IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHARLES SMITH,	:	
	:	C.A. No. 04A-08-001 WLW
Employee/Appellant,	:	
	:	
v.	:	
	:	
THE DELAWARE STATE HOUSING AUTHORITY,	:	
	:	
Employer/Appellee.	:	

Submitted: June 7, 2005
Decided: September 30, 2005

ORDER

Upon an Appeal of the Decision of the
Industrial Accident Board. Reversed and Remanded.

Mary F. Higgins, Esquire of The Law Offices of Mary F. Higgins, Odessa, Delaware; attorneys for the Appellant.

Scott R. Mondell, Esquire and Christian G. McGarry, Esquire of Elzufon Austin Reardon Tarlov & Mondell, Wilmington, Delaware; attorneys for the Appellee.

WITHAM, R.J.

Upon consideration of the parties' briefs and the record below, it appears to the Court:

On March 2, 2004, Charles Smith ("Claimant") filed a Petition for Determination of Compensation Due as a result of a motor vehicle accident that occurred on May 2, 2003, during the course of his employment. The Industrial Accident Board ("Board") conducted a hearing on July 7, 2004, where Delaware State Housing Authority ("Employer") stipulated that Claimant is entitled to total disability benefits from May 2, 2003 through August 26, 2003, but argued that at most, Claimant suffered a flare-up of a preexisting lumbar and cervical spine injury that has returned to baseline.[1] By a decision dated July 21, 2004, the Board concluded that: (1) Claimant's lumbar and cervical spine injuries returned to baseline as of August 26, 2003; (2) Claimant is entitled to payment of medical expenses for his headaches and spinal injuries from May 2, 2003 through August 26, 2003; (3) Claimant is entitled to payment of medical expenses for his left elbow and knee injuries, including impending knee surgery; and (4) Claimant's total disability period is limited to May 2, 2003 through August 26, 2003.[2] These conclusions were the result of the Board's acceptance of Dr. Varipapa's opinion over the opinion of Dr. Upadhyay.[3] The Board based this decision on its determination that Claimant was not

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[1] *Smith v. Delaware State Hous. Auth.*, IAB Hearing No. 1231288 (July 21, 2004).

[2] *Id.* at 14 -15.

[3] *Id.* at 13. Dr. Varipapa, a board-certified neurologist, testified for Employer. Dr. Upadhyay, board-certified in physical medicine and rehabilitation, testified for Claimant.

credible; therefore, his subjective complaints, on which Dr. Upadhyay relied to form his opinion, were unreliable.[4] Consequently, the Board set the date for termination of total disability as August 26, 2003, which is the date that Dr. Varipapa examined Claimant and determined his injuries had returned to baseline. Claimant appealed the Board's decision arguing that: (1) pursuant to *Hoey*,[5] Claimant had no duty to look for work prior to December 12, 2003[6]; (2) pursuant to *Gilliard-Belfast*,[7] Claimant was entitled to total disability benefits from the date of the injury, May 2, 2003, through the date of the hearing, July 7, 2003; (3) the labor market survey did not meet the requirements of *Jennings*[8] and the Board did not allow Claimant to ask legally appropriate questions of the preparer of the survey; and (4) the Board improperly allowed Employer to raise the offer made pursuant to 19 *Del. C.* § 2327 in violation of D.R.E. 408. For the reasons set forth below, the decision of the Board is reversed and remanded.

Standard of Review

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial

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[4] *Id.* However, Dr. Upadhyay did make objective findings of spasms in Claimant's neck and low back. *See Id.* at page 5.

[5] *Hoey v. Chrysler Motors Corp.,* 1994 Del. LEXIS 401.

[6] Employer terminated Claimant on December 12, 2003.

