IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MACY'S	)	
	)	
Employer Below/	)	
Appellant,	)	
	)	C.A. No. 05A-11-007 MJB
v.	)	
	)	
PATRICIA CAMPBELL	)	
	)	
Employee Below/	)	
Appellee.	)	

Submitted: March 20, 2006
Decided: June 28, 2006

On appeal From the Industrial Accident Board. **REVERSED**.

OPINION AND ORDER

R. Stokes Nolte, Esquire, Nolte & Associates, Wilmington, Delaware, Attorney for Appellant Macy's.

Michael D. Bednash, Esquire, Lawrance Spiller Kimmel, Esquire, Kimmel, Carter, Roman & Pelz, P.A., Wilmington, Delaware, Attorney for Appellee Patricia Campbell.

BRADY, J.

Procedural History

This is an appeal from a decision of the Industrial Accident Board ("Board"). The issue is whether Patricia Campbell ("Claimant") is entitled to additional compensation due to a recurrence of total disability beginning June 30, 2005. A hearing on the merits took place before the Board on Octber 19, 2005. A decision was rendered by the Board on November 1, 2005 granting Claimant compensation for total disability from June 30, 2005 continuing to the present time. Macy's ("Employer") filed a timely Notice of Appeal. This is the Court's Opinion and Order on Appeal.

Standard of Review

The Court has a limited role when reviewing a decision by the Industrial Accident Board. If the decision is supported by substantial evidence and free from legal error,[1] the decision will be affirmed.[2] Substantial evidence is evidence that a reasonable person might find adequate to support a conclusion.[3] The Court will reverse and remand a decision of the Board if its findings are not supported by substantial evidence, or when the Board has made a legal mistake.[4]

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[1] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).
[2] *Sirkin and Levine v. Timmons*, 652 A.2d 1079 (Del. Super. Ct. 1994).
[3] *Oceanport Indus. Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1994).
[4] *Mullin v. W.L. Gore & Assoc*., 2004 WL 1965879 (Del.Super.); *see also Forbes Steel and Wire Co. v. Graham*, 518 A.2d 86, 87-88 (Del. 1986); *Doe v. General Foods Corporation*, 1986 WL 6589 at *4 (Del.Super.); *Kentucky Fried Chicken v. Iman*, 1995 WL 653497 (Del.Super.).

Facts

On November 24, 1998 Claimant climbed on some boxes while performing a floor move for Employer.[5] While standing on the boxes, Claimant lost her balance, causing her to fall and hit her neck back, elbow and hands.[6] Claimant first treated with her family doctor after the incident, Dr. Adams.[7] Dr. Adams referred Claimant to Dr. Bennick.[8] Claimant returned to work for Employer six to eight months following the incident, but was only able to work "a couple weeks" before Dr. Bennick recommended she discontinue her employment.[9] Dr. Bennick referred Claimant for physical therapy and chiropractic treatments and Claimant also had some nerve blocks done at St. Francis Hospital.[10] Dr. Bennick also referred Claimant to Dr. Sowa, who performed surgery on Claimant's right elbow, two surgeries on Claimant's left hand, surgery on three fingers of Claimant's right hand and surgery on Claimant's right wrist.[11] Claimant also treated with Dr. Katz and Dr. Falco.[12] Claimant also had some nerve blocks done by Dr. Moran.[13]

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[5] IAB No. 1136671 Transcript at 4.
[6] *Id* at 4-5.
[7] *Id* at 6.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id* at 8-11.
[12] *Id* at 10.
[13] *Id*.

Claimant testified she injured her neck in a car accident in 1987 or 1988, but after treating for six months, she had fully recovered and sought no further treatment.[14] Claimant testified she was able to perform her job for Employer without any pain prior to the falling incident.[15]

Claimant testified at the time of the October 2005 Board Hearing she last worked approximately eighteen months before for Total Care Physicians, making the date she last worked approximately April 2004.[16] Claimant testified she was fired from her job because she was missing too much time from work due to her work-related injuries.[17]

Dr. Moran testified on behalf of Claimant at the hearing. He opined the neck pain and upper extremity symptoms are related to her work incident occurring in November 1998.[18] Dr. Moran testified Claimant had probable discogenic neck pain, right upper extremity radicular symptoms in the mixed C6-7 distribution, with cervical spondylosis and spinal stenosis at C5-6 and C6-7, and carpel tunnel release with right first extensor compartment tenosynovectomy.[19] Dr. Moran testified a fall like Claimant sustained at work in November 1998 could lead to further degenerative changes, as seen

[14] *Id* at 12.
[15] *Id* at 13.
[16] *Id* at 20.
[17] *Id*.
[18] *Appellee Answering Brief* Exhibit 3 (Dr. Moran Deposition) at 8.
[19] *Id* at 7.

on many of Claimant's imaging tests.[20] Dr. Moran also testified the incident could lead to further arthritic degeneration and disk degeneration in the neck and the incident could tear the disk wall in Claimