IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JULIA STEELE,	:	
	:	
Claimant Below-Appellant,	:	C.A. No. 00A-12-001-WLW
	:	
v.	:	
	:	
ANIMAL HEALTH SALES, INC.,	:	
	:	
Employer Below-Appellee.	:	

Submitted: July 10, 2001
Decided: October 19, 2001

O R D E R

Upon Appeal from a Decision of the
Industrial Accident Board. Affirmed.

John J. Schmittinger and Walt F. Schmittinger, Schmittinger and Rodriguez, P.A., Dover, Delaware, attorneys for the Claimant Below-Appellant.

Colin M. Shalk, Casarino, Christman & Shalk, Wilmington, Delaware, attorneys for the Employer Below-Appellee.

Julia Steele v. Animal Health Sales, Inc.
C.A. No. 00A-12-001
October 19, 2001

This is an appeal by Julia Steele ("Claimant") from a decision of the Industrial Accident Board ("Board") dated November 30, 2000. For the following reasons the Order of the Board is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from a compensable work injury sustained by the Claimant on February 19, 1998, while employed by Animal Health Sales, Inc. ("AHS"), at which time Claimant was injured during a robbery and suffered physical and psychological injuries. She began medical treatment for her injuries shortly after the incident, and on February 26, 1998, began receiving compensation for total disability.[1]

Her total disability benefits ceased as of August 1998.[2] Based on the record submitted, it appears that Claimant stopped medical treatment for her

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[1] **State of Delaware Office of Workers' Compensation Agreement as to Compensation. (Citation on Appeal, Cl's Exh. #4.)**

[2] **Apparently, in August of 1998, AHS filed a Petition for Review of Claimant's total disability status on the basis that Claimant was no longer totally disabled. The Petition was stipulated to by counsel and granted by the Board. (Dep. of Steven E. Tooze, M.D., October 13, 1999, AHS Ans. Br., Exh. C at 24.)**

injuries in October 1998.

In February of 1999, Claimant started to look for work. She started a new job as an assembler at Playtex in March of 1999.[3]

[3] **Bd. Dec., May 22, 2000, at 2.**

In May of 1999, Claimant began to see Dr. Weisberg, a psychiatrist, for problems related to the work injury at AHS.[4] She also began treatment with Dr. Godfrey, seeing him from September 1999 to November 1999, for physical symtomology related to the work injury. She received injections, manipulative treatment and pain medications from Dr. Godfrey.[5]

On December 9, 1999, while continuing to work at Playtex, Claimant filed a Petition to Determine Additional Compensation Due,[6] alleging that she had suffered a loss of earning capacity due to the AHS work injury. She sought partial disability benefits ongoing from March 21, 1999 (the date she started her new employment at Playtex), but did <u>not</u> seek total disability.

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[4] Dep. of Jay Weisberg, M.D., Apr. 14, 2000, AHS Ans. Br., Exh. D at 4.

[5] (Dep. Of Eugene Godfrey, M.D., Nov. 10, 2000, AHS Ans. Br., Exh. E at 8-9.) On October 20, 1999, Claimant also received a lump-sum payment to compensate her for a 28% permanent impairment to her left arm related to the work injury at AHS.

[6] Bd. Dec., May 22, 2000, at 2.

On April 5, 2000, approximately five weeks before the hearing on her Petition, Claimant went back to see Dr. Godfrey for the first time since November 1999.[7] Dr. Godfrey diagnosed an acute flare-up of her left shoulder, as well as tenderness over the left scapula and mid-thoracic area and neck. He noted that she was markedly protecting her shoulder.[8] Dr. Godfrey prescribed the same treatment he had prescribed throughout the course of Claimant's care from 1999 to the present–i.e. physical therapy, injections and a transcutaneous electric nerve stimulation (TENS) unit.[9] Dr. Godfrey agreed that Claimant's current flare-up was to be expected as part of Claimant's usual cycle of shoulder complaints related to this work injury.[10] He did not diagnose her as totally disabled during this check up in April 2000.

