, 2003

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Appellant.

Anthony M. Frabizzio, Esq., Heckler & Frabizzio, Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of Appellant's Appeal From
Decision of Industrial Accident Board
AFFIRMED

VAUGHN, Resident Judge

Scheers v. Independent Newspaper
C.A. No. 02A-05-002
March 31, 2003

ORDER

Upon consideration of the briefs of the parties and the record of the case, it appears that:

1. The appellant, James Scheers ("claimant"), appeals from a decision of the Industrial Accident Board ("Board") which granted the employer's petition to terminate total disability benefits, granted the claimant partial disability benefits, granted the claimant's petition for additional compensation for outstanding medical bills, denied his petition for a special bed and reclining chair, and awarded the claimant medical witness fees and attorney's fees. The issues raised on appeal are limited to the Board's decision to terminate total disability benefits and the award of attorney's fees. Therefore, it is necessary to consider only these two aspects of the Board's decision. The claimant contends that the Board's conclusion that he is not totally disabled is "factually and legally incorrect." He also contends the Board committed error by allowing only one attorney's fee. He contends that since he received two compensation awards, one for partial disability and one for medical expenses, he should have been allowed two attorney's fees. The employer, Independent Newspapers, contends that the Board's decision should be affirmed.

2. The role of the court in reviewing an appeal from the Industrial Accident Board is limited to assessing whether the Board's decision is supported by substantial evidence and is free of legal error.[1] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a

[1] *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

conclusion."[2] The court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[3] The court simply reviews the case to determine if the evidence is legally adequate to support the Board's factual findings.[4]

3. On August 16, 1995, the claimant injured his back in a work-related accident. As a result of the injury, he was unable to work and received total disability. He underwent three back operations. In December 2000, while engaged in physical therapy for his back, the claimant injured his right knee. The injury to the knee itself required surgery, which took place in August 2001. On October 26, 2001, the employer filed a petition to terminate the claimant's total disability benefits. On December 5, 2001, the claimant filed a Petition for Additional Compensation Due for medical expenses related to the August 2001 surgery, plus the cost of a heated massage recliner and a Craftmatic contour bed.

4. At its hearing held on March 25, 2002, the Board considered testimony from Joseph Lucey, a vocational consultant, Dr. Robert Riederman, an orthopedic surgeon, Dr. Irene Mavrakakis, a specialist in pain management, Dr. Eric T. Schwartz, an orthopedic surgeon, Dr. David Nixon, a psychiatrist, and the claimant. Mr. Lucey testified about a labor market survey which he had performed. Dr. Riederman testified that the claimant is capable of performing sedentary work. Dr.

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[2] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.,*636 A.2d 892, 899 (Del. 1994); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *see Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

[3] 213 A.2d at 66.

[4] *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3 (Del. Super. 1999).

Mavrakakis testified that the claimant is capable of performing part-time, sedentary work. Dr. Schwartz testified concerning the claimant's knee surgery. Dr. Nixon's testimony is discussed below. As mentioned, the Board concluded that the claimant is no longer totally disabled.[5] It did, however, find that he is partially disabled. He is restricted to sedentary jobs.[6]

5. The claimant contends that the evidence does not support a finding that he is no longer totally disabled. Specifically, he contends that the Board failed to give due consideration to Dr. Nixon's testimony about his psychiatric problems. He contends that Dr. Nixon's testimony establishes that the claimant is unable to work due to his psychiatric condition. He contends that Dr. Nixon's testimony is unrebutted. He contends that the Board is not free to disregard testimony and cannot simply declare factual findings which are inconsistent with the evidence. He contends that the claimant's physical condition and psychological condition cannot be viewed as separate, component parts, but must be viewed as a whole. He further contends that since his treating psychiatrist has determined that he is psychiatrically unable to work, the Board's termination of total disability benefits is error under the

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[5] Total disability has been defined as follows: "'Total disability' means a disability which prevents an employee from obtaining employment commensurate with his qualifications and training. (Citations omitted). The term means such disability that the employee is unable to perform any services 'other than those which are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.' (Citations omitted). 'Total disability' may be found, in spite of sporadic earnings, if the claimant's physical condition is such as to disqualify him from regular employment in any well-known branch of the labor market." *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910 (Del. 1967).

[6] The Board also concluded that the claimant was not a displaced worker. The claimant takes no issue with that determination.

case of *Gilliard-Belfast v. Wendy's*.[7] In that case, an injured worker was ordered by her physician not to work until after he had performed arthroscopic surgery on her knee. The surgery was delayed while decisions were made as to whether the procedure would be covered by insurance. The Board held that Ms. Gilliard-Belfast was not totally disabled during the time she was waiting for the surgery. The Delaware Supreme Court reversed, holding that "a person who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."

6. Dr. Nixon's opinion concerning the claimant's ability to work, as stated in his direct examination, is as follows:

> Counsel: With respect to those depression symptoms does that have an affect to the extent that it does affect his ability to engage in gainful employment?
>
> Dr. Nixon: Prior to three weeks ago, I would have said that he would not be able to engage in gainful employment based on his pain and his depression. Over the last three weeks I don't know how his moods will play into this. He's still in pain but he's more and more motivated, we'll have to see.
>
> Counsel: Is it fair to say that at present, Mr. Scheers is in a state of transition with this new medication that may provide him with relief or improvement in those depressive symptoms?
>
> Dr. Nixon: Yes.

[7] 754 A.2d 251 (Del. 2000).

