IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BRUCE CABALLERO	)	
	)	
Claimant-Below,	)	
Appellant	)	
	)	
v.	)	C.A. No. 04A-02-006 JTV
	)	
GERALD DONOVAN	)	
ASSOCIATES	)	
	)	
Employer-Below,	)	
Appellee.	)	

Submitted: September 29, 2005
Decided: December 30, 2005

Walt F. Schmittinger, Esq. and Lori A. Brewington, Esq. Schmittinger & Rodriguez, Dover, Delaware. Attorney for Appellant.

Colin M. Shalk, Esq., Casarino, Christman & Shalk, Wilmington, Delaware. Attorney for Appellee.

Upon Consideration of Appellant's
Appeal from Decision of Industrial Accident Board
AFFIRMED

VAUGHN, President Judge

Caballero v. Gerald Donovan Associates
C.A. No. 04A-02-006 JTV
December 30, 2005

OPINION

Bruce Cabellero ("Claimant"), appeals a January 16, 2004, decision of the Industrial Accident Board ("Board"), which denied his Petition to Determine Additional Compensation Due. Claimant sought compensation for total disability. The Board concluded that Claimant failed to meet his burden to prove either total or partial disability.

FACTS

Claimant worked as chief for a surveying crew for Gerald Donovan Associates ("Employer"). The job required him to map and mark properties throughout various terrains including locations where he cleared brush with machetes and chainsaws. At its hearing on December 17, 2003, the Board considered testimony from three employees of Employer; Dr. Nazim Ameer, a pain management specialist who treated Claimant; Dr. Russell Labowicz, a rheumatologist who examined Claimant on behalf of Employer; David Braun, Employer's president and owner; and Claimant.

Beginning in April 2002, Claimant began suffering pain in his elbow after clearing about a mile and a half of property lines. Claimant first sought treatment with his family physician and then later was referred to another physician who gave him two cortisone injections. Claimant's pain became worse, proceeding from his elbow down his forearm and into his hand after he worked several jobs in the woods marking property lines.

He sought treatment in June 2002 from a pain management specialist, Dr. Ameer, who performed cortisone injections, which reduced the pain. Dr. Ameer

testified through deposition that he believes Claimant suffered from Complex Regional Pain Syndrome Type 1("CRPS Type 1"). Despite injections, the physical nature of his work – carrying equipment, setting things up, writing repeatedly, reaching behind him for his field pack and using the instruments – caused Claimant's pain to worsen.

Dr. Ameer testified that as early as August 2002, he wrote letters to Claimant's employer stating he should not use his upper right extremity at work. When the doctor learned Claimant exacerbated his condition by using an alder and a chainsaw, he wrote another note, in March 2003, calling for Claimant to avoid using his right arm. This was followed by a note in April 2003 to Employer's insurance company emphasizing the need to reduce strenuous activities with upper extremities and advising Claimant was still having problems because he did not discontinue those activities. Two months later, Dr. Ameer followed with a letter specifying a sedentary work environment for Claimant to remove trauma he believed aggravated the CRPS. Then in August 2003, Dr. Ameer ordered Claimant not to return to work for three months. After Claimant left work, the doctor said he noticed improvements with continuous injections. In November 2003, Dr. Ameer advised Claimant not to go back to his employer for at least 12 months. He stated this order was directly related to Employer's failure to comply with his recommendations. Dr. Ameer said:

> I have never advised him to not work forever. I only wanted his employer to give him a sedentary job where he could function, his symptoms could improve. But then I advised him, if your employer cannot accommodate

> you despite all these years of services, then you would be better off finding a job for yourself that does not require such excessive use of hand.
> ...
> That disability is from his occupation where he was injured. But that letter does not apply [*sic*] that he cannot work at all.

The work restrictions, according to Dr. Ameer, were the result of Employer's non-compliance with the doctor's recommendations. He stated, "If the Employer doesn't understand the gravity of CRPS Type I and doesn't want to comply with the physician's recommendation, what choice did I have, I had no choice but to tell him to quit his job."

Claimant said he would give the doctor's notes to the office manager or Employer's president, David Braun ("Braun"). Employer responded by having him work on the instrument as opposed to the machete and the rod. But, Claimant said, because the work he was performing was field work as opposed to sedentary duty, Claimant encountered several jobs in which he had no choice but to use his arm, which aggravated his condition. Employer hired an additional person to work on Claimant's crew in January 2003. However, the use of the three-man crew was inconsistent and often Claimant was working with just one other individual in doing the work, which forced him to use his upper right extremity.

When asked whether Employer refused to accommodate his restrictions, the Claimant responded "not in so many words." However, Claimant stated Employer

continued to assign him tasks in the field as opposed to sedentary duties. Claimant said Braun told him that he would not bring him into the office "because you might hurt yourself." Claimant said he was "dumbfounded" by this response and didn't inquire further because he said he was told Employer did not have to accommodate him.