On May 11, 2000, the Board heard Claimant's Petition for partial disability. The Board granted her Petition on May 22, 2000,[11] finding that Claimant had suffered a loss in earning capacity related to the AHS work injury. She currently receives partial disability benefits on an ongoing basis. Again, it appears that Claimant did not allege total disability at the May 11 Board hearing.

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[7] **Godfrey Dep. at 25.**

[8] ***Id.* at 10.**

[9] ***Id.* at 8-10.**

[10] ***Id.* at 10.**

[11] **Bd. Dec., May 22, 2000, at 8.**

On May 31, 2000, Claimant returned to see Dr. Godfrey for the same complaints she experienced on April 5, 2000. She stated she was no better. Dr. Godfrey again prescribed more of the same treatment–this time trigger-point injections. He then gave her a three-day no-work note.[12] It is from this date that Claimant alleges a recurrence of total disability.

[12] **Godfrey Dep. at 10-11.**

On June 5, 2000, it appears that the Claimant came into Dr. Godfrey's office when he was not available and requested another no-work note. A no-work note was issued for the time period of June 5, 2000, to June 12, 2000. Dr. Godfrey testified that he had no record of a visit on June 5th (other than the no-work note given that day). Dr. Godfrey stated that Claimant "probably came in the office and I was probably in the ER when she called."[13] So, even though he did not think he examined the Claimant, he authorized a "no-work" note at her initiation.

On June 9, 2000, Claimant came back to Dr. Godfrey "complaining vociferously about the left shoulder pain." He did not find her totally disabled that day based upon his physical examination. He testified: "*In order to give her the benefit of the doubt* . . . [he] thought it was fair [to] her to reorder the MRI of her left shoulder."[14] He also ordered a functional capacity evaluation. Then he took her out of work indefinitely, "*mainly because of her psychiatrist.*"[15]

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[13] ***Id.* at 12.**

[14] ***Id.* at 12-13 (emphasis added).**

[15] ***Id.* Dr. Godfrey testified that up until April 5, 2000, he had considered Claimant's**

condition to be chronic (but not totally disabling) and was treating her accordingly. By June 2000, however, Dr. Godfrey alleged that Claimant's psychiatrist and Dr. Rowe began to have "a real problem with her," and Dr. Godfrey took her out of work "mainly because of her psychiatrist."

Meanwhile, Dr. Weisberg, Claimant's psychiatrist, testified that he did not take Claimant out of work in May or June 2000 due to her work-related depression.[16] He testified that Claimant's psychological condition remained unchanged from April 2000 through November 2000,[17] and that he "would stop short of saying that she is totally disabled."[18] Dr. Weisberg opined that, "absolutely," it would be better for Claimant to be employed.[19] On cross-exam, Dr. Weisberg testified that he did not take the Claimant out of work in May, but that Dr. Godfrey did.[20]

At the end of June 2000, Claimant filed a second Petition to Determine Additional Compensation Due.[21] She maintained that, as of May 31, 2000, she

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[16] Bd. Dec., Nov. 23, 2000, at 9.

[17] Second Dep. of Jay Weisberg, M.D., AHS Ans. Br., Exh. F at 22.

[18] *Id.* at 25.

[19] *Id.* at 9.

[20] *Id.* At 35.

[21] Citation on Appeal, Petition to Determine Additional Compensation Due.

had suffered a recurrence of total disability related to the February 1998 work injury at AHS.

Her physical tests results at about that time were normal or improving or, possibly, unclear as to their interpretation. A June 29, 2000, MRI showed improvement.[22] An August 1, 2000, functional capacity evaluation showed unclear or improving results.[23] Lab work, discussed with patient on August 16, 2000, showed normal results.[24]

Dr. Godfrey expressed that Claimant was markedly disabled at this time, but he believed that more than just her physical injuries from the AHS work injury contributed to the disability. He testified that there was a psychological part to the disability wherein Claimant "ha[d] a very negative attitude against

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[22] **Godfrey Dep. at 14, 31-32.**

[23] **Godfrey Dep. at 17, 35, 38-41. Initially, Dr. Godfrey testified that a November 2000 functional capacity evaluation showed a 40% weakness in Claimant's left upper extremity and that patient was decompensating when compared to the August 2000 functional capacity exam (showing an 18 percent strength deficit in the left arm).**

Upon cross-exam however, Dr. Godfrey admitted that he had been mistaken. In actuality he had been looking at the March 2000 functional capacity exam showing the 40% strength deficit. He had mistaken the March results for November results. It does not appear, however, that a November functional capacity evaluation was ever performed. Moreover, the Claimant showed a "poor effort" on the March 2000 exam; therefore, the results were not necessarily reliable or comparable with other exams.

