

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM C. FLAX,	§
	§
Appellant Below-	§ No. 450, 2003
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware,
	§ in and for New Castle County
STATE OF DELAWARE,	§ C.A. No. 02A-11-002
	§
Appellee Below-	§
Appellee.	§

Submitted: April 2, 2004

Decided: June 29, 2004

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

ORDER

This 29th day of June 2004, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The appellant, William Flax, filed this appeal from the Superior Court's order affirming a decision of the Industrial Accident Board (the Board). The Board denied Flax's petition for additional compensation due. We find no merit to Flax's appeal. Accordingly, we affirm the Superior Court's judgment.

(2) The record reflects that Flax was employed by the State of Delaware Division of Family Services. On February 22, 2001, Flax was involved in a single vehicle accident while driving a State automobile. Flax

suffered an injury to his low back. Flax did not dispute that, between 1994 and 2000, he had been involved in five previous accidents, all of which resulted in injury to his low back. Up to the time of the 2001 accident, Flax was in active treatment for his low back pain from those prior accidents, and the treatment included taking prescription pain medications. Flax did not return to work following the 2001 accident upon the advice of his physiatrist, Dr. Sternberg. After the accident, Flax received PIP benefits from the State, which included lost wages and medical payments.

(3) In May 2001, Flax filed a petition with the Industrial Accident Board to determine his right to workers compensation benefits. Initially, the State disputed that Flax was involved in a work-related accident. The Board therefore, scheduled a hearing on Flax's petition. Prior to the hearing, the State agreed that the accident was compensable for the purposes of reasonable and necessary medical expenses only. Flax's then-counsel informed Flax that a hearing before the Board was no longer necessary given Flax's receipt of wage benefits through the State's PIP coverage and the State's agreement as to the compensability of the accident.

(4) In August 2001, the State requested Flax to be examined by a neurologist, Dr. Kamali. Dr. Kamali's examination found no signs of muscle spasms, atrophy, or weakness or any other neurological problem. Following

the examination, Dr. Kamali reported that Flax was capable of returning to work full-time with the restriction that he not lift anything over fifteen pounds. In October 2001, the State wrote to Flax indicating that there was a job available for him with the restriction specified by Dr. Kamali. Flax contacted the State and was told the available position, in fact, was his former position, which involved significant amounts of driving. Flax did not return to work at that time because driving long distances was contrary to Dr. Sternberg's restrictions.

(5) By September 10, 2001, Flax had reached the \$25,000 policy limit on the State's PIP coverage. In May 2002, the State informed Flax that he had exhausted his paid leave and would be placed on an unpaid leave of absence. Flax then filed a petition with the Board to determine additional compensation due for a claimed period of total disability from September 10, 2001, the date PIP benefits were exhausted, through the end of March 2002. After a hearing on October 7, 2002, the Board denied Flax's petition on the ground that Flax had failed to prove he was totally disabled from any and all employment during the claimed period. The Board, however, did award Flax his claim for medical expenses as well as attorneys fees and medical witness fees.

(6) Flax appealed to the Superior Court. The Superior Court, in a detailed decision, found substantial evidence to support the Board's ultimate conclusion that Flax had failed to establish his total disability during the claimed period. Accordingly, the Superior Court affirmed the Board's judgment. This appeal followed. In reviewing Flax's claims on appeal, our standard of review mirrors the standard applied by the Superior Court. We review de novo any legal issues decided by the Board and review the Board's factual findings to determine whether they are supported by substantial evidence.¹

(7) In his opening brief on appeal, Flax raises five issues. First, Flax contends the Board erred in failing to find that the State had violated the requirements of the Workers' Compensation Act. Second, Flax asserts that the Board erred in terminating his benefits in the absence of a petition by the State to terminate his benefits. Third, Flax contends that he was entitled to rely on Dr. Sternberg's advice not to return to work and that the Board violated his rights under the Workers' Compensation Act by accepting Dr. Kamali's testimony rather than Dr. Sternberg's. Fourth, Flax argues that the Board violated his rights by allowing the State to admit Dr. Kamali's deposition transcript into evidence at the hearing. Finally, Flax

¹ *Scheers v. Independent Newspapers*, 832 A.2d 1244, 1246-47 (Del. 2003).

appears to assert that, given the State's agreement as to the compensability of the accident and Dr. Sternberg's order not to return to his job, he had no obligation either to return to work with the State or to look for other employment until the Board ruled he was not totally disabled.

(8) In response, the State asserts that Flax misunderstands both the facts of his case and the applicable law. The State contends that Flax's reliance on the decision in *Gilliard-Belfast v. Wendy's*,² which forms the foundation of most of his arguments on appeal, is misplaced. In *Gilliard-Belfast*, the parties agreed that the claimant was injured in an industrial accident and the employer paid the claimant for a period of total disability and paid for surgery on the claimant's knee. After the claimant filed a petition for additional compensation, the Board concluded that the claimant required a second knee surgery and that the need for surgery was due to her industrial accident. Nonetheless, the Board held that the claimant had failed to establish her right to temporary total disability benefits while waiting for the second surgery, even though her treating physician had ordered her not to work. This Court reversed the Board's decision because, given the "unanimous view" of both parties' medical experts that the surgery was necessary and reasonable, requiring the claimant to return to work in

² 754 A.2d 251 (Del. 2000).

violation of her doctor's orders would have put the injured employee "in a completely untenable position."³

(9) The State argues that *Gilliard-Belfast* has no application because the parties in Flax's case never had an agreement on Flax's claim for total disability benefits for any period of time and because the medical experts were not in agreement on Flax's claim of being totally disabled. We agree. Although the State did not dispute that the accident was compensable for the purposes of paying Flax's reasonable and necessary medical expenses, Flax presented no evidence of an agreement with the State as to total disability benefits. Moreover, when competing medical experts disagree on a claimant's disability, the conflicting testimony is a matter for the Board to resolve as the trier of fact.⁴ In Flax's case, the Board explained its rationale for accepting Dr. Kamali's opinion over Dr. Sternberg's opinion. The Board's rationale is supported by the record.⁵

(10) With respect to Flax's claims that the State was required to file a petition to terminate and that the Board erred in considering the deposition testimony of the State's medical expert, we note that these issues were not

³ *Id.* at 253.

⁴ *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 877 (Del. 2003).

⁵ *Id.*

raised before the Board and we find basis for consideration of these claims for the first time on appeal.⁶

(11) Having carefully considered the parties' respective positions, we find it manifest that the judgment of the Superior Court should be affirmed on the basis of the Superior Court's well-reasoned decision dated August 15, 2003. There is substantial evidence in the record to support the Board's factual findings, and we find no error of law.⁷

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

⁶ Del. Supr. Ct. R. 8.

⁷ *Scheers v. Independent Newspapers*, 832 A.2d at 1246-47.