**IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| DELAWARE SUPERMARKETS, INC., | : | |
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| Employer Below-Appellant, | : | |
| | : | |
| v. | : | C.A. No. 05A-06-008 SCD |
| | : | |
| CARMELLA MULDOON, | : | |
| | : | |
| Claimant Below-Appellee. | : | |

Submitted: November 7, 2005
Decided: January 5, 2006

**O R D E R**

This 5th day of January, 2006, the briefs of the parties in connection with this appeal, by employer, of the ruling of the Industrial Accident Board, through its hearing officer pursuant to 19 Del. C. § 2301B (a)(4), having been considered, it appears that:

1. The issue on appeal was whether the claimant was entitled to continue receiving partial disability benefits. She sustained a compensable injury on April 10, 2004. She received total disability benefits for a period of time, then, by agreement, she commenced receiving partial disability benefits.

2. Before the Board was the January 10, 2005 petition to terminate or modify the partial disability benefits. The only factual issue was whether the claimant was physically able to work more than the four hours per day she was then working.

3. The employer, ShopRite, offered the testimony of Dr. Andrew Gelman in support of its position that the claimant was capable of returning to full time work, with a one month transitional phase. A summary of the evidence offered by Dr. Gelman is set forth in careful detail in the Board's opinion and will not be repeated in its entirety here. Key among the factual

points the Board made were: Dr. Gelman's opinion was based on one meeting with the claimant, he relied upon a functional capacity evaluation (FCE) report, he conducted an examination of the claimant which included an assessment of various physical capabilities, and the examination took five to ten minutes.

4. The Board also heard from Dr. C. Richard Sharbaugh. He has been the primary care physician for the claimant for twenty-three years. He knew claimant both pre and post her industrial accident. His physical examination of the claimant revealed limited ranges of motion and positive straight leg raise tests. He believed that EMG testing confirmed a pinched nerve at the L5 region which, when compared to an earlier EMG, showed a worsening of her condition. He expressed the opinion that the claimant was not capable of working increased hours.

5. The claimant testified. She stated that working four hours a day was a "struggle" and that she had only been able to do it for five weeks. She also testified that Dr. Gelman's record indicating that she weighed 175 pounds was inaccurate, that she weighed no more than 140 pounds, and that the examination with Dr. Gelman was not as comprehensive as described.

6. It is not unusual for the Board to be presented with conflicting testimony of two medical doctors. The Board's factual determination will not be disturbed so long as there is substantial evidence to support the factual finding.[1]

7. Employer argues that the Board's findings are not supported by substantial evidence because the objective evidence supports its petition; that the claimant's partial disability has terminated. Employer also argues that Dr. Sharbaugh's testimony exceeded the bounds of appropriate expert testimony when he stated that requiring the claimant to work eight hours a day

[1] 29 Del. C. § 10142. *See also Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

would be a "miscarriage," and when he made a reference to "the insurance company forcing the claimant to work eight hours per day."

8. The Board's decision carefully addressed the testimony of all three witnesses and concluded:

> Faced with the conflicting medical opinions offered in this matter, the Board chose to accept the opinion of Dr. Sharbaugh. The Board reached this opinion based on the fact Dr. Sharbaugh has treated Claimant over twenty three years, and thus, had sufficient time to evaluate Claimant's condition. As her treating physician, there is no question he could assess both her pre- and post-accident conditions. At present, he opined that Claimant continues to remain totally disabled. He cited not only the failed approaches to therapy, but the objective evidence of the EMG examinations. In his opinion, the EMG revealed a worsening in Claimant's condition as compared to her 2004 exams. From such, he continues to remain of the opinion Claimant can work four hours per day. He related her continued restrictions to the original accident.
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> In contrast, the Board chose to disregard the opinion offered by Dr. Gelman. The Board, in fact, questions the completeness and accuracy of his opinion given both the testimony of Claimant and the comparison to the earlier report from Dr. Kamali. As to the credibility of Claimant, ShopRite raised no issues surrounding either her subjective complaints or history of the injury. The Board accepts her testimony and notes the limited exam performed by Dr. Gelman, which he admitted lasted no more than "five to ten minutes." From the limited exam, he opined that Claimant can return to full-duty work capacity with one month. He appeared to place great reliance on the Barley Mill Rehabilitation report, which unfortunately for ShopRite, dooms his own testimony. Even accepted on face value, the report expressly limits Claimant's work capacity to no more than six hours per day. On this, the doctor could not explain how his opinion imposed an increased workday above the report on which he placed such reliance. Under this apparent inconsistency, the Board could not accept the doctor's opinion on Claimant's ability to return to work in a full-time capacity.[2]

[2] Board Decision, 05/27/2005 at 8-9.

9. The Board's decision is based on the evidence, is rational, does not consider the arguably inadmissible evidence from Dr. Sharbaugh, and is within the scope of its discretion as fact-finder.[3]

The decision of the Board is AFFIRMED.

IT IS SO ORDERED.

The Honorable Susan C. Del Pesco

Original to Prothonotary
xc: Christopher T. Logullo, Esquire
Jonathan B. O'Neill, Esquire

[3] *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005). *See also Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1983).