> Counsel: On the other hand, they may not from this point out?
>
> Dr. Nixon: We don't know.
>
> Counsel: We don't know what kind of improvement he'll get from here on out?
>
> Dr. Nixon: Correct.
>
> Counsel: So would it be fair to say that it would be premature for you to conclude that this represents for him turning the corner and making recovery?
>
> Dr. Nixon: Yes, it would be premature to say that.

On cross-examination, he testified as follows:

> Counsel: You mentioned in your testimony that you believe his depression or mood does affect his ability to work, is that correct?
>
> Dr. Nixon: I believe that his depression is contributing to his problem in the way that he's not fully functional.
>
> Counsel: Do you believe that he is totally disabled from all work based solely on is depression?
>
> Dr. Nixon: No, I think it's his pain.
>
> Counsel: If I were to tell you that Dr. Mavrakakis, who testified already by deposition in his case, testified that she thought that Mr. Scheers could work in some capacity based on his physical condition and pain, would you have

> any disagreement with that?
>
> Dr. Nixon: No, I would defer to her opinion there.
>
> Counsel: Just so I'm clear, you do not believe that his mood or depression itself would be totally disabling to him?
>
> Dr. Nixon: No.
>
> Counsel: Do you think that that would affect or would there be any restrictions in the types of things he could do because of his depression or mood?
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> Dr. Nixon: Prior to about three weeks ago I would have a difficult time seeing him functioning in a work environment based on his tendency to become tearful, despondent, frustrated. The last three weeks there's been reason to believe that maybe his mood will not be a major factor in his ability to work or not work. Nor have I ever felt that that was a major factor. I thought it was the pain that was preventing him from working, as well as the impact of the pain on his lifestyle.

The Board summarized Dr. Nixon's testimony on pages eight and nine of its decision. In its final two sentences summarizing Dr. Nixon's testimony, the Board stated the following:

> Claimant is not totally disabled based on his depression. Dr. Nixon deferred to Dr. Mavrakakis regarding Claimant's physical ability to work and pain level.

7. After considering the evidence and the Board's decision, I find that the Board did give due consideration to the testimony of Dr. Nixon. While his

testimony may be subject to some interpretation, it adequately supports the Board's conclusion that the doctor was not expressing an opinion that the claimant is totally disabled. In addition, a complete reading of the testimony of Dr. Nixon reveals that the doctor never ordered or instructed the claimant not to work. Therefore, *Gilliard-Belfast v. Wendy's* is not applicable. After consideration of the entire record, I find that there is substantial evidence to support the Board's conclusion that the employer met its burden of establishing that the claimant is no longer totally disabled.

8. The Board's award of attorney's fees reads as follows:

> Claimant's attorney attested that he spent twenty-three hours preparing for the hearing, which lasted approximately four hours. His first contact with Claimant was on January 15, 1997. Claimant's attorney has been practicing law in Delaware for over thirty-five years. Based on these factors, and on the results obtained, the Board awards one attorney's fee in the amount of thirty percent of the award or $7,036.50, whichever is less.

The aggregate mathematical amount of the claimant's partial disability award is $108,558.92. The amount of medical expenses awarded is $9,056.03. Since thirty percent of the sum of these two awards exceeds $7,036.50, the effect of the Board's decision is to award $7,036.50 in attorney's fees.[8]

10. The claimant contends that he is legally entitled to two, separate attorney's fees since he received two compensation awards, one for partial disability

[8] $7,036.50 is, or at the time was, the current statutory maximum for a single attorney's fee. 19 *Del. C.* § 2320(10).

and one for medical expenses for knee surgery. If two attorney's fees were awarded, the total maximum attorney's fees would be $9,753.31 ($7,036.50 for the partial disability award and $2,716.81, or 30 percent, for the award of medical expenses).

11. A claimant who receives a compensation award from the Board is entitled to receive a reasonable attorney's fee as well.[9] Where a claimant receives more than one compensation award, the Board must allow attorney's fees for each award.[10] In *Simmons v. Delaware State Hospital*[11] the claimant received awards of partial disability benefits, medical expenses, and permanent impairment benefits. The Board characterized the claimant's case as involving three separate claims. It awarded two attorney's fees, one for the partial disability award and one for the medical expenses award, each in the amount of the statutory maximum. It did not award an attorney's fee for the permanent impairment award. The Supreme Court reversed, reasoning that under the statute a claimant is entitled to the allowance of an attorney's fee for each separate compensation award. The court reasoned that although an attorney's fee may be minimal or even nominal, the statute cannot be disregarded entirely.

12. In this case, although the Board expressed the award as a single attorney's fee, it appears that the Board believed that the amount actually awarded, $7,036.50, was sufficient for both compensation awards. This is evident from the

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[9] 19 *Del. C.* § 2120(10).

[10] *Simmons v. Delaware State Hospital*, 660 A.2d 384 (Del. 1995).

[11] *Id.*

fact that the Board took into consideration the full amount of time which counsel devoted to the entire case. The claimant has not, in his opening or reply brief, challenged the overall reasonableness of the amount awarded. The Board could easily have expressed the award as two fees, with substantially all of the fees attributed to the partial disability compensation and a nominal amount attributed to the medical expense compensation. Under these circumstances, I am not persuaded that the Court should find error in the manner in which the Board acted in this particular case.

12. Therefore, the Board's decision is ***affirmed***.

IT IS SO ORDERED.

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Resident Judge

oc: Prothonotary
cc: Order Distribution
File