Most importantly, however, Dr. Godfrey noted that *if* the March 2000 exam and the August 2000 exam could be compared, the August 2000 capacity exam showed Claimant was getting better.

[24] ***Id.* at 43.**

improvement."[25] He also testified that *weaknesses in other areas not affected by the work injuries at AHS* (such as claimant's right hand and 13% impairment to low back) contributed to her total disability.[26]

Dr. Case testified for the defense that Claimant's physical condition had not changed between June 1999 (when she was working at Playtex), and August 2000 (when she was not); therefore, she had not suffered a recurrence of total disability.[27]

On November 30, 2001, the Board denied Claimant's Petition to Determine Additional Compensation Due, and did not find a recurrence of total disability as of May 31, 2000. The Board accepted the testimony of Dr. Case, rejected the opinion of Dr. Godfrey, and found that Claimant was not a *prima facie* displaced worker.

II. CLAIMS OF THE PARTIES

[25] ***Id.*** **at 45-46.**

[26] ***Id*** **at 48.**

[27] **Dep. of Jerry L. Case, M.D., AHS Ans. Br., Exh. G.**

Claimant appeals the Board's decision to deny her Petition for additional total disability benefits. She alleges that the decision of the Board is contrary to the law and evidence presented at the hearing, and is not supported by substantial evidence. Specifically, Claimant asserts that the decision to deny her total disability is a misapplication of Delaware law under *Gilliard-Belfast v. Wendy's, Inc.*,[28] a recent Delaware Supreme Court decision. Claimant disputes the authority of the Board to deny her total disability benefits from the time Dr. Godfrey gave her a no-work note on May 31, 2000, until the date of the Board's decision on November 30, 2001. She does not question the authority of the Board to deny her petition from the date of the Board's decision.

[28] **Del. Supr., 754 A.2d 251 (2000).**

AHS denies that Delaware law requires once a claimant "returns to a treating doctor, if that doctor places her on disability then the disability cannot be contradicted in any way until and unless there is a defense evaluation."[29] Moreover, AHS asserts that the Board was correct in denying Claimant total disability benefits during the pendency of her Petition in this case, because there is substantial evidence that Claimant, not her treating doctor, decided she was totally disabled.

II. STANDARD OF REVIEW

[29] **AHS Ans. Br. at 15.**

The limited appellate review of the factual findings of an administrative agency is well settled in Delaware. The function of the reviewing Court is to determine whether the agency's conclusions are supported by substantial evidence and are free from errors of law.[30] If no questions of law are presented, the Court's role is to determine whether the agency's decision is supported by substantial evidence.[31] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[32] The appellate court does not weigh the evidence, determine questions of credibility or make its own factual findings.[33] It merely determines if the evidence is legally adequate to support the agency's factual findings.[34] Moreover, the Court must take "due account of the experience and specialized competence" of the IAB and the purposes of the Workers' Compensation Act.[35] The Court must also determine whether the Board's decision is free from legal error. The Court's

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[30] ***General Motors v. Freeman*, Del. Supr., 164 A.2d 686, 688-89 (1960); *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66-67 (1965).**

[31] ***Freeman* at 689; *Johnson* at 66-67.**

[32] ***Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp.*, Del. Super., 517 A.2d 295, 297 (1986), *app. dism.*, Del. Supr., 515 A.2d 397 (1986).**

[33] ***Johnson* at 66.**

[34] **29 *Del. C.* § 10142(d).**

[35] ***State v. Cephas*, Del. Supr., 637 A.2d 20, 23 (1994).**

review of alleged errors of law is *de novo*.[36]