Braun testified that he recalled Claimant complaining about having problems with his arm in the summer of 2002, but that he never asked for an accommodation. He hired an additional person to work with Claimant on projects that required a large amount of physical labor. Braun acknowledged the third worker was not working with the two-man crew on all occasions. Braun stated he hired the third person to take the physical work away from Claimant and that when he discussed Claimant's situation with him the conversations ended with Braun telling Claimant to let him know when he could not perform the work anymore.

Braun said he does not recall Claimant asking for an accommodation. He also said he does not recall Claimant asking to work inside the office or telling Claimant that doing so would be too dangerous. Braun stated he did not recall seeing any notes from Claimant at the time they were written, restricting him from repetitive use of his upper extremity. Braun recalled a discussion he had with Claimant about working in the office. He stated he never said he was unwilling to allow Claimant to work in the office, however he acknowledged that he stated he did not have work for him to do in the office and he wondered whether Claimant could use the computer mouse. Braun stated:

> The second point, in my mind when I was having that discussion was that usually within the week before that he had told me that his arm hurt even when he was using the mouse on the computer and that would be a large aspect of what he would have been doing in the office and I didn't think that that was going to help him much.

Braun said the last time Claimant worked for Employer was when Claimant left a note on his desk that said he would be out of work for three months. Claimant came into work the next day and discussed the letter with Braun but, according to Braun, at no time did he ask for a job that did not involve the repetitive use of his upper extremity. Braun said Claimant is not on his active list of employees, but he has not been deleted and he would "most likely" rehire Claimant if he could come back.

Claimant said he has attempted to find other employment, including positions at Wal-Mart and Willis Chevrolet as well as work as a building inspector or safety instructor/teacher at Shooters Choice.

Dr. Labowicz testified on behalf of Employer through deposition. An internist and rheumatologist, Dr. Labowicz stated he did not believe Claimant suffered from CRPS Type I and disagreed with the weekly injections given by Dr. Ameer as an appropriate course of treatment. Based on Claimant's history, Dr. Labowicz believes Claimant suffered an injury at work.

Dr. Labowicz agreed Claimant should withhold use of a machete or other physical activities using his right arm because the pain in Claimant's arm increases after repetitive use, but that Claimant could work if he was able to find a position

requiring no physical work or repetitive use of his upper extremity. He also agreed that if Employer disregarded Claimant's doctor's restrictions, it would be appropriate for him to stop working.

In its Findings of Fact and Conclusions of Law, the Board stated that no real dispute existed as to whether Claimant suffered an injury at work. The Board, however, found that Claimant was not totally disabled because his physician at no time said Claimant was totally disabled from any and all employment. The Board stated:

> In fact, [Dr. Ameer] stated that Claimant could recover from his present condition in approximately three to four months once he stopped the physical work as a surveyor. Thus, the Board finds Claimant not totally disabled at this time.

Additionally, the Board found it was unable to calculate a partial disability rate because it was not presented with sufficient evidence to establish a reasonable job search or loss of earning capacity.

STANDARD OF REVIEW

The scope of review for appeal of a board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.[1]

[1] *Robinson v. Metal Masters, Inc.,* 2000 Del. Super. LEXIS 264; *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d340, 342 (Del. 1993); *Johnson v.*

"Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[3] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.[4] The court must give "due account of the experience and specialized competence of the Board and of the purposes of our workers' compensation law."[5] When reviewing the Board's findings, the reviewing court should accept those findings, even if acting independently, the reviewing court would reach contrary conclusions.[6] Absent an error of law, the standard of review is abuse of discretion.[7] An abuse of discretion arises only where the Board's decision has "exceeded the bounds of reason in view of the

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Chrysler Corp., 213 A.2d 64, 66 (Del. 1965).

[2] *Olney v. Cooch,* 425 A.2d 610, 614 (Del. 1981); *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620 (1966).

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

[4] *ILC of Dover, Inc. v. Kelley,* 1999 Del. Super. LEXIS 573, at *3.

[5] *Histed,* 621 A.2d at 342.

[6] *H & H Poultry v. Whaley,* 408 A.2d 289, 291 (Del. 1979).

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

circumstances."[8] Only where no satisfactory proof exists to support the factual finding of the Board may the Superior Court overturn it.[9]

Parties' Contentions

Claimant argues the Board erred as a matter of law when it failed to award total disability benefits because both doctors agree that Claimant suffered a workplace injury and because Claimant was issued a "no-work" order by one of those doctors – a restriction he is obligated to follow. Claimant argues that Employer's solutions to accommodate his injuries were inadequate as his condition continued to worsen as he continued to engage in activities harmful to his upper right extremity. Essentially, Claimant argues he has a right to rely on his treating physician's no-work restriction for twelve months and, accordingly, should be compensated for total disability.