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

[8] *Jennings v. Univ. of Delaware*, 1986 Del. Super. LEXIS 1088.

evidence exists to support the Board's finding of fact and conclusions of law.[9] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[11] Errors of law are reviewed de novo. Absent an error of law, the standard of review for a Board's decision is abuse of discretion.[12] The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."[13] Additionally, "this Court will give deference to the expertise of administrative agencies and must affirm the decision of any agency even if the Court might have, in the first instance, reached an opposite conclusion."[14]

Total Disability

Claimant argues that the Board erred as a matter of law by determining that Claimant was no longer totally disabled as of August 26, 2003 because he still had

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[9]*Histed v. E. I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 Del. Super. LEXIS 9; *Robinson v. Metal Masters, Inc.,* 2000 Del. Super. LEXIS 264.

[10]*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (*quoting Consolo v. Federal Mar. Comm'n,* 383 U.S. 607, 620 (1966)).

[11]*Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (*quoting Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

[12]*Digiacomo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

[13]*Willis*, 2003 Del. Super. LEXIS at *2-3.

[14]*Collins*, 1999 Del. Super. LEXIS at *9.

not undergone knee surgery, which the Board determined was necessary as a result of the accident. Additionally, there was still a "no work" order issued by Dr. Upadhyay. The applicable case law is found in *Gilliard-Belfast v. Wendy's Inc.*[15] In *Gilliard-Belfast*, the Supreme Court held that "a person who can only resume some form of employment by disobeying orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."[16] The treating doctor in *Gilliard-Belfast* ordered the employee not to work prior to surgery.[17] It took eight months until the employee finally had her operation.[18] The employer expressed concerns over the length of time that the employee did not work prior to surgery.[19] However, the Court stated, "[t]hose concerns would have been ameliorated if Wendy's insurance carrier had either expedited its authorization for the second surgery or requested Gilliard-Belfast's treating physician to reconsider his 'no work' order."[20] In *Delhaize America, Inc. v. Baker,*[21] the Delaware Supreme Court reiterated *Gilliard-Belfast* when it stated, "if a claimant is instructed by his treating physician

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[15]754 A.2d 251.

[16]*Id.* at 254.

[17]*Id.* at 252.

[18]*Id.* at 253.

[19]*Id.*

[20]*Id.*

[21]*Delhaize America, Inc. v. Baker*, Del. Supr., No. 04A-05-001, Berger, J. (August 12, 2005) (ORDER).

that he or she is not to perform *any* work, the claimant will be totally disabled during the period of the doctor's order."[22] However, in *Carey v. H & H Maintenance, Inc.*,[23] the Court held that if the Board found that the employee was told not to work for reasons that were unrelated to his accident, *Gilliard-Belfast* was inapplicable.

In this case, the Board found that Dr. Upadhyay told Claimant not to work based on his injuries as a whole. Dr. Upadhyay believed that Claimant's headaches, left elbow, left knee, lumbar spine and cervical spine injuries were related to his motor vehicle accident. Even though the Board accepted the opinion of Dr. Varipapa over that of Dr. Upadhyay, they still compensated Claimant for his medical expenses relating to his headaches, cervical and lumbar spine injuries, left elbow, and knee, including impending knee surgery. Because the reasons Dr. Upadhyay based his "no work" order on were deemed compensable by the Board, *Carey* is inapplicable.

However, the Board decided to terminate total disability as of August 26, 2003. The problem is that Claimant was still restricted by a "no work" order from his treating physician, Dr. Upadhyay, which Claimant was permitted to rely on. If Employer took issue with Dr. Upadhyay's "no work" order, it was Employer's responsibility to ask Claimant's treating doctor to reconsider according to *Gilliard-Belfast*. Therefore, pursuant to *Gilliard-Belfast* and *Delhaize*, Claimant was totally disabled and it was an error of law for the Board to retroactively determine when

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[22] *Id.* (emphasis in original).

[23] 2001 Del. Super. LEXIS 335; *aff'd Carey v. H & H Maint., Inc.*, 792 A.2d 188 (Del. 2002).

Claimant's total disability ended despite a "no work" order.

Conclusion

Because this Court determined that the Board erred as a matter of law by finding that Claimant's total disability ended on August 26, 2003, Claimant's other contentions need not be addressed.

For the foregoing reasons, the decision of the Board is ***reversed and remanded***. IT IS SO ORDERED.

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

WLW/dmh
oc: Prothonotary
xc: Order Distribution