III. DISCUSSION

Claimant alleges that the Board made an error of law, and that "[t]his appeal begins and ends with an analysis of *Gilliard Belfast v. Wendy's*."[37] Claimant maintains she was totally disabled as a matter of law, "under *Gilliard-Belfast,* from the time her treating doctors took her out of work completely until the Board issued its decision . . . ."[38]

In *Gilliard-Belfast,* the claimant filed a Petition to Determine Additional Compensation Due seeking additional surgery and total disability benefits related to a compensable work injury. "The Board determined that Gilliard-Belfast had sustained an industrial injury to her knee, for which a second surgical procedure was necessary and appropriate."[39] Gilliard-Belfast's doctor

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[36] ***Brooks v. Johnson,* Del. Supr., 560 A.2d 1001, 1002 (1989); *Duvall v. Charles Connell Roofing*, Del. Supr., 564 A.2d 1132 (1989).**

[37] **App. Op. Br. at 11 (citing to *Gilliard-Belfast v. Wendy's, Inc.*, Del. Supr., 754 A.2d 251 (2000)).**

[38] **App. Op. Br. at 14.**

[39] ***Gilliard-Belfast* at 251.**

had ordered her not to work while she was waiting for the surgery.

Although doctors on both sides (for employer and claimant) agreed that the claimant needed further surgery, the defense medical expert opined that claimant could have completed light-duty work during the time she was waiting for her second surgery. As a result of this testimony, the Board determined that Gilliard-Belfast was not totally disabled while she was waiting to have the operation, and denied total disability benefits during that period. The Superior Court affirmed the Board's decision and the Delaware Supreme Court reversed.

In its decision, the Delaware Supreme Court noted that the Board granted claimant's petition after "accept[ing] the *unanimous* view of the medical experts that Gilliard-Belfast's second knee surgery was reasonable and necessary."[40] Moreover, six months before the hearing, the employer was on notice that its *own doctor* "agreed the second surgery was necessary . . . ."[41]

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[40] ***Id.*** **at 253 (emphasis added).**

[41] ***Id.***

The employer knew the surgery was compensable and that the claimant was legitimately under the orders of the treating doctor. Where a claimant is awaiting pending surgery that has been approved by both sides, and her treating doctor finds her totally disabled during the waiting period, the employer's insurance carrier cannot just deny total disability, but should "either expedite[] its authorization for the second surgery or request[] [claimant]'s treating physician to reconsider his 'no work' order."[42]

The current case can be distinguished from *Gilliard-Belfast* in several respects. First, there was no unanimity among Claimant's *own* doctors as to her need for further treatment, let alone unanimity between Claimant's doctor and the defense medical doctor for AHS. In such a situation, Claimant alleges that her treating doctor's determination of disability always controls before the hearing. Her "position is that *Gilliard-Belfast* addresses the period of time *before* the Board resolves the conflicts in the medical testimony concerning work restrictions."[43]

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[42] ***Id.*; *see also Malcolm v. Chrysler Corp.*, Del. Super., 255 A.2d 706 (1969) (finding employer liable for total disability where doctors for both the claimant and the employer agreed as to the issue of compensability, but the employer disingenuously delayed payment of benefits by arguing the claimant could still find some employment).**

[43] **App. Op. Br. at 14 (emphasis in original).**

However, in cases where there is no agreement between the parties, total disability under Delaware law is more than a medical determination. Furthermore, Claimant has a burden of proof she must meet to establish her right to benefits for a recurrence of total disability.[44] Where Claimant's "objective examinations were essentially unchanged"[45] before and after the date of the alleged recurrence, she has not met that burden. For these reasons, "it is the function of the Board, and not that of a physician, to determine a claimant's disability–subject to the requirement that the Board's findings be based on substantial competent evidence."[46]

> **[T]he determination of total disability requires a consideration and weighing of not only the medical and**

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[44] ***See Howell v. Supermarkets Gen. Corp.*, Del. Super., 340 A.2d 249 (1978) (applying the burden of proof rule to claimant); *Walden v. Georgia Pacific Corp.*, Del. Supr., Nos. 236, 1999, 1999 WL 801437, Holland, Hartnett, Berger, JJ. (1999) (finding claimant must show "'a return of an impairment without the intervention of a new or independent accident' to establish a recurrence").**

