SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

January 14, 2010

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RE: ***William Porter v. Daisy Construction Co.***
C.A. No. S09A-07-001-RFS

Dear Counsel:

Pending before me is Claimant William Porter's appeal of a decision of the Industrial Accident Board ("Board"). Claimant argues that the Board made errors of law requiring reversal of its decision terminating his total disability compensation benefits. Employer Daisy Construction Company argues that the Board made no error of law and that the decision should be affirmed. After carefully reviewing the record and the parties' submissions, I find no error of law in the Board's decision and conclude that it shall be affirmed.

Facts and posture. In March 2006, Claimant injured his right wrist while picking up and throwing a piece of black top during his work for Employer. The injury was acknowledged by Employer as being compensable, and total disability benefits were paid in the amount of $181.18 weekly, based on a date of accident average weekly wage of $203.41. Medical expenses were also paid. Claimant underwent four surgeries to his right wrist, and a fifth one was recommended by Claimant's doctor at the time of the Board hearing.

In November 2008, Employer filed a Termination Petition, and the Board held a hearing in April 2009. During this time, Claimant continue to receive total disability benefits from the Workers' Compensation Fund. The Board issued its decision on April 16, 2009, finding that Claimant was no longer totally disabled as of the date of the hearing and requiring Employer to repay the Fund the amount of benefits that the Fund had paid to Claimant for the period from date of the filing of the Petition to Terminate to the date of the hearing (that is, November 21, 2008 to April 9, 2009). The Board concluded Claimant capable of full-time, light duty work.

The evidence presented to the Board. Errol Ger, M.D. an orthopedic surgeon, testified by deposition on behalf of Employer. He reviewed Claimant's medical records and examined him on three occasions between October 2007 and September 2008. Dr. Ger diagnosed Claimant with scapholunate dissociation of the right wrist caused by a work injury in March 2006. Dr. Ger noted that Claimant had had four surgeries on his right wrist but still suffered pain and weakness that would probably be permanent. In his

expert opinion, Dr. Ger concluded that Claimant can perform full-time light duty work, including all the jobs on Employer's Labor Market Survey.

Shelli Palmer, a vocational case manager, also testified on behalf of Employer. She compiled a Labor Market Survey based on Dr. Ger's recommendation that Claimant could perform light duty work with restrictions to his right hand. She also took into account Claimant's restrictions and educational background. She identified seven positions that met Claimant's credentials and accommodated his limitations, all of which were within a reasonable commute from Claimant's residence. One job was at Taco Bell, one at Pizza Hut and another at La Hacienda. Ms. Palmer visited all the sites to verify the availability of the jobs. The average weekly wage of the jobs is $248.29, which compared favorably to his pre-injury average weekly wage of $203.41.

David Sopa, M.D., is an orthopedic surgeon who testified by deposition on Claimant's behalf. He treated Claimant since the accident and did not believe that Claimant was capable of working as of the date of his deposition in March 2009. He testified that Claimant had four surgeries and that another one was scheduled. Dr. Sopa stated his opinion that Claimant will never be able to do the heavy work he was accustomed to doing prior to the work accident. Claimant was on a no-work status until the next surgery is performed, but Dr. Sopa believed that he can be retrained for a different type of work. Claimant was taking Percocet and Oxycodone for pain.

Claimant testified on his own behalf. He was 42-years old and went as far as the

seventh grade in school. He then attended a technical school and has done general masonry work, farming and general construction work. He reported having a learning disability in that he has a third-grade reading level and has trouble with math. Other than the pain in his right wrist, he had no physical problems. He believed that he needed a fifth surgical procedure before he can consider going back to work. Before the accident, Claimant's dominant hand was his right hand; now it is his left hand. He performs household chores, cooks, shops and drives, but does not lift heavy objects. He continues to experience significant pain in his wrist, radiating into his hand, and he takes pain medication three or four times per week. Claimant was an amateur wrestler, but he no longer engages in that activity. He does not believe that he can be trained for any new jobs because of his learning disability.

The Board decision. The Board noted that the doctors agreed on several issues, including Claimant's diagnosis, but disagreed as to the work restriction to be placed on Claimant. The Board accepted the testimony of Dr. Ger that Claimant can work on a light duty basis as more credible than Dr. Sopa's opinion that he should not work at all. Dr. Sopa conceded that Claimant can be retrained and that he currently drives. Dr. Ger was of the opinion that while Claimant will never do the heavy work he was accustomed to perform, he is capable of light duty work. His limitations are confined to the right wrist. Dr. Ger acknowledges Claimant's pain and physical limitation of the right wrist as being real. The Board found his testimony more credible than Dr. Sopa's testimony.

The Board found that Claimant is able to perform the jobs listed on Employer's

Labor Market Survey and that he could do so without a loss of earning power. For these reasons, the Board ordered that Claimant's total disability benefits were terminated as of the date of the hearing, April 9, 2009, and directed Employer to make the appropriate reimbursement to the Workers' Compensation Fund, for the period of time between the filing of the termination petition and the date of the hearing.

Standard of review. This Court's review of a decision of the Industrial Accident Board is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's findings of fact and conclusions of law.[1] Substantial evidence is evidence that a reasonable mind might accept to support a conclusion.[2] This Court does not weigh the evidence, determine questions of credibility, or make factual findings.

First motion for reargument. On reargument before the Board, Claimant asserted that the Board failed to address the issue of whether Claimant should be kept out of work on total disability because of an upcoming surgery. In response to the motion for reargument, the Board stated that it did address the issue of the next surgery in its initial Decision.

Claimant raises this same argument on appeal to this Court. On page 8 of the Board's Decision, the Board observed that Dr. Sopa had put Claimant on a no-work status pending the next surgery, but found more credible the testimony of Dr. Ger, who testified

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[1]*Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340 (Del. 1993).

[2]*Olney v. Cooch*, 425 A.2d 610 (Del. 1981).

that Claimant could perform full-time light duty work. When two experts offer different opinions, the Board is free to accept either opinion.[3] Thus the Court finds that Claimant's assertion that the Board ignored relevant evidence is not accurate. The Board's finding that Claimant could perform light duty work even though he had another surgery scheduled is affirmed.

Claimant also asserted on reargument that an attorney's fee was warranted because Claimant received the award or benefit of Employer's reimbursement to the Workers' Compensation Fund. The Board stated that Claimant did not receive an award via the reimbursement to the Workers' Compensation Fund, but rather that Claimant had already received that benefit during the period of disability and that the Fund received the benefit, not Claimant.

Claimant renews this argument on appeal, but the Court finds that the Board was correct. The Board is authorized to award attorney's fees, pursuant to 19 *Del. C.* § 2320(10):

> A reasonable attorney's fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware. . . at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party.

The relevant phrase here is "to an employee awarded compensation." In its Order on Reargument, the Board correctly stated that Employer was directed to reimburse the Fund for benefits paid from the date of the filing of Employer's termination petition to the

[3] *DiSabatino Brothers, Inc. v. Wortman*, 453 A.2d 102 (Del. 1982).

date of the hearing. Thus the Fund received the benefit, not the Claimant. Claimant did not receive any benefit or award of compensation. The Court affirms the Board's finding that Claimant was not entitled to an attorney's fee.

Second motion for reargument. Claimant argued that the Board erred in failing to order a medical witness fee. In its Order denying the second motion for reargument, the Board rejected this argument on the same grounds that it had denied the argument for an attorney's fee, that is, Claimant received no award or benefit from the Board's decision.

In his appeal to this Court, Claimant argues that he did receive a benefit from having an expert witness because the Board did not terminate his benefits on the day Employer filed its petition to terminate. However, Claimant has not shown that the Board continued Claimant's disability benefits until the date of the hearing because of Dr. Sopa. In fact, the termination petition was filed on November 21, 2008; Dr. Sopa was deposed on March 4, 2009, and the hearing was held April 9, 2009. Thus the Board continued Claimant's disability benefits for approximately four months without benefit of Dr. Sopa's deposition or opinion. The Court concludes that the continuation of Claimant's benefits was not due to the efforts of Dr. Sopa, who was not deposed until one month prior to the hearing.

The Board is authorized to award medical witness fees when a claimant prevails, pursuant to 19 *Del. C.* § 2322(e):

> The fees of medical witnesses testifying at hearings before the Industrial Accident Board in behalf of an injured employee shall be taxed as a cost to the employer or the employer's insurance carrier in the event the injured

employee receives an award.

Here, the critical phrase is "in the event the injured employee receives an award." That is, if the employee receives an award, he may also receive a medical witness fee. In addition, the Delaware Supreme Court has stated that a claimant may receive a medical witness fee for any favorable change in position such as a determination of a compensable injury, recognition that the Board has jurisdiction over the claim, recognition of the five-year statute of limitations, or the possibility of future permanency and disfigurement benefits.[4] In the case at bar, these factors were not present, having already been established or not having been raised. The Court concludes that the Board made no error of law in concluding that claimant was not entitled to an award for a medical witness fee.

For all these reasons, the decision of the Board terminating the total disability benefits of Claimant William Porter is **AFFIRMED.**

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes, Judge

Original to Prothonotary

[4] *Pugh v. Wal-Mart*, 945 A.2d 588 (Del.).