Employer counters by saying the Board's decision is founded on substantial evidence and is free from any errors of law. Employer argues that because Claimant's only claim is that his upper extremity limitation hampered his ability to do one job and since no one testified that the he was otherwise disabled, the Claimant failed to meet his burden to establish total disability. Employer states there was a "disconnect" between Claimant, the doctor and Employer about what the employer was being told about Claimant's work restrictions. Employer also contends that neither doctor

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[8] *Floundiotis v. State,* 726 A.2d 1196, 1202 (Del. 1999); *Lilly v. State,* 649 A.2d 1055, 1059 (Del. 1994).

[9] *Johnson,* 213 A.2d at 64.

thought that Claimant was totally disabled.

Claimant responds by stating that both Claimant's and Employer's doctors agree that an employer's failure to comply with a treating physician's recommendations justifies a no-work restriction from the treating physician.

Claimant also contends that Employer was aware of his injuries and that its attempt to hire a third person was inadequate to address the injury. The Claimant also argues he had no choice but to follow his doctor's advice to discontinue working at Employer beginning in August 2003. Additionally, Claimant argues he continued to remain as an employee and, therefore, had no duty to seek other employment as he is under no obligation to search for employment when he has a reasonable expectation of returning to work with his current employer.

DISCUSSION

The Issue of Total Disability

Claimant argues the Board's decision is contrary to the holdings in *Gilliard-Belfast v. Wendy's Inc.*,[10] *Clements v. Diamond State Port Corp.*[11] and *Nanticoke Memorial Hospital v. Roach.*[12] Specifically, Claimant contends that he had a right to rely on his treating physician's no-work order beginning in August 2003. In my opinion, however, all three cases are factually distinguishable from this one.

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[10] 754 A.2d 251 (Del. 2000).

[11] 831 A.2d 870 (Del. 2003).

[12] C.A. No. 03A-10-001, Del. Super., Stokes, J. (Sept. 8, 2004).

In *Gilliard-Belfast*, an injured worker was ordered by her physician not to work until after she received arthroscopic surgery on her knee. The surgery was delayed while decisions were being made as to whether the procedure was covered by insurance. The Board held that the claimant was not totally disabled while she waited for the surgery. The Supreme Court reversed, holding that "a person who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."[13] The treating physician in that case had initially restricted the claimant to sedentary work, but changed that to no-work while she was waiting for the surgery. When he made that change, he had concluded that she could not work at all while awaiting the surgery. In other words, his opinion was that she was totally disabled at that time. This Court has previously commented that the case "cannot be divorced from the facts."[14] Here, the doctor instructed Claimant not to work not because he thought Claimant was totally disabled, but because he thought Employer was not honoring the work restrictions. I do not think that *Gilliard-Belfast* requires a finding of total disability in a case where all doctors agree that claimant is not totally disabled.

Additionally, Claimant cites the *Clements* case in which the Supreme Court

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[13] *Gilliard-Belfast,* 754 A.3d. at 254.

[14] *Delhaize America, Inc. v. King*, Del. Super. C.A. No. 03A-12-002, Bradley, J. (Apr. 29, 2005).

held that until the Board resolves the issue of total disability, the claimant is entitled to "follow the no-work instructions of the treating physician."[15] In *Clements*, the claimant's pain management physician issued a disability note stating that claimant was "totally disabled" until he could be seen at a followup appointment. The Board found that the claimant's subjective complaints about his injured back misled the doctor and, therefore, the claimant could not rely on the total disability order. However, the Supreme Court held that this was an error of law, citing the rule in *Gilliard-Belfast*: "a person who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities." The Court in *Clements* also commented, however, that the holding in *Gilliard-Belfast* was based "upon the operative fact that, in the medical opinion of the claimant's treating physician, the claimant was totally disabled."[16] That was not the opinion of Claimant's treating physician in this case.

Claimant also cites the holding in *Roach* in which the Court determined that the claimant was justified in relying upon her treating physician's disapproval of the jobs offered by the employer as well as his conclusion she was unable to work. As in *Gilliard-Belfast* and *Clements*, the facts in *Roach* also involve a claimant deemed "totally disabled" by a physician.

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[15] *Clements,* 831 A.2d at 879.

[16] *Id*. at 878 (emphasis added).

In this case, unlike the individuals in *Gilliard-Belfast*, *Clements* and *Roach*, Claimant was never diagnosed as "totally disabled." Claimant was ordered by his doctor not to work, but the doctor acknowledges that Claimant did not lack the physical capability of working at least partially. The doctor's testimony is as follows: Question from Claimant's attorney:

> Doctor, that brings us to August 20, 2003 when you apparently wrote [Claimant] directly telling him, you were urging him not to work for a period of at least three months. Your letter reads, and I quote, "Because your medical condition has not improved due to the lack of compliance to work restrictions by your employer."
>
> Answer from Dr. Ameer:
> Exactly.

