

January 28, 2002

Henry C. Davis, Esquire
Henry Clay Davis, III, P.A.
207 East Market Street
P.O. Box 744
Georgetown, DE 19947

Raymond W. Cobb, Esquire
Raymond W. Cobb, LLC
Three Mill Road, Suite 206
Wilmington, DE 19806

**RE: Young v. Food Lion, Inc.,
C.A. No. 01A-04-004**

Date Submitted: October 25, 2001

Dear Counsel:

This is the Court's decision on the appeal by Lora Young ("Claimant") from an Industrial Accident Board ("Board") decision denying Claimant's petition for workers' compensation benefits.

On September 29, 2000, Claimant filed a Petition to Determine Additional Compensation Due with the Board. The Claimant sought workers' compensation benefits for a five percent impairment to her right knee. On March 12, 2001, the Board conducted a hearing regarding Claimant's petition. After the evidence was presented, the Board concluded that the Claimant failed to meet her burden of proof under 19 *Del. C.* §2326. Accordingly, the Board denied Claimant's petition. Pursuant to 19 *Del. C.* §2349, Claimant appealed the Board's decision to this Court.

I.

Testimony at the hearing established the following. On June 28, 1997, Claimant fell while working in the deli department at Food Lion, injuring her right knee. After the fall, she complained of pain and an occasional buckling sensation in her knee. If she drove for more than fifteen minutes, she felt pain from her knee up to her thigh. At the time of the hearing, Claimant worked as a buffet server 6.5 to 7.5 hours per day. Her knee always hurt when she worked.

Dr. John Spieker, a board certified orthopedic surgeon, testified by deposition for the Claimant. He began treating the Claimant in July of 1997. After a series of examinations, which included an MRI and a diagnostic arthroscopy, Dr. Spieker concluded that the Claimant suffered from a bone edema at the thigh bone and shin bone on the inner side of the knee. Dr. Spieker surmised that the buckling sensation that the Claimant felt was an involuntary reflex caused by pain when certain parts of the knee contacted each other. When that occurred, the Claimant quickly attempted to relieve the pressure, which caused her knee to buckle.

Dr. Spieker testified that Claimant suffered a five percent impairment to her right knee. Dr. Spieker based his diagnosis on the Fourth Edition of the American Medical Association Guidelines (“Guidelines”). Because there was no chart in the Guidelines that directly related to Claimant’s injury, Dr. Spieker extrapolated his diagnosis from a combination of two charts detailing related injuries to the knee. Dr. Spieker also relied on his own experience as a board certified orthopedic surgeon.

Claimant did not have swelling, loss of range of motion, atrophy, knee laxity, or gait derangement. Claimant had no ligament or meniscal injury. The arthroscopy revealed some cracks in the medial femoral condyle. However, those cracks were consistent with the normal degenerative

process given the Claimant's age and weight. In other words, Claimant had no significant physical impairment of her knee.

The Board found that neither the Claimant nor Dr. Spieker identified any loss of function to justify the five percent impairment rating. The Board recognized that the Claimant suffered from pain, but noted that pain alone is not compensable. Instead, the pain must be accompanied by some functional loss of use. The Board stated that it could not determine whether Dr. Spieker's rating based on tables of similar injuries was appropriate without a better comparison of the injuries and their effects on leg function. For those reasons, the Board found that the Claimant's intermittent pain did not qualify for permanent impairment benefits.

II.

Claimant asserts that the Board erred as a matter of law in refusing to grant her petition. In support of her claim, Claimant presents three arguments. One, the Board gave undue weight to the absence of Claimant's particular injury in the Guidelines. Two, the Board's factual findings are inconsistent with the testimony presented, particularly that of Dr. Spieker. Three, the Board impermissibly relied on the fact that the Claimant worked full time at the time of the hearing.

The Supreme Court and this Court have emphasized repeatedly the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. *Johnson v. Chrysler Corporation*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d

397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler*, 213 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d).

The Board's decision in this case is supported by substantial evidence. The Board was correct in noting that "pain which is not associated with loss of use is not compensable." *Wilmington Fibre Specialty Co. v. Rynders*, 316 A.2d 229 (Del. Super. 1974), *aff'd*, 336 A.2d 580 (Del. 1975), *see also Cale v. Governor Bacon Health Center*, Del. Super., C.A. No. 83A-NO-16, Stiftel, J. (June 19, 1984); *Whaley v. Teal Construction, Inc.*, Del. Super., C.A. No. 81A-OC3, Stiftel, J. (May 13, 1982). While the Claimant experienced pain, there is no evidence that she experienced a functional loss of use of her knee. She had no swelling, no atrophy, no gait derangement, and no loss of range of motion. Without some physical manifestation of the injury, the Board correctly asserted that the Claimant suffered no loss of use.

"The question of whether a person has sustained a permanent partial disability is a question of fact to be determined by the Board after evaluating the expert medical testimony of the Claimant." *Cale v. Governor Bacon Health Center*, Del. Super., C.A. No. 83A-NO-16, Stiftel, J. (June 19, 1984). The Board found Dr. Spieker's testimony to be unpersuasive regarding his method for arriving at the five percent impairment figure. The Board noted that Dr. Spieker failed to explain how Claimant's injury was similar to the injuries from the tables Dr. Spieker used. The Board further explained that "without a comparison of the injuries and their affects on leg function, the Board cannot determine if a rating based on a similar injury is appropriate." (Bd. Dec. At 4.) Such a conclusion is well within the Board's discretion.

Although the Board mentioned the fact that the Claimant worked as a buffet server approximately seven hours a day, this was obviously not a major factor in the Board's determination. It only accounted for a single sentence in the Board's decision. The Board's decision is supported by substantial evidence even without the sentence in question.

Accordingly, the Claimant's appeal is denied and the Board's decision is affirmed.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary
Industrial Accident Board