IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

REBA HUGHES,	)	
	)	
Claimant Below–	)	
Appellant and	)	
Cross-Appellee,	)	
	)	
v.	)	C.A. No. 99A-11-003 HDR
	)	
GENESIS HEALTH VENTURES,	)	
	)	
Employer Below–	)	
Appellee and	)	
Cross-Appellant.	)	

Submitted: April 4, 2001
Decided: June 28, 2001

Walt F. Schmittinger, Esq. of Schmittinger & Rodriguez, P.A., Dover, Delaware, for Claimant Below-Appellant and Cross-Appellee.

R. Stokes Nolte, Esq. of Wilmington, Delaware, for Employer Below-Appellee and Cross-Appellant.

Upon Claimant's Appeal from a Decision
of the Industrial Accident Board to Terminate
Temporary Total Disability Benefits
REVERSED
Upon Employer's Cross-Appeal from a Decision
of the Industrial Accident Board to Award
Partial Permanent Impairment Benefits
and to Authorize Surgery
AFFIRMED

RIDGELY, President Judge

Hughes v. Genesis Health Ventures
99A-11-003 HDR
June 28, 2001

O R D E R

This 28th day of June, 2001, upon consideration of the parties' briefs and the record below, it appears that:

(1) Reba Hughes ("Claimant") and Genesis Health Ventures ("Employer") separately appeal from the November 15, 1999 decision of the Industrial Accident Board ("Board"). The Board granted Claimant permanent partial disability benefits for a 14% impairment of the cervical spine, authorized cervical disk surgery and awarded medical witness fees and attorneys fees. The Board also granted Employer's petition for review in part by terminating Claimant's total disability benefits and awarding temporary partial disability benefits of $17.61 per week. Claimant appeals the termination of her temporary total disability benefits. Employer appeals the award of partial permanent impairment and authorization for surgery.

(2) The Claimant, age forty-seven, had worked for the Employer as a dietary aide since 1989. The Claimant was first injured in 1993 when she felt a sharp pain in her upper left arm while lifting large tubs of milk containers. She received treatment for this injury and entered an agreement with the Employer's worker's compensation carrier. Claimant returned to work in the same position. Additionally, the plaintiff filed injury reports in 1994 and 1995 for the same type of pain in the same area of her arm and shoulder. She missed some time from work after the 1994 accident and underwent additional therapy. The Claimant re-injured herself in 1997 when she was again lifting tubs of milk. At the time of the 1997 accident, her complaints had expanded from the upper arm to include the neck and shoulder. She has had chronic pain since and has been out of work since May, 1988 due to her doctor's orders. The

Claimant testified that she still endures considerable pain, and her pain worsened when she tried to work for one day since May, 1988. Prior to the Board's decision of November 15, 1999, the Claimant was receiving temporary total disability benefits and was under a no work order from her treating physician.

(3) In reviewing the factual decisions of an administrative agency in Delaware, the function of this Court is to determine whether the agency's conclusions are supported by substantial evidence and free from legal error.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] This Court does not weigh the evidence, determine questions of credibility or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4] The Court must also determine whether the Board's decision is free from legal error.[5] The Court's review of alleged legal errors is *de novo.*[6]

(4) The Claimant appeals the decision of the Board terminating temporary total disability benefits in favor of temporary partial disability benefits. Separately,

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[1] ***General Motors v. Freeman*, Del. Supr., 164 A.2d 686, 689 (1960); *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66-67 (1965); *Hartnett v. Coleman*, Del. Supr., 226 A.2d 910, 911 (1967).**

[2] ***Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994).**

[3] ***Johnson* at 66.**

[4] **29 *Del. C.* § 10142(d).**

[5] ***Brooks v. Johnson*, Del. Supr., 560 A.2d 1001, 1002 (1989).**

[6] ***Id.***

the Employer appeals the decision of the Board on two grounds. First, the employer alleges that Dr. Rodgers' causation opinions were not based on substantial competent evidence. Second, the Employer asserts that the Board's conclusion that the statute of limitations was tolled was not based on competent evidence.

(5) First, the Court will consider the Board's finding that the Claimant was not totally disabled. The Board terminated the Claimant's total disability benefits on the basis that she was neither physically totally disabled as a result of her injury nor economically disabled.[7] The Claimant challenges this finding both legally and factually.

[7] ***Hughes v. Genesis Health Ventures*, IAB Hearing Nos. 993320 and 1115112 (November 15, 1999) ("Decision") at 11-12.**

Unquestionably, total disability encompasses both physical disability and economic disability.[8] The term "total disability" is not to be interpreted as utter helplessness, but rather total disability means a disability which prevents an employee from obtaining employment commensurate with his qualifications and training.[9] The degree of compensable disability depends on impairment of earning capacity.[10]

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[8] ***Joynes v. Peninsula Oil Company*, Del. Super., C.A. No. 00A-06-001, Witham, J. (March 14, 2001).**

[9] ***Hartnett* at 913.**

[10] ***Id.***

With respect to the issue of work restrictions, the Delaware Supreme Court has decided the case of *Gilliard-Belfast v. Wendy's*.[11] *Gilliard* held that a claimant who can only resume some form of employment by disobeying the orders of his treating physician is totally disabled, at least temporarily, regardless of his capabilities.[12] In *Gilliard* the claimant was told by her physician not to return to work while she waited for her surgery, scheduled to occur within a few weeks. In fact, the surgery did not take place for eight months. The IAB found that it was unreasonable for the employee to be out of work for eight months waiting for surgery; therefore, she was not totally disabled during that time. The Supreme Court found that the treating doctor's "no work" order was controlling and an employee should not be expected to disobey her doctor's orders by returning to work.[13] If a treating physician's order not to work is disregarded, "the claimant who returns to work not only incurs the risk of further physical injury but also faces the prospect of being denied compensation for that enhanced injury."[14]