Question from Claimant's Attorney:

> You went on to say, "The chance of permanent disability has greatly increased, and there still could be hope for a fair prognosis if you stay out of work to above mentioned period of time."
>
> Answer: Absolutely.

In August 2003, Claimant alerted Employer that he would be out of work for at least three months due to his doctor's advice. Yet, the doctor states in deposition testimony that he had a "chance of permanent disability." He at no time stated to Claimant that Claimant was totally disabled. Later, when asked by Claimant's

attorney whether the doctor felt Claimant would be capable of doing something as long as it was limited, the doctor answered:

> I always believed it. Not only that, the patient has always believed it ... I have never advised him to not work forever. I only wanted his employer to give him a sedentary job where he could function, his symptoms could improve. But then I advised him, if your employer cannot accommodate you despite all these years of services, then you would be better off finding a job for yourself that does not require such excessive use of hand.

Thus, Claimant has failed to establish total disability such that he may qualify for total disability benefits. Therefore, the decision of the Board on the issue of total disability benefits should be affirmed.

The Issue of Partial Disability

Claimant also argues that the Board erred in denying him partial disability benefits when it found that Claimant failed to present sufficient evidence of a loss of earning capacity. The Board stated, "While Claimant presented evidence of his earning capacity at GD [Gerald Donovan], he presented no evidence to determine an appropriate post-accident earnings rate. At most, Claimant stated that he applied for four positions over the five months preceding the hearing." According to the Board, that was not a reasonable job search to identify alternative employment and without more evidence of a job search or loss of earning capacity the Board could not

calculate a partial disability rate.

Claimant argues this finding was in error because the employer and the employee share a mutual duty of finding employment for the employee, citing *Chrysler Corp. v. Duff*.[17] Claimant states that he tried, but was unsuccessful in finding light-duty employment. Additionally, Claimant cites one of the findings in *Duff*, that one of the factors that weigh heavily in determining the availability of work within the claimant's restriction is the refusal of the employer, because of injury, to offer the employee lighter work which the employee is capable of performing. Claimant argues the clearest indication of his inability to find work is Employer's unwillingness to find him a suitable position, specifically not exploring the possibility of Claimant working inside the office. However, as *Duff* emphasizes, the refusal of the employer to offer light duty is only one factor to be considered. Here there was evidence that Employer did not have light duty work available for Claimant.

Claimant also argues that he had no duty to look for work because he remains totally disabled because he was never terminated by Employer, citing *Hoey v. Chrysler Motors Corp.*[18] In *Hoey*, the claimant, a 17-year-employee, was injured at work and was unable to return to work for more than a year. For that time period, claimant received total disability payments. When she was able to return to work, she was given certain restrictions by her doctor, which prevented her from resuming the

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[17] 314 A.2d 915 (Del. 1973).

[18] 655 A.2d 307 (Del. 1994).

position she retained prior to being injured. During this time, she continued to be listed by the employer as an employee and reported every six weeks to be examined by a company physician. The Court determined that it was not reasonable to expect the claimant to seek other employment until she was advised by her employer that it had no light-duty work available to her and that she would be discharged. The claimant was awaiting a light-duty position – which had been available to many employees injured on the job – to become available with employer and was participating in a work-hardening program and following employer's instructions to report to the company doctor. The Court held that, "under these particular facts and circumstances,"[19] it was reasonable for the Claimant to believe employer might soon have a light-duty job available for her, and she was under no duty to look for other work until she was advised by the employer she would not be given such a position.

Claimant also relies upon the above-mentioned *Roach* decision in which the employer offered the claimant two light-duty positions which were conditioned on approval by claimant's doctor. The doctor disapproved of those positions. The Court held that the *Hoey* reasoning applied to the facts in that case because the employer offered two sedentary positions that were conditioned on approval from the claimant's doctor, and the employer gave no indication that it intended to terminate the claimant's employment should she not accept the positions. Claimant states that the reasoning in *Hoey* and *Roach* applies here because there is evidence that Claimant

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[19] *Hoey v. Chrysler Motors Corp.,* 1994 WL 723023 (Del. Supr.) at *2.

remains an employee of Gerald Donovan and because Employer was aware of Claimant's sedentary work restrictions and discussed making accommodations with him on several occasions.

These cases are distinguishable because in this case the relationship between the employer and employee was far more interrupted than the one in those cases, after Claimant stopped working. Employer did not consider Claimant an "active" employee after he stopped working, indicating only that he would be "most likely" willing to rehire him.

After considering the entire record, I find no error in the Board's conclusion that Claimant presented insufficient evidence for the Board to determine a post-accident earnings rate, which is necessary in order to make any award for partial disability.

For the foregoing reasons, the decision of the Board is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

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