IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PATRICIA ATKINSON,	)	
	)	
Employee-Appellant,	)	
	)	
v.	)	C.A. No. 00A-04-011 RRC
	)	
DELAWARE CURATIVE WORKSHOP,	)	
	)	
Employer-Appellee.	)	

Submitted: October 11, 2000
Decided: January 8, 2001

ORDER

UPON APPEAL FROM A DECISION OF THE INDUSTRIAL ACCIDENT BOARD. AFFIRMED.

Upon consideration of Employer's appeal of the decision of the Industrial Accident Board (Board) granting Employee's Petition to Determine Additional Compensation Due, Employee's Response, and Employer's Reply, it appears to this Court that:

1. Patricia Atkinson ("Claimant") sustained a compensable work related injury to her low back on January 18, 1996 while employed as a secretary by the Delaware Curative Workshop ("DCW"). Claimant filed a Petition to Determine Compensation Due, which was followed by the Industrial Accident Board's

("Board") decision of November 1, 1996. The Board concluded in its decision dated November 1, 1996 that the January 18, 1996 accident aggravated a pre-existing condition of a degenerative disk at L5-S1.[1] The Board awarded Claimant temporary total disability benefits from April 10, 1996 through October 10, 1996 and attorney's fees in the amount of 30 percent of the award or $2,250.00, which ever is less.

[1] *Atkinson v. Delaware Curative Workshop*, IAB No. 1075174 (Nov. 1, 1996).

On May 16, 1997 Claimant filed a Petition to Determine Additional Compensation Due seeking an award of permanent partial disability for her lower back. On November 24, 1997, the Board held a hearing on that Petition. The Board concluded in its January 15, 1998 decision that Claimant did not satisfy her burden of proof and that Claimant had "exaggerated her symptoms, which she supported only with subjective complaints and no objective function deficits noted by any physician."[2] The Board relied upon the opinion of Dr. Norman Eckbold, who testified on behalf of DCW. The Board accepted Dr. Eckbold's opinion that "[t]here was nothing in the MRI's nor in Claimant's physical examination that led him to suggest any [permanent] impairment referable to the industrial [accident] of January 18, 1996."[3] Thus, the Board denied Claimant's Petition to Determine Additional Compensation Due. Claimant appealed that decision to the Superior Court. This Court affirmed the Board's decision holding that the doctrines of res judicata and collateral estoppel did not apply to Claimant's case.[4]

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[2] *Atkinson v. Delaware Curative Workshop*, IAB No. 1075174 (Jan. 15, 1998).

[3] *Id.*

[4] *Atkinson v. Delware Curative Workshop*, Del. Super., C.A. No. 98A-02-013, Cooch, J.

(May 19, 1999) (ORDER).

Claimant then filed a third and a fourth Petition to Determine Additional Compensation Due on October 8 and October 29, 1999. After having surgery performed on her lower back, Claimant sought reimbursement for medical expenses and benefits for a recurrence of total disability ongoing from January 12, 1998 as well as attorney's fees. The Board held a hearing on March 27, 2000 and issued its decision on April 12, 2000. In its decision, the Board relied upon the testimony of Dr. Bruce Rudin, Claimants treating physician, and determined that the period of total disability stipulated to by the parties, from September 29, 1998 through June 9, 1999 was appropriate. The Board further concluded Claimant was entitled to partial disability benefits beginning June 10, 1999, that Claimant's back surgery was causally related to the 1996 work accident and necessary based upon Dr. Rudin's testimony, that Dr. Rudin's medical expenses were reasonable and compensable, and that Claimant was entitled to reasonable attorney's fees. DCW now appeals the Board's decision.

2. DCW argues that the Board erred as a matter of law in its April 12, 2000 decision, in holding that Claimant's September 1998 surgery and subsequent recurrence of total disability was causally related to the January 18, 1996 accident and that Claimant's petition was not barred under the collateral estoppel doctrine.[5]

[5] Appellant's Opening Brief at 5.

