

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

AVON PRODUCTS,                    )  
  )  
    Appellant,                    )  
  )  
        v.                            )  
  )  
KIMBERLY FLAHERTY,            )  
  )  
    Appellee.                    )

C. A. No. 03A-10-009 JEB

Submitted: June 14, 2004  
Decided: September 28, 2004

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

**OPINION**

*Appearances:*

Francis X. Nardo, Esquire, Wilmington, Delaware.  
Attorney for Avon Products.

Robert P. Lobue, Esquire, Wilmington, Delaware.  
Attorney for Kimberly Flaherty.

**JOHN E. BABIARZ, JR., JUDGE**

Employer Avon Products has appealed a decision of the Industrial Accident Board (“Board”) awarding temporary total disability benefits and permanent partial disability benefits to Claimant Kimberly Flaharty. This award was made after the case was remanded to the Board with instructions to grant Claimant’s petition and to determine the appropriate amount of partial disability. While it is highly unusual for the Superior Court in its appellate role to reverse a Board decision based on the testimony of a medical expert, the Court did so in this case, and hereby affirms the Board’s entry of an award for Claimant, as instructed by the Court.

### **FACTS**

Claimant worked at Avon Products as a bin filler, lifting 50- to 80-pound boxes off pallets and placing them on shelves. Claimant hurt her back at home in March 1997 and experienced ongoing back problems culminating in back surgery in April 1999. She returned to work in the same capacity several months later. In April 2001, Claimant left work early because of severe back pain and has not worked since that time. She had a second back operation in May 2001 and subsequently filed a petition for workers’ compensation benefits.

The Board denied Claimant’s petition, finding that her work activities were not a substantial cause of her injury. On appeal, this Court reversed that finding and remanded the case to the Board for an entry of judgment as to temporary total benefits

and for a determination of the appropriate amount of partial disability benefits. The Court denied Employer's motion for reargument. On remand, the Board entered an award for the temporary total disability and held a hearing on the issue of partial disability. The Board then awarded ongoing weekly benefits in the amount of \$171.09 per week, as well as medical witness fees and attorneys fees.

Employer now appeals to this Court, arguing that the Board's decision was not supported by substantial evidence. Claimant asserts that the Board's decision is in concert with this Court's order and should be affirmed.

### **STANDARD OF REVIEW**

In reviewing a decision of the Board, the Court's role is to determine whether the Board's findings are supported by substantial evidence and are free from legal error.<sup>1</sup> Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion.<sup>2</sup> The Court does not weigh the evidence, determine questions of credibility or make factual findings.<sup>3</sup> It merely determines if the evidence is legally adequate to support the Board's findings.<sup>4</sup>

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<sup>1</sup>*Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. 1979). *See also* DEL. CODE ANN. tit. 19, § 3323f(a).

<sup>2</sup>*Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1998).

<sup>3</sup>*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1960).

<sup>4</sup>DEL. CODE ANN. tit. 29, § 10142(d).

## DISCUSSION

Employer argues that there is not substantial evidence to support a finding that Claimant's job duties were a substantial factor in her second back injury. Employer asserts first that the Board's decision on remand to grant the petition was not the product of an orderly and logical deductive process. However, the Board had no choice in the matter. This Court ordered the Board to grant the petition, and the Board had no discretion to do otherwise.

Employer also revisits the medical testimony and renews the position it took on the motion for reargument.<sup>5</sup> Although this issue is not properly before the Court at this stage of the proceedings, the Court reiterates in summary fashion its previous findings because it is unusual for the Superior Court to reverse a decision where the Board purports to rely on expert medical testimony.

First, Dr. Gelman, Employer's medical expert, advised Claimant to avoid repetitive bending, kneeling and lifting weight more than 20 to 25 pounds. Although these activities are exactly what Claimant did on her job as a bin filler, Dr. Gelman stated in his deposition that he did not believe that Claimant's job duties were a substantial cause of her back problems. He found that everyday activities such as

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<sup>5</sup>See *Flaharty v. Avon Products*, Del. Super., C. A. No. 02A-06-006, Babiarz, J. (April 1, 2003).

standing and walking contributed to the back injury. Need it be said that if standing and walking helped cause Claimant's back injury, bending, kneeling and lifting must be a substantial factor in causation? This inherent contradiction in Dr. Gelman's testimony is but one reason that his opinion cannot constitute substantial evidence.

Another reason is Dr. Gelman's careful distinction between a "substantial factor" and "contributing factor." As stated in this Court's prior opinion in this case, the Delaware Supreme Court does not draw such a fine line. In referring to the fact that a pre-existing condition cannot in and of itself produce another injury, the Supreme Court stated as follows:

**Some other contributing factor must be present.** When that factor is the everyday stress and strain of a worker's job, he or she should not be denied on a theory which finds no support in the statutory enactments of the General Assembly.<sup>6</sup>

Furthermore, in its first decision, the Board stated that a claimant must show that her job duties were "**the** substantial cause" of the injury, whereas the law states that she must show that her duties were "**a** substantial cause." This difference is not mere word-smithing. The law in Delaware is that under the usual exertion rule a work injury is compensable even if the claimant had a pre-existing injury if the

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<sup>6</sup>*Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1134 (Del. 1989) (emphasis added).

ordinary stress and strain of employment is a substantial cause of the injury.<sup>7</sup> In this case, there is not substantial evidence to support the Board's initial finding that Claimant's work duties were not a substantial cause of her second injury.

Finally, as the Court noted in its denial of Employer's motion for reargument, this Court did not reweigh the medical evidence but rather viewed the totality of the evidence as opposed to simply isolating Dr. Gelman's statement that Claimant's job was not a substantial cause of her injury from the rest of his testimony. Dr. Gelman was ill-acquainted with Claimant's actual work and focused his testimony instead on what he perceived to be inadequate medical records. Simply put, this is not substantial evidence.

### CONCLUSION

For all these reasons, the Board's decision awarding workers' compensation benefits to Claimant Kimberly Flaharty is *Affirmed*.

***It Is So ORDERED.***

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Judge John E. Babiarz, Jr.

JEB,jr/rar/bjw  
Original to Prothonotary

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<sup>7</sup>*Id.*