The instant case is similar to *Gilliard*. The Claimant's treating physician, Dr. Quinn, ordered the Claimant not to return to work because he felt that work would unduly exacerbate her existing condition.[15] As in *Gilliard*, doctors who were

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[11] ***Gilliard-Belfast v. Wendy's,* Del. Supr., 754 A.2d 251 (2000).**

[12] ***Gilliard* at 254.**

[13] ***Id.***

[14] ***Gilliard* at 253.**

[15] **Decision at 11.**

independently examining the Claimant and not treating her found the Claimant capable of light duty work.[16] The Board subsequently relied on Dr. Rodgers' and Dr. Sopa's findings that the Claimant was capable of returning to light duty work in terminating her total disability benefits.[17]

The *Gilliard* Court rejected the independent medical examination findings as controlling, even though, as is the case here, the most recent independent medical exam and findings occurred after the treating physician had put the claimant on a "no work" order.[18] The Supreme Court decided that if the employer disagreed with the "no work" order, the employer should have requested the claimant's "treating

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[16] **Dr. Rodgers and Dr. Sopa found the Claimant capable of light duty work. Decision at 11.**

[17] **Decision at 11.**

[18] ***Gilliard* at 253.**

physician to reconsider his 'no work' order."[19]

[19] ***Gilliard* at 253.**

In support of the Board's findings that the Claimant was not temporarily totally disabled, the Employer argues that Claimant was under the impression that she was released for light duty work and even introduced evidence of her "job search" log depicting her efforts to find work. However, I find no reference in the Board's decision that it considered the Claimant's testimony or job search log in deciding the issue of temporary total disability.[20] Even so, it is the no work order of Dr. Quinn which is controlling under *Gilliard*.

I find on this record that the Board erred in determining that the Claimant was not totally disabled contrary to the rationale of *Gilliard*. Because this error requires reversal, I need not address the issue of economic disability.

(6) The Court next turns to the Employer's assertion that the Board improperly relied on Dr. Rodgers' opinions in reaching its decision on permanent impairment and surgery. The Board accepted Dr. Rodgers' findings that the Claimant's 1997 injury was the primary and most likely cause of her permanent impairment and subsequent need for surgery. The Employer alleges that the Board erred when it accepted Dr. Rodgers' opinion because it was not based on medicine or science, but instead was based on logic. The Employer further asserts that Dr. Rodgers' opinions were inconsistent with the medical records presented to the Board.

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[20] **Decision at 11.**

In reviewing the determinations of the Board, this Court must defer to the Board's findings as to credibility of witnesses or other factual findings.[21] Based on the combined uncontroverted testimonies of Drs. Quinn, Rodgers and Sopa, the Board found that the Claimant's neck injuries were long standing and did not occur only as a result of the 1997 injury.[22] Based on the testimonies of both Dr. Rodgers[23] and Dr.

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[21] ***Johnson* at 66.**

[22] **Decision at 8.**

[23] **Decision at 6 ("If there were one point when the cervical injury occurred it was most likely in October 1997. . . The last injury required more extensive treatment and it had a more significant impact on her life.").**

Quinn,[24] the Board further determined that the 1997 injury was the primary cause of the Claimant's current symptoms. The Board relied on Dr. Rodgers' opinion, in conjunction with similar testimony from Dr. Quinn, to make its findings. The findings are supported by substantial evidence.

[24] **Decision at 5 ("In 1997 she aggravated the problem by lifting at work, making her much more symptomatic . . . The last aggravation made her symptomatic enough that she is now a surgical candidate.").**

(7) Employer next argues that the Board erred in rejecting its statute of limitations defense regarding medical expenses. The Board found that the medical expenses which were paid by the Employer relating to Claimant's various accidents since 1993 tolled the statute of limitations. After payments have been made under an agreement or Board award, the statute of limitations does not begin to run until the expiration of five years from the time of the making of the last payment under the agreement.[25] To toll the statute, the payments must be made under an agreement, award, or a feeling of compulsion under the Act.[26]

The Employer disagrees with the Board's findings that its payment of Claimant's medical expenses relating to Claimant's 1993 and 1995 accidents were made under a feeling of compulsion. The Board's opinions must be based solely on the record before it.[27] The Board relied on three pieces of information from the record below to reach its decision. First, Employer agreed to cover Claimant's 1993 arm injury.[28] Second, the Claimant filed an injury report after the 1995 injury specifically referencing a neck injury. Therefore, the Employer was on notice and had reason to believe that the neck injury was compensable and likely made payments accordingly.[29] Third, the 1997 injury was found to be the primary cause of the Claimant's current

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[25] **19 *Del. C.* § 2361(b).**

[26] ***McCarnan v. New Castle County*, Del. Supr., 521 A.2d 611, 616-17 (1987).**

[27] ***Turbitt v. Blue Hen Lines*, Del. Supr., 711 A.2d 1214 (1998).**

[28] **Decision at 9.**

[29] ***Id.***

condition, and the 1997 injury was not subject to any statute of limitations concerns.[30] Therefore, the Board's decision to toll the statute of limitations is supported by substantial evidence in the record.

[30] ***Id.***

Accordingly, the Board's decision to terminate temporary total disability benefits is ***REVERSED***. The decision of the Board to award partial permanent impairment and to authorize surgery is ***AFFIRMED***.

IT IS SO ORDERED.

/s/ Henry duPont Ridgely
President Judge

cmh
oc: Prothonotary
xc: Order distribution