DCW further argues that the Board's April 12, 2000 decision (that Claimant's 1998 surgery and resulting recurrence of total disability was causally related to the January 18, 1996 accident) was not supported by substantial evidence.[6]

In response, Claimant argues that the doctrine of collateral estoppel does not bar the Board from holding Claimant's September 1998 surgery was reasonable, necessary and causally related to the January 18, 1996 accident.[7] Furthermore, Claimant contends there was substantial, competent evidence to support the Board's finding that the September 1998 surgery was causally related to the January 18, 1996 industrial accident.[8]

[6] Appellant's Opening Brief at 7.

[7] Claimant's Answering Brief at 6.

[8] Claimant's Answering Brief at 10.

3. The Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency. The function of the reviewing Court is to determine whether substantial evidence supports the agency's decision.[9] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[10] This Court on appeal, does not weigh the evidence, determine questions of credibility, or make its own factual findings.[11] This Court's duty is limited to determining whether substantial evidence supports the Board's findings of fact and whether errors of law exist.[12] As the Court performs this duty, it views the facts in a light most favorable to the prevailing party below.[13] Only where there is no satisfactory proof in support of the factual findings of the Board may Superior Court overturn it.[14] Furthermore, this Court will give deference to the expertise of administrative agencies and must affirm the decision of an agency even if the Court might have, in the first instance, reached an opposite conclusion.[15]

4. At the March 27, 2000 hearing, the Board: (1) relied on Dr. Bruce J. Rudin's testimony and accepted his opinion that Claimant was capable of returning to work on a part-time basis in a sedentary duty job in June 1999; (2) accepted Dr. Rudin's belief (over the opinion of Dr. Andrew J. Gelman, DCW's testifying

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

[10] *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista v. Chrysler Corp*., Del. Super., 517 A.2d 295, 297 (1986), *appeal dismissed*, Del. Supr., 515 A.2d 397 91986).

[11] *Johnson* at 66.

[12] 19 *Del. C.* §3323(a).

[13] *See Chundnofsky v. Edwards*, Del. Supr., 208 A.2d 516, 518 (1965).

[14] *Johnson* at 66.

[15] *See* 29 *Del. C.* §10142(d); *Petty v. University of Delaware*, Del. Supr., 450 A.2d 392, 396 (1982); *Levitt v. Bouvier*, Del. Supr., 287 A.2d 671 (1972).

physician) that these restrictions were related to the January 18, 1996 accident; (3) concluded that the period of total disability originally stipulated to by the parties, from September 29, 1998 until June 9, 1999 was appropriate; (5) found that Dr. Rudin's medical expenses of $21,000 were reasonable and compensable; (6) found that Claimant was entitled to receive partial disability benefits for two-thirds of the difference between her pre-injury and post-injury earnings ($123.33 per week); and (7) the Board found Claimant was entitled to reasonable attorney's fees assessed as costs against DCW pursuant to 19 Del. C. §2320(g) in the amount of $2,250.00 or 30 percent of each award, whichever is less.[16]

[16] *Atkinson v. Delaware Curative Workshop*, IAB No. 1075174 (April 12, 2000) at 11-13.

5. The applicable statue for Claimant's case, 19 *Del. C.* §2347, provides the Board with statutory authority to "review any agreement or award" once an application has been filed by "any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred . . ."[17] The statute, by its express terms, permits the Board to review any award if the incapacity of the injured employee has increased or recurred.[18] It appears to this Court that this is Claimant's situation. Because the

[17] *Atkinson v. Delaware Curative Workshop*, Del. Super., C.A. No. 98A-02-013, Cooch, J. (May 19, 1999) (ORDER) at 1.

[18] *See Atkinson v. Delaware Curative Workshop*, Del. Super., C.A. No. 98A-02-013, Cooch, J. (May 19, 1999), (ORDER)(holding that 19 *Del. C*. §2347 precludes the application of the res judicata doctrine and the doctrine of collateral estoppel.) *Cf. Hitchens v. Milton*, Del. Super., C.A. No. 96A-03-005, Graves, J. (Oct. 8, 1996) (Mem.Op.) (concluding that "[t]he Board's previous grant of denial of benefits cannot be considered res judicata as to subsequent review"); *Powell v. Air Products and Chemicals*, Del. Super., C.A. No. 93A-02-009, Gebelein, J. (Mem. Op.) (holding that "appellant may file for additional compensation due and the claim is not barred by res judicata").