[45] ***Walden* at *3.**

[46] ***Poor Richard Inn v. Lister*, Del. Supr., 420 A.2d 178, 180 (1980).**

> **physical facts but also such factors as the employee's age, education, general background, occupational and general experience, emotional stability, the nature of the work performable under the physical impairment, and the availability of such work.**[47]

[47] ***Ham v. Chrysler Corp.*, Del. Supr., 231 A.2d 258, 261 (1967) (citations omitted).**

The Claimant herein states that she would "not divest the Board of its legislative authority to resolve conflicts in the medical testimony"[48] *at the hearing.* However, *"before"* the hearing she would divest the Board of that function. She maintains that the treating doctor's work restrictions control during that time because "claimants [have] the right to rely on their doctor's work restrictions until the parties can get to trial."[49] In essence, Claimant argues that the Board had the right to terminate her total disability benefits as of the date of the hearing, but did not have the right to decide whether Claimant was eligible for them in the first place. Claimant states that the treating doctor's work restrictions control "*in advance* of a Board determination of the matter."[50]

In the absence of an agreement between the parties, the Board should not be divested, even for a time, in favor of the treating physician because, under 19 *Del. C* § 2347, the Board has the power to retroactively award benefits from the date a claimant is truly eligible.[51] "[T]he Board has the authority to make its

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[48] **App. Op. Br. at 14.**

[49] ***Id.***

[50] ***Id.* (emphasis added).**

[51] **19 *Del. C.* § 2347 states in applicable part:**

> **On the application of any party in interest on the ground that the incapacity of the injured employee has subsequently . . . increased . . . or recurred . . . , the Board may at any time, but not oftener than once in 6 months, review any agreement or award.**
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> **On such review, the Board may make an award . . . increasing or renewing the compensation previously agreed upon or awarded . . . .**

order retroactive to the date of the application therefor. What it ought to do in any given case, including the present one, must depend upon the facts,"[52] not on the unilateral decision of the Claimant's treating physician. "[T]he real intent of the Legislature was that an injured person shall be entitled to all the benefits provided by the statute and that it must have intended the Board to have those powers which are required to see that [the Claimant] gets those benefits."[53]

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[52] ***Kent Gen'l Hosp. V. Blanco*, Del. Supr., 195 A.2d 553, 556 (1963).**

[53] ***Id.***

Under the Delaware workers' compensation statute, the employer is also protected by a Board determination of total disability. If the treating physician is the arbiter of total disability prior to the hearing, an employer may "have to pay more than its obligation under the law, and we likewise do not believe that the Legislature intended that result."[54]

In addition to the fact that there was not unanimity between doctors in this case, *Gilliard-Belfast* can be distinguished on a second basis. *Gilliard-Belfast* will not apply where the treating physician determines that non-work injuries contribute to the total disability status.[55]

Claimant argues, here, that she was totally disabled simply because her doctor told her not to work. The Board did not believe that Claimant's subjective complaints were related to the work injury, however, as her doctor had no credible objective evidence to substantiate her claims. Importantly, Claimant's treating physician testified that some of her disability stemmed from weaknesses in areas (such as the low back and right arm) which were not related

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[54] ***Id.***

[55] ***Carey v. H & H Maintenance, Inc.*, Del. Super., C. A. No. 00A-09-003, 2001 WL 985114 at *4, Bradley, J. (Aug. 6, 2001) (Mem. Op.).**

to the work injury.[56]

[56] **Godfrey Dep. At 48.**

"In *Gilliard Belfast*, the injured worker had been told by her doctor not to work because of medical problems that the Board had determined *were related* to the worker's accident. This distinction makes *Gilliard-Belfast* inapplicable to Appellant's case,"[57] because Claimant's treating physician attributed some of her disability to *non-work related* weaknesses in the low back and right hand.

The facts in the instant case are more analogous to *Wade Insulation, Inc v. Visnovsky*,[58] rather than to *Gilliard-Belfast.* In *Wade*, the Claimant's doctor had not released the Claimant to work, but would have released him if the Claimant had asked; therefore, the Board did not find that the claimant was totally disabled during the time he was under a no-work order from his treating physician.

