SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

P.O. Box 746
COURTHOUSE
GEORGETOWN, DE 19947

November 1, 2004

Edward C. Gill, Esquire
Law Office of Edward C. Gill, P.A.
P.O. Box 824
Georgetown, DE 19947

Cassandra Roberts, Esquire
Young, Conaway, Stargatt, and Taylor
1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19899

RE: Peden v. Dentsply International
C.A. No. 03A-11-003 ESB

Date Submitted: July 23, 2004

Dear Counsel:

This is my decision on Nancy Peden's ("Peden") appeal of the Industrial Accident Board's ("Board") decision denying her Petition to Determine Compensation Due. The Board's decision is affirmed for the reasons set forth below.

STATEMENT OF THE FACTS

Peden worked as a production operator for Dentsply International ("Dentsply"). Peden slipped and fell at work on December 6, 2002. Peden initially complained of pain in her ankle and knee. Peden now alleges she suffered numerous injuries to her neck, back, and extremities. The parties agree that Peden was involved in a workplace accident on December 6, 2002, that Peden received temporary, short-term disability benefits from Dentsply for the period from December 16, 2002 to May 17, 2003, and that Dentsply is entitled to a credit in the amount of $4,329.60 if

workmen's compensation benefits are awarded. The parties disagree on the nature and extent of Peden's injuries.

Peden claims that she did not have any problems performing her job prior to the accident. However, upon having her recollection refreshed, Peden recalled a series of ailments she experienced prior to the accident. In 2000, Peden sought treatment for numbness and weakness in her hands and she complained about her inability to focus and dizziness. In 2002, prior to the accident, Peden received at least one injection into her shoulder for pain.

Dr. Wilson, Peden's primary care physician since March 2002, testified by way of deposition. He indicated that Peden did not have any prior disabling injuries or restrictions. However, Dr. Wilson did not review the medical records of Dr. Girgis, who was Peden's former primary care physician. Peden was examined by Dr. Wilson on December 19, 2002. The findings of that examination indicated that Peden had muscle spasms in her back and a tender sacroiliac joint. Based on an MRI examination, Dr. Wilson identified a herniated disc in Peden's cervical spine. Dr. Wilson testified that the herniated disc resulted from the fall on December 6, 2002. Dr. Wilson further testified that Peden continues to suffer from the fall, experiencing pain in her lower back and shoulders, numbness in her hands, and a difficulty in concentration due to the medications she is currently taking. Dr. Wilson opined, that as a result of the injuries, Peden is unable to work in any employment. Dr. Wilson also had Peden on "no-work" status. Peden did not ask Dr. Wilson if she could return to work in some capacity. However, if she had asked him, Dr. Wilson would not have returned Peden to work. Much of Dr. Wilson's opinion is based upon Peden's subjective complaints of pain, his findings, and a seven month old review by Dr. Rowe.

Dr. Fink, a board certified neurologist, testified by deposition on behalf of Dentsply. He performed two examinations of Peden. The first examination was on March 20, 2003. The second examination was on August 11, 2003. Dr. Fink reviewed the test results and the medical records of the doctors who had previously treated Peden. After a review of the records and the March 20, 2003, examination, Dr. Fink opined that Peden was improving. Dr. Fink did not believe that Peden was totally disabled or that she should be on "no-work" status. He diagnosed Peden with a soft tissue injury to her upper, middle, and lower back, as well as her arms. In contrast to Dr. Wilson, Dr. Fink deemed the herniated disc to be degenerative in nature rather than traumatically induced. Based upon Peden's subjective complaints, Dr. Fink testified that Peden could work in a sedentary manner. Furthermore, Dr. Fink believed that Peden would benefit from physical therapy treatment. However Peden declined to undergo physical therapy. Dr. Fink's second examination on August 11, 2003 produced results similar to the March 20, 2003 examination. Based upon the second examination, Dr. Fink testified that Peden's complaints were out of proportion with her injuries. Dr. Fink believed that Peden was still capable of returning to work in a sedentary-type capacity. Dr. Fink also testified that in Dr.Girgis's notes from October 2001, Peden insisted to Dr. Girgis that she did not want to return to work and requested a no-work slip from him following her recovery from gastroenteritis. At no point was Peden considered a surgical candidate during this process.

The Board denied Peden's Petition to Determine Compensation Due, concluding that Peden did not suffer a compensible injury. This decision was based upon the Board's finding that Dr. Fink's testimony was more credible than Dr. Wilson's testimony. The Board believed that Dr. Fink stood in a better position, as a board-certified neurologist, to make a credible decision regarding the extent of Peden's injuries. Dr. Fink believed that Peden suffered a soft tissue injury to her back, but

the herniated disc was caused by an arthritic process. The Board also had difficulty discerning the extent of Peden's injuries prior to the accident, as Dr. Wilson presented no testimony on the matter.

Standard of Review

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate 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] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support it's conclusions.[5]

---

[1] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

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

[3] *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66 (Del. 1965).

[4] 29 *Del.C.* § 10142(d).

[5] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. Ct. 1958).

Discussion

I. Substantial evidence exists to support the Board's decision to deny Peden's Petition for Compensation Due.

Peden argues that the Board's decision denying her Petition to Determine Compensation Due for temporary total disability is not supported by the record. The Board indicated that it relied upon Dr. Fink's medical analysis of Peden's condition in determining the nature and extent of her injury. Peden contends that this evidence does not rise to the level of substantial evidence, considering Dentsply admitted there was a work-related injury and her medical expenses were reasonable.

To weigh the credibility of testifying witnesses is within the purview of the Board.[6] The Board based its decision on the credibility of the medical experts. It concluded that given Dr. Fink's expertise as a Board Certified Neurologist, he was in a better position to assess Peden's medical condition because he had "an opportunity to view situations such as that present in the instant matter on numerous occasions."[7] The examinations conducted by Dr. Fink did not provide objective indications that corresponded with the alleged injuries. Dr. Fink opined that while Peden may have suffered a soft tissue injury from the fall, he could not determine if the other injuries were pre-existing conditions or resulted from the fall. Dr. Fink concluded from a review of the evidence that Peden could work in a full-time sedentary capacity.

The Board disregarded the opinion offered by Dr. Wilson on a couple grounds. First, as the treating physician for Peden, Dr. Wilson did not review the records of Peden's prior medical history. During the hearing, evidence was presented to the Board that Peden had previously suffered from

---

[6] *See Johnson v. Chrysler*, 213 A.2d 64, 66 (Del. 1965).

[7] *Peden v. Dentsply Int'l*, IAB Hearing No. 1223381 (Nov. 3, 2003) at 6.

ailments similar to the ones alleged from the fall of December 6, 2002. Dr. Wilson did not have any knowledge of this fact. Second, the Board disregarded Dr. Wilson's opinion because he based his decision that Peden could not work on her subjective complaints, a potentially dated opinion offered by Dr. Rowe, and an MRI examination. Third, Dr. Wilson did not explain why Peden could not work in any capacity. It was well within the Board's discretion to accept Dr. Fink's opinion over that offered by Dr. Wilson in finding that Peden is not totally disabled.

Peden's testimony does not support her contention that she had no problems prior to the accident. Cross-examination revealed that Peden had suffered pains in her hands and elbows prior to the accident, and that she was tested for arthritis because she "wanted to know what kind of arthritis [she] had because it runs it[sic] in [her] family."[8] Her prior test for arthritis would appear to support Dr. Fink's contention that Peden's herniated disc could be due to an arthritic condition.[9] Peden also testified that she had prior problems focusing and her judgment being fuzzy due to the medications. Prior to her accident at work, Peden testified to receiving an injection into her shoulder for pain.

The Court concludes that in addition to Dr. Fink's testimony, as relied upon by the Board, Peden's cross-examination provides substantial evidence to justify the Board denying Peden's Petition to Determine Compensation Due. While Dentsply agrees that Peden had an accident at work on December 6, 2002, it disputes the nature and extent of the injuries. Based upon the testimony before it, the Board determined that Peden's injuries did not rise to the necessary level for temporary

[8] Tr. at 33.

