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

SUNRISE ASSISTED LIVING, INC.	)	
	)	
Employer-Appellant,	)	
	)	
v.	)	C.A. No. 03A-12-004 RRC
	)	
	)	
KATHLEEN M. MILEWSKI	)	
	)	
Employee-Appellee.	)	

Submitted: July 16, 2004
Decided: October 12, 2004

MEMORANDUM OPINION

UPON APPEAL FROM A DECISION OF THE INDUSTRIAL ACCIDENT BOARD.

AFFIRMED.

John W. Morgan, Esquire, Heckler & Frabizzio, P.A. Wilmington, Delaware, Attorney for Employer-Appellant.

Gary S. Nitsche, Esquire, Weik, Nitsche, Dougherty and Componovo, Wilmington, Delaware, Attorney for Employee-Appellee.

COOCH, J.

I. INTRODUCTION

Appellant Sunrise Assisted Living, Inc. ("Employer") has appealed the denial by the Industrial Accident Board ("Board") of Employer's petition to terminate the benefits of Kathleen M. Milewski ("Employee"). The issue before this Court is whether the Board could give equal or more weight to the lay testimony of Employee about her inability to work, in conjunction with (but not completely aligned with) the supporting testimony of her medical expert, to determine the duration of her work related total disability.

Employer argues that the Board was in error to have accepted Employee's lay testimony when, according to both its medical expert and Employee's medical expert, Employee was able to work in some capacity. Employee asserts, and her medical expert agreed, that she continued to suffer from the injuries sustained in the accident. Employee argued to the Board and on appeal (and contrary to her expert's opinion that she "probably" could return to work, part-time and with restrictions) that she was unable to return to work in any capacity at the time of the hearing.

This Court holds that the Board was entitled to give appropriate weight to the above lay testimony when it was supported in part, but contradicted in part, by expert testimony. The testimony of Employee in conjunction with her expert's medical diagnosis, as to her ongoing

complaints and subsequent treatment, constituted substantial evidence to support the Board's determination that Employee was totally disabled at the time of the hearing. The decision of the Board is affirmed.[1]

II. FACTUAL AND PROCEDURAL HISTORY

The basic facts of this case are not in dispute. Employee had worked for Employer as a licensed practical nurse since December 2002. Employee was injured on April 21, 2003. There is no dispute that Employee was injured in the course of her employment and Employer began paying her total disability benefits. In July 2003, Employer filed a petition to terminate the disability benefits because it believed that Employee was able to return to work as of June 9, 2003. A hearing was held on November 14, 2003 and the petition was denied in the Board's decision of December 1, 2003.[2] Employer then filed this appeal of the Board's decision to the Superior Court.

A. The Board's Summary of the Evidence

Employer has accepted, "for the purposes of [the] appeal," the Board's summary of the testimony. That summary can be paraphrased as

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[1] Employer has also argued on appeal that the Board did not have substantial evidence to support its finding that appropriate work was available in the open labor market. Because this Court finds that there was substantial evidence to support the Board's finding of total disability the Court need not reach this issue.

[2] The petition was heard pursuant to 19 *Del. C.* § 2345 by a Hearing Officer.

follows:

Dr. Robert Smith, a board certified orthopedic surgeon, testified by deposition on behalf of Employer in which he opined that Employee could have returned to work effective June 9, 2003. Dr. Smith examined Employee twice: on June 9, 2003 and October 20, 2003. The exams consisted of a review of various diagnostic studies of Employee's spine and knee. He testified that both a physical and neurological exam presented normal objective findings. Dr. Smith testified that Employee had suffered a sprain/contusion of the wrist, hand, knee and right hip; however, he opined that the injuries had diminished or resolved as of the June 2003 exam.

On cross-examination, Dr. Smith acknowledged that he had disregarded the results of two MRIs and EMG taken of Employee. He testified that an MRI performed in May 2003 revealed bulged discs at C5-C6 and C6-C7 and that a second MRI taken in July 2003 identified moderate disc desiccation and minimal annular bulging in addition to moderate bilateral carpal tunnel syndrome. The EMG taken on June 27, 2003, after Dr. Smith's first examination of Employee, showed left S1 radiculopathy. Dr. Smith testified that he disagreed with the analyses of the MRIs and he explained the discrepancy as due to a misreading of the test results by "other clinicians."

Employee testified that the accident occurred on April 21, 2003 while Employee was feeding a patient. Employee tripped over a geriatric chair that had been left in the patient's room. She then complained of pain in her neck, lower back and hands. Employee has also had pain in both hands since the accident and she claimed that her left hand is useless. Employee received chiropractic treatment for her injuries, which she felt had alleviated some of her pain. She testified that she has not been able to work because of her neck and back pain in conjunction with the pain in her hands. The Board noted that Employee was born with scoliosis and has suffered from pain in her back throughout her life.

Dr. Bruce Grossinger, a board certified neurologist, testified for Employee by deposition and opined that she "probably" could have returned to work as of October 21, 2003 in a part-time sedentary capacity. Dr. Grossinger examined Employee twice: on June 13, 2003 and October 21, 2003. Dr. Grossinger took Employee's medical history including how the accident occurred and her subsequent treatment. He reviewed the diagnostic studies that indicated abnormal disc bulges at C5-C6 and C6-C7. He performed a physical exam which revealed mild weakness in the upper extremities, accompanied by tenderness and spasm in her neck and back. Dr. Grossinger also testified that he noted positive Spurling's and root

tension signs on the left side of Employee's body. He discounted the findings as to her lower back because of her history of scoliosis and a negative rate on the EMG.[3] Grossinger testified that Employee did not present any indications of symptom magnification or embellishment.

Dr. Grossinger's diagnosis included two traumatic cervical disc injuries, median nerve injuries, lumbar facet syndrome and lumbar degenerative joint disease, which were all causally related to the April 21, 2003 accident. Dr. Grossinger made the same findings at the October exam. He recommended that Employee discontinue her "open-ended" chiropractic treatment and to obtain a functional capacity evaluation. Dr. Grossinger opined that Employee could return to work in a sedentary position; however, she remained disabled from her position as a nurse. On cross-examination, Dr. Grossinger testified that Employee could work a four-hour day with restriction on lifting, squatting and bending and with regular position changes. He testified that she could "probably" perform this regimen now.

B. The Board's Findings of Fact and Conclusions of Law

The Board found that Employer had not met its burden of proving by a preponderance of the evidence that Employee was no longer totally

[3] Employee is apparently not contesting the Board's finding that her lower back pain is from a pre-existing condition.

disabled.[4] The Board held that to demonstrate that total disability has ended, Employer must show Employee can work with or without restriction.[5] The Board further held that Employer must prove that Employee is not partially disabled if there is evidence of some continuing disability that could affect her earning capacity.[6]

The Board found that the testimony of Dr. Smith (that Employee's injuries had resolved and she was capable of returning to work) was unsupported by the evidence and thereby rejected the essence of his testimony. The Board found Dr. Smith's testimony to be "contradictory and confusing in light of the documented medical evidence."[7] The Board did not accept Dr. Smith's testimony that the discrepancies between his diagnosis and the diagnostic exams was due to a misreading by other clinicians.[8]

The Board accepted Dr. Grossinger's testimony "as far as he described [Employee's] ongoing complaints and subsequent treatment."[9]

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[4] IAB Decision at 8.

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *Id.* at 9.

[9] *Id*.

The Board noted that Dr. Grossinger had found "spasm and guarding on physical exam."[10] The Board further noted that after reviewing the same records as Dr. Smith, Dr. Grossinger found that Employee "suffered from both neck and upper extremity injuries," and that she could not return to work in her capacity as a nurse.[11] However, the Board rejected Dr. Grossinger's testimony that Employee could return to work on a part-time basis.[12] The Board found that his testimony on this issue was "less than convincing when he stated that [Employee] could 'probably' return to work."[13]

The Board found Employee's live testimony that she could not work in any capacity at that time of the hearing to be credible.[14] The Board also agreed with Dr. Grossinger that Employee could not return to work in her capacity as a nurse.[15] The Board found that "the record is well-documented as to [Employee's] limitations and ongoing complaints.[16] The Board

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[10] IAB Decision at 9.

[11] *Id*.

[12] *Id.* at 10.

[13] *Id*.

[14] *Id*.

[15] *Id.* at 9.

[16] *Id*.

rejected Dr. Grossinger's testimony as to Employee's ability to work part-time because it had "personally view[ed] [Employee] and witnessed the pain and discomfort she displayed."[17] The Board found that "[in]n light of [Employee]'s testimony . . . given her complaints of ongoing pain and discomfort, and use of Oxycontin, she cannot presently work in any capacity."[18]

III. STANDARD OF REVIEW

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[19] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[20] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[21] The

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[17] IAB Decision at 9.

[18] *Id.* at 10.

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

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

[21] *Johnson*, 213 A.2d at 66.

reviewing Court must view the facts in a light most favorable to the party prevailing below;[22] therefore, it merely determines if the evidence is legally adequate to support the agency's factual findings.[23] When factual determinations are at issue, the reviewing Court should defer to the experience and specialized competence of the Board.[24] If the decision is supported by substantial evidence, the Court must affirm the decision of an agency even if the Court might have, in the first instance, reached an opposite conclusion.[25]

IV. CONTENTIONS OF THE PARTIES

A. Employer's Argument

Employer argues that there was not substantial evidence to support the Board's finding that Employee was totally disabled because there was uncontroverted expert testimony that she was able to work. It asserts that the Board erroneously "rejected the opinions of all medical experts."[26]

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[22] *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

[23] 29 *Del. C.* §10142(d).

[24] 29 *Del. C.* §10142(d); *Histed v. E.I. DuPont De Nemours & Co.*, 621 A.2d 340, 342(Del. 1993); *Julian v. Testerman*, 740 A.2d 514, 519 (Del. Super. Ct. 1999), *aff'd* 737 A.2d 530 (Del. 1999).

[25] *Brogan v. Value City Furniture*, 2002 Del. Super. LEXIS 88 *6.

[26] Appellant's Opening Brief at 8 (hereinafter "Appellant's Op. Br. at _.").

Employer argues that the Board cannot "choose to ignore uncontroverted medical evidence."[27] It asserts that the Board may reject the testimony of one expert and accept the testimony of another expert, but it must accept the testimony of one of the testifying experts.[28] Employer argues that "it is axiomatic that the Board in this case cannot simply rely on the testimony of the [Employee] to the exclusion of all medical evidence."[29]

B. Employee's Response

Employee argues that the Board's decision to find that she was totally disabled at the time of the hearing and unable to work in any capacity was supported by substantial evidence . Employee asserts that "the [Board] was within [its] discretion to carefully review evidence and make a determination about what portions of the evidence were credible and which were not."[30] Employee argues that there were "objective signs of injury including disc abnormalities, abnormal neurological tests [and] objective findings on examination."[31] Employee further argues that "the Hearing Officer may

[27] Appellant's Op. Br. at 8.

[28] *Id*. at 13-14.

[29] *Id*. at 13.

[30] Appellee's Answering Brief at 10 (hereinafter "Appellee's Ans. Br. at _.").

[31] Appellee's Ans. Br. at 10.

reject in whole or in part a portion of an expert's opinion as long as there is substantial evidence to support the Hearing Officer's decision."[32]

V. DISCUSSION

A. Legal Background

The issue before this Court is whether the Board could give equal or more weight to the lay testimony of Employee about her inability to work, in conjunction with (but not completely aligned with) the supporting testimony of her medical expert, to determine the duration of her work related total disability. This Court holds that the Board was entitled to give appropriate weight to that lay testimony when it was supported by medical evidence and/or even when it contradicted expert testimony. The testimony of Employee in conjunction with her expert's medical diagnosis as to her ongoing complaints and subsequent treatment was competent evidence to support the Board's determination that Employee was totally disabled at the time of the hearing.

In *Playtex v. Leonard*, this Court noted that Delaware law concerning the function of the Board is that "[t]he Board, sitting as the trier of fact, is permitted to pass on the credibility of witnesses and to accord their

[32] Appellee's Ans. Br. at 11.

testimony the appropriate weight."[33] This Court held that "[t]he function of resolving conflicts in, and reconciling, inconsistent testimony and evidence is exclusively reserved for the Board. [Citation omitted]. It is exclusively the Board's role to resolve conflicts in the testimony and weigh the credibility of each witness."[34] The Delaware Supreme Court has held that "the Board [is] entitled to accept the testimony of one medical expert over the views of another."[35]

Causation or duration of an employee's medical condition can be determined by the Board based in part upon the lay testimony of the employee. A prominent secondary source states that:

> "[a]s to issues touching disability, it has been held that the fact-finders may find disability when the medical testimony denies its existence, or may find a degree of disability different from any degree supported by medical testimony, or in the case of conflicting medical testimony, adopt a percentage of disability somewhere between the figures favored by doctors."[36]

Larson's further explains that the reason for permitting awards in the face of

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[33] *Playtex Products, Inc., v. Leonard*, 2002 Del. Super. LEXIS 433 * 16.

[34] *Playtex Products, Inc.,* 2002 Del. Super. LEXIS 433 * 18; *see Christiana Health Care System, VNA v. Taggart*, 2004 Del. Super. LEXIS 78 (holding that "[i]t is not within the purview of this Court to resolve issues of credibility and assign weight to evidence presented.").

[35] *Standard Distributing Co. v. Nally*, 630 A.2d 640 (Del. 1993).

[36] 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 128.03(3) (2003).

contradictory medical testimony is because "lay testimony, including that of the [employee], is of probative value in establishing such simple matters as the existence and location of pain . . . and the actual ability or inability of [employee] to perform work."[37] Another secondary source states that "[w]hen a commission determines the permanent disability of a workers' compensation [employee] . . . both expert and lay testimony should be considered when deciding the extent of an employee's disability."[38] This Court in *General Metalcraft, Inc. v. Hayes* held that "medical testimony in combination with lay testimony is sufficient evidence to support the finding of causation."[39] In *Custom Iron Shop v. Roxbury* this Court held that "[w]hen the medical evidence is uncertain, the Board may properly rely on other credible evidence in making its factual determinations."[40]

In *Streett v. State,* as in the instant case, there was no dispute as to the existence of an injury or its causation; the dispute was as to the duration of the disability.[41] There the dispute centered around whether the employee

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[37] Larson, Larson's Workers' Compensation Law § 128.04 (2003).

[38] 82 Am Jur 2nd *Workers Compensation* § 585 (2004).

[39] *General Metalcraft, Inc. v. Hayes*, 1982 Del. Super. LEXIS 864 *3.

[40] *Custom Iron Shop v. Roxbury*, 1999 Del. Super. LEXIS 346 *6.

[41] *Streett v. State*, 669 A.2d 9, 12 (Del. 1995).

had been disabled for three days as required by 19 *Del. C.* § 2321, the minimum duration requirement for workers' compensation benefits, or less than three days. The Supreme Court found that "[t]he medical evidence as to the duration of [the employee's] disability was relatively weak and somewhat inconsistent." The Supreme Court held that "duration is an issue, similar to causation, where medical evidence may be supplemented by other credible evidence. [Citation omitted]. Here, the other credible evidence was [the employee's] testimony that she was suffering significant pain and would have been unable to work for one week following the accident."[42] In a similar case from Pennsylvania, the Court held that "[t]he claimant's testimony that her hand remained infirm sufficiently supported the award" of benefits even when her attending physician testified that the claimant's hand had been completely healed.[43]

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[42] *Streett*, 669 A.2d at 12.

[43] *Scott Paper Co. v. Workmen's Comp. App. Bd.*, 325 A.2d 480 (Pa. Commw. Ct. 1974); *see also* Larson's Workers' Compensation Law § 128.04D12 for numerous cases standing for the proposition that lay testimony of the claimant can be given equal or more weight by a worker' compensation board when determining the extent and duration of disability.

B. Analysis of conflicting testimony about the medical condition of Employee and whether she could return to work.

1. Dr. Smith's Testimony

The Board rejected Dr. Smith's testimony that Employee's injuries had resolved or diminished by June 2003 and that she could return to work because it found his testimony unsupported by the evidence. Dr. Smith testified that Employee had normal objective findings as to both physical and neurological exams and that in his opinion she could have returned to work as of June 2003. However, the Board ultimately rejected this testimony by Dr. Smith because it found that "Dr. Smith conducted little, if any, physical exams during the two visits" Employee had with him.[44] The Board also found Dr. Smith's testimony unsupported by the evidence because the MRIs showed bulged discs, which Dr. Smith admitted but which he stated "he cannot identify the etiology of."[45] The Board found his testimony to be "contradictory and confusing in light of the documented medical evidence."[46]

2. Dr. Grossinger's Testimony

The Board accepted in part and rejected in part the testimony of Dr.

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[44] IAB Decision at 10.

[45] *Id.* at 9.

Grossinger, Employee's expert, that she continued to suffer from her injuries but that she "probably" could return to work part-time in a sedentary job. Dr. Grossinger testified that Employee had abnormal disc bulges, mild weakness in her upper extremities, and tenderness and spasm in her neck. Dr. Grossinger also testified that Employee did not present any indication of symptom magnification or embellishment. The Board rejected only Dr. Grossinger's testimony about Employee's ability to return to work on a part-time basis.[47] The Board stated that "his opinion appeared less than convincing when he said [Employee] could 'probably' return to work," and that Dr. Grossinger "did not review the LMS prior to his testimony nor opined as to what positions could accommodate the restrictions he placed on [Employee]."[48]

3. Employee's Testimony

The Board accepted Employee's testimony that she was unable to work in any capacity. The Employee testified that she had pain in her hands and neck. She also testified that she was unable to work at all because of the pain. Additionally, the Board had the opportunity to hear Employee's live

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[46] *Id.* at 8.

[47] IAB Decision at 10.

[48] *Id.*

testimony in assessing her credibility as compared to the Board reviewing the experts' testimony through depositions. The Board found that Employee's testimony was credible as it "had the chance to personally view [Employee] and witnessed [her] pain and discomfort during the hearing."[49]

4. The Cases Cited by Employer are Inapposite

Employer relies on several cases to support its position; however, the cases cited are not on point. The first cases upon which Employer relies, *Standard Distributing Co. v. Nally,* and *DiSabatino v. Wortman*, are cited for the proposition that the Board may choose to accept the testimony of one expert over the testimony of another.[50] This, however, is not the question before this Court. The Board in the instant case did choose to accept part of the testimony of one expert over the testimony of another expert. It found Employee's expert, Dr. Grossinger, more credible as to Employee's medical condition than Employer's expert, Dr. Smith. The issue in this case, however, is whether the Board could give equal or more weight to the lay testimony of Employee in conjunction with supporting expert testimony.

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[49] *Id.* at 9, 10.

[50] *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993) (holding that "the Board was entitled to accept the testimony of one medical expert over the views of another.") (citing *DiSabatino v. Wortman*, 453 A.2d 102, 105 (Del. Supr. 1982)); *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1064 (Del. 1999) (holding that "in the usual context, [when there are] conflicting expert opinions each supported by substantial evidence . . . the Board would be free to accept one expert's opinion over another").