Board is permitted this statutory authority, the doctrine of collateral estoppel does not apply.[19]

Notwithstanding the fact 19 *Del. C.* §2347 provides for the review of any award by any party in interest on the grounds the injury has recurred or increased, collateral estoppel does not barr the Board's April 12, 2000 decision because the issues litigated in the March 27, 2000 hearing were not identical to the issues argued in the prior hearing to Determine Additional Compensation Due.

6. Prior Delaware cases have held, specific factors must be considered for the doctrine of collateral estoppel to apply:

[19] *See Atkinson v. Delaware Curative Workshop*, Del. Super., C.A. No. 98A-02-013, Cooch, J. (May 19, 1999) (ORDER) (citing 46 Am. Jur.2d *Judgments* §516 (1994) for the proposition that collateral estoppel did not apply to Claimant's appeal because "[t]he issue decided in the earlier action must be identical to the one presented in the subsequent action.")

(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[20]

[20]*State v. Machin*, Del. Super., 642 A.2d 1235, 1239 (1993), *appeal dismissed*, 655 A.2d 1225 (1995) [citations omitted].

"The use of the conjunctive 'and' requires all factors to be satisfied for the doctrine of collateral estoppel to apply."[21] This Court further held that if one factor is not satisfied, "it is unnecessary to address the remaining factors."[22] Claimant's May 16, 1997 Petition to Determine Additional Compensation Due was denied because the Board found at that time, Claimant's injuries did not warrant additional compensation. At that time, Claimant had not undergone surgery on her lower back. However, as of March 27, 2000, Claimant had undergone surgery on her lower back. The issue at the March 27, 2000 hearing was whether the surgery was reasonable, necessary and related to the January 18, 1996 work related accident. Upon hearing the deposition of Claimant's treating physician, Dr. Rudin, the Board determined that Claimant had satisfied her burden of proof that the surgery was reasonable, necessary and related to the January 18,1996 work related accident.

The record indicates that Dr. Rudin, testified that Claimant's injuries did not warrant surgery when he initially saw Claimant, but that Claimant's injuries had escalated to a degree where surgery was required.[23] Dr. Rudin testified that on

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[21] *Atkinson v. Delaware Curative Workshop*, Del. Super., C.A. No. 98A-02-013, Cooch, J. (May 19, 1999) (ORDER) at 3-4.

[22] *Id.*

[23] Rudin Dep. at 10.

November 26, 1997 after having examined Claimant again "that her symptoms have focused dramatically since last seen. . ."[24] The record indicates that Dr. Rudin prescribed conservative care therapy for Claimant, but that the therapy failed to alleviate Claimant's pain. Thereafter, Dr. Rudin, who had once believed surgery was unnecessary, concluded Claimant was a good candidate for surgery. The record further indicates that once Claimant's surgery was complete, her pain subsided.

7. For the above mentioned reasons, this Court finds the doctrine of collateral estoppel does not apply to the case at bar. Furthermore, this Court finds there was substantial evidence introduced at the Board's hearing for the Board to have found that Employee was had sustained partial disability. Similarly, substantial evidence existed for the Board to have concluded that Claimant was entitled to medical benefits in relation to the September 1998 surgery and that Claimant was entitled to reasonable attorney's fees. The Board's decision to reject the testimony of Dr. Gelman and accept the testimony of Dr. Rudin was supported by substantial evidence and the Board did not otherwise commit any errors of law.

[24] Rudin Dep. at 10.

IT IS SO ORDERED.

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Original to Prothonotary

cc: Industrial Accident Board
Francis X. Nardo, Esquire
Kenneth F. Carmine, Esquire