[9] The Court is not making this conclusion, however, it is recognizing the fact the evidence exists that provides support for the Board's decision to accept the testimony of Dr. Fink over that of Dr. Wilson.

total disability. This decision is supported by substantial evident in the record. Peden's appeal of the Board's decision on this ground is **DENIED**.

II. Substantial evidence exists to support the Board's decision that Peden was not a displaced worker.

The Board held that Peden was not a displaced worker as set forth by the doctrine in *Torres v. Allen Family Foods*.[10] An employee can show she is a displaced worker through two separate methods. First, the worker can be a prima facie displaced worker. A prima facie displaced worker is one who "although not utterly helpless physically, because of the degree of obvious physical impairment, combined with various factors such as mental capacity, education, training, and age, is placed in a situation where [s]he could not ordinarily sell [her] services in any well-known branch of the labor market."[11] Second, the worker can show displacement by showing that [s]he has "made reasonable efforts to secure suitable employment which have been unsuccessful because of injury."[12] Under the displaced worker doctrine, where an injured employee is able to work but only in a limited capacity, "both the employer and the employee share a mutual duty to obtain employment for the employee, the precise extent of which cannot be clearly and definitely expressed as a general rule."[13]

---

[10] *Torres v. Allen Family Foods*, 672 A.2d 26 (Del. 1996).

[11] *Joynes v. Peninsula Oil Comp.*, 2001 Del. Super. Lexis 124, at *11 (Del. Super. Ct. 2001).

[12] Id at *11.

[13] *Chrysler Corp. V. Duff*, 314 A.2d 915, 918 (Del. 1973).

However, "the primary burden is upon the employee to show that [s]he has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury."[14]

The Board held that Peden was not a prima facie displaced worker because she did not fit the requirements as established by *Torres*.[15] *Torres* addressed the situation where an employer establishes a claimant can first return to work.[16] The burden then shifts to the claimant to prove that because she is handicapped by an injury, she can no longer be employed regularly.[17] The Board found that the situation in *Torres* was not present in the case at hand. In the immediate case, since Peden was the one who filed the Petition, she has the burden of proof in attempting to establish that she was a displaced worker. Throughout the process, Peden argued that she was entitled to total disability benefits. As such, Peden was not arguing that she could return to work in a limited capacity, but that she could not return to work at all. The evidence presented by Peden established that she was fifty-five years old, had no problems performing her job prior to the accident, and that the last time she did sedentary type work was in the 1970s. There was no evidence of Peden's level of education. The Board accepted the testimony of Dr. Fink over that of Dr. Wilson. Dr. Fink testified that Peden was capable of a full-time sedentary position. These facts are not sufficient to establish that Peden is a displaced worker. Based upon the record, substantial evidence existed to support the Board's finding that Peden was not a displaced worker. The second showing of displacement does not apply because Peden has not shown reasonable efforts to obtain other

---

[14] *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973).

[15] *Torres v. Allen Family Foods*, 672 A.2d 26 (Del. 1996).

[16] Id.

[17] Id. at 30.

employment, which has been unsuccessful due to her injury. Peden's appeal of the Board's decision on this ground is **DENIED**.

III. The Board was correct in holding that the *Hoey* Doctrine did not apply.

Peden argues that the Board's decision that the *Hoey* doctrine does not apply is wrong. The *Hoey* Doctrine states that a claimant is not expected to seek employment elsewhere until she has been advised by her employer that no modified duty work was available and that she would be discharged.[18] The Board held that the *Hoey* Doctrine did not apply for the same reasons that the displaced worker doctrine did not apply. No evidence was presented that Peden made reasonable efforts to find work but was unsuccessful due to the injuries sustained from the December 6, 2002 accident, or that Dentsply knew that Peden required alternative employment and could not fulfill her request. Because Peden asserted that she was and is still totally disabled, the *Hoey* Doctrine is inapplicable. If it was Peden's position that she had been capable of working in a sedentary type position and informed Dentsply of this, then the burden would have shifted to Dentsply. This is not the case. At no time was Dentsply aware that Peden sought modified duty work. While Dr. Fink opined that Peden could return to work in a sedentary type capacity, Peden and Dr. Wilson stated otherwise. If Dr. Wilson opined that Peden was able to return to work in a sedentary type capacity, the *Hoey* Doctrine would be applicable and Dentsply would have been required to inform Peden that no modified duty work existed and that she would be discharged. Substantial evidence exists to support the Board's finding that the *Hoey* Doctrine is inapplicable. Peden's appeal of the Board's decision on this ground is **DENIED**.