Here, as in *Wade*, there is substantial evidence in the testimony from Dr. Godfrey, that he would have released the claimant to work if she requested. In fact, he had already approved her work at Playtex when she approached him. Then, claimant changed her mind and pressured the doctor to keep her out of work. Dr. Godfrey testified that he gave claimant a no-release note in June, at her request, without even seeing her. He testified that to "give her the benefit of the doubt" he took her out of work indefinitely while performing tests to try to substantiate her claims. The objective tests, however, did not show evidence of

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[57] ***Carey* at *4 (emphasis added).**

[58] **Del. Supr., 773 A.2d 379, 382 (2001).**

total disability. When Claimant asked Dr. Godfrey if she could go to work at Playtex he released her. After she went back she felt she couldn't do her work and called him.[59]

[59] **Godfrey Dep at 47-48. The facts here do not show that Dr. Godfrey "insisted" Claimant remain unemployed. As noted in *Gilliard-Belfast*, "[t]hirty years ago, the Superior Court held that ' . . . [a claimant] remains 'disabled' from the viewpoint of workmen's compensation so long as his treating physician *insists* that he remain unemployed . . . .'" 754 A.2d at 254 (citing *Malcolm v. Chrysler,* Del. Super., 255 A.2d 706, 710 (1969))(emphasis added).**

Finally, there are procedural difficulties with Claimant's contention that she was entitled to total disability from the time her treating doctor took her out of work *until the date of the Board's decision* because the employer has the Petition for Review "mechanism" (under 19 *Del. C.* § 2347) to terminate doctor-ordered benefits.[60]

First, setting aside the issue that Claimant was never granted the right to total disability benefits by the Board, under the Delaware workers' compensation statute when an employer's petition to terminate is granted, the benefits are almost always ended *as of the date of the filing of the employer's Petition,* not the date of the hearing or the date of the Board's decision.[61] There is no basis to request total disability benefits from the doctor's no-work note until the date of

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[60] **App. Op. Br. at 13.**

[61] ***See, Wade* 773 A.2d at 380-381 (*aff'g* Board Order terminating benefits as of date of filing petition (March 1999), not date of IAB hearing (August 1999); *cf., Brenda Phillips v. American Cancer Soc.*, Del. Super., 1993 WL 485889, Bifferato, J. (Sep. 29, 1993) (holding that employer's petition to terminate benefits is normally cut off as of the date of filing petition; however, in this case, an exception would be made to cut off benefits as of the date of the hearing because claimant's doctor surprised her at the hearing–testifying adversely against her that he was releasing her to work).**

the *hearing* or the date of the Board's *decision.*

The second procedural difficulty with Claimant's interpretation of the Petition for Review termination mechanism is that, under Claimant's scheme, she would not have been granted a Board order for total disability benefits. Under § 2347, the Board is required to terminate *something*–i.e., an award or an agreement. In cases where the parties do not agree, if the Board does not issue an order upon the doctor's finding of total disability, the employer cannot seek to terminate the doctor-ordered benefits. "Compensation payable to an employee, under [§2347], shall *not terminate* until and unless the Board enters an award ending the payment of compensation after a hearing *upon review of [a prior] agreement or award* . . . ."[62] Unless the Board is now mandated to issue non-discretionary total disability orders upon presentation of a doctor's note, an employer is ineligible to petition for termination of those benefits. Even the Supreme Court in *Gilliard-Belfast*, and the Superior Court in *Ham*, remanded those cases back to Industrial Accident Board for the entry of orders consistent with the court's finding of total disability. The employers could not be made to pay total disability on the basis of the doctor's script alone (*even if* the Supreme Court found the doctor's order valid).

Under § 2347, when total disability is not agreed upon by the parties, upon presentation to the Board of a no-work note from a treating physician, the Board

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[62] **19 *Del. C.* § 2347(emphasis added).**

would have to issue an Order awarding total disability benefits. It would have no discretion. It is unlikely that the Delaware Supreme Court in *Gilliard-Belfast* meant to go so far.

For the foregoing reasons, the decision of the Board in Julia Steele v. Animal Health Sales, Inc. is AFFIRMED.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File