The second set of cases upon which Employer relies, *Diamond Fuel Oil v. O'Neal*, *Air Mod Corporation v. Newton*, and *Ware v. Baker Driveway, Inc.*, are cited for two propositions: 1) that the Board should have accorded "substantial weight" to Dr. Grossinger's testimony because he was the treating physician and 2) that the Board should have accepted his testimony (that Employee could "probably" return to work,) because it was given to a reasonable medical probability.[51] The Board did not give "substantial" weight to his testimony because it found part of that testimony unpersuasive in light of the medical evidence and Employee's own testimony. However, the Board did give weight to Dr. Grossinger's testimony and accepted his medical opinion as to Employee's condition. The Board did not, however, accept his opinion that Employee could "probably" return to work. The Board, as the trier of fact, must weigh the credibility of the witnesses and it found Dr. Grossinger's opinion, that Employee could "probably" return to work, to be "less than convincing."

[51] *O'Neal*, 734 A.2d at 1066 (holding that the Board should not accept as substantial evidence opinions that are couched in terms such as "expectation" or "suspicion," but it should accept as substantial evidence medical opinions that are expressed as "more likely than not," "reasonable medical probability," and "most probable"); *Air Mod Corporation v. Newton*, 215 A.2d 434, 438 (Del. 1965) (holding that the Court "must recognize . . . the understandable reluctance of medical witnesses to be dogmatic . . . [and] [i]n the thinking and reasoning of a physician . . . the realm of probability and possibility often overlap"); *Ware v. Baker Driveway, Inc.*, 295 A.2d 734, 738 (Del. Super. 1972) (holding that the Board should have relied on testimony "within the limits of medical probabilities to the exclusion of possibilities and speculation").

VII. CONCLUSION

This Court must be faithful to the confines of appellate review of an administrative agency's decisions as outlined in 29 *Del. C.* § 10142(d) and case law. The function of the Court is to determine whether the Board's decision was supported by substantial evidence and is not to weigh the evidence, determine questions of credibility, or make its own factual findings. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. As the Supreme Court has held, "duration is an issue, similar to causation, where medical evidence may be supplemented by other credible evidence."[52] This Court has viewed the facts in a light most favorable to the party prevailing below (Employee) and has determined that the evidence was legally adequate to support the Board's decision. Where appropriate, this Court has deferred to the experience and specialized competence of the Board. It has affirmed the Board's decision without consideration of whether the Court might have reached an opposite conclusion had the case been before it originally.

Contrary to Employer's position (that the Board rejected all of the medical testimony and relied solely upon Employee's testimony), the Board in fact used its expertise and experience to assess the credibility of all the

witnesses, including Employee, and to determine what evidence to accept. It found that Dr. Grossinger "reviewed the same records reviewed by Dr. Smith, and found [Employee] suffered from both neck and upper extremity injuries."[53] The Board explicitly stated that it "accepted the testimony of Dr. Grossinger, as far as he described Employee's ongoing complaints and subsequent treatment."[54] Taken together, the medical testimony of Dr. Grossinger about Employee's ongoing complaints and subsequent treatment and Employee's own testimony about her pain and inability to work was substantial evidence to support the Board's decision that she was totally disabled at the time of the hearing.

This Court holds that the Board could accord equal or more weight to the lay testimony of an employee about her inability to work, in conjunction with (but not completely aligned with) the supporting medical testimony of her medical expert, to determine the duration of her total disability. The Court further holds that the Board was entitled to give appropriate weight to that lay testimony when it was supported by medical evidence and/or when it contradicts the expert testimony. The testimony of Employee in

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[52] *Streett*, 669 A.2d at 12.
[53] IAB Decision at 9.

[54] *Id.*

conjunction with her medical expert's diagnosis as to her ongoing complaints and subsequent treatment was competent evidence to support the Board's determination that Employee was totally disabled at the time of the hearing.

For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED.**

IT IS SO ORDERED.

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oc: Prothonotary
Industrial Accident Board