---

[18] *Hoey v. Chrysler Motors Corp.*, 655 A.2d 307, 1994 WL 723923 (Del. Super. Ct. 1994).

IV. Peden was under an obligation to seek employment.

Peden contends that she was totally disabled because Dr. Wilson placed her on a no-work status. Citing *Gillard-Belfast*, Peden argues that if she can only perform some form of employment by disobeying the orders of her treating physician, then she is totally disabled, at least temporarily, regardless of her capabilities.[19] As a result, Peden suggests that she was not required to seek employment because the Board's ruling was directly contrary to Delaware law and not based on substantial evidence when it determined she was not disabled.

In the case of competing medical testimony, the Board is free to choose one opinion over the other, as long as substantial evidence exists to support that opinion.[20] When there is no agreement between the parties, total disability under Delaware law is more than a medical determination.[21] In *Flax*, the employer did not dispute that the industrial accident was compensable for purposes of paying Flax's reasonable and necessary medical expenses.[22] The difference was that the medical experts were not in agreement on the issue of whether Flax was totally disabled.[23] The employer argued that *Gilliard-Belfast* was inapplicable because the parties never had an agreement on Flax's claim for total disability for any period of time and because the medical experts were not in agreement. The Supreme Court agreed with the employer's argument.[24] As such, *Gilliard-Belfast*

---

[19] *Gillard-Belfast v. Wendy's, Inc.*, 754 A.2d 251 (Del. 2000).

[20] *DiSabatino Bros v. Wortman*, 453 A.2d 102 (Del. 1982).

[21] *Steele v. Animal Health Sales, Inc.*, 2001 WL 1355134 (Del. Super. Ct. 2001).

[22] *Flax v. State of Delaware*, 2004 Del. Lexis 279 (Del. Supr.).

[23] *Flax v. State of Delaware*, 2004 Del. Lexis 279 (Del. Supr.).

[24] Id. at *7.

is inapplicable to the case at hand because the parties never had an agreement, or a Board decision, that Peden was totally disabled for any period of time and the medical experts were in disagreement over whether Peden was totally disabled. Therefore, the issue became one for the trier of fact.

In the present case, the Board's decision was supported by substantial evidence. The medical experts in this case did not agree that Peden could not work. Dr. Fink testified that Peden could work in a sedentary type capacity, while Dr. Wilson believed that Peden belonged on no-work status. The Board clearly stated in its decision its reasons for finding the testimony of Dr. Fink more credible than that of Dr. Wilson's. Additionally, the Board stated that there was a causation problem between the accident that occurred on December 6, 2002, and the alleged injuries. The Board was not satisfied that some of Peden's injuries did not pre-date the December 6, 2002 accident. The cross-examination of Peden created doubts that her injuries were initially sustained on December 6, 2002. After stating that she did not remember the prior injuries, Peden had her recollection refreshed. She testified that she experienced numbness and weakness in her hands and complained of dizziness in 2000. In 2002, Peden received an injection into her shoulder to mask the pain she was experiencing. Part of the Board's decision was based upon the fact that Dr. Wilson based his opinion on Peden's subjective complaints and less on the objective evidence. It was within Peden's discretion to follow the advice of her treating physician. However, it is the Board's decision to determine if Peden's injury was compensable. After reviewing the evidence, the Board felt Peden had not carried her burden. Peden's appeal of the Board's decision on this ground is **DENIED**.

CONCLUSION

I affirm the Board's decision for the reasons set forth herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB:tll

cc: Prothonotary's Office
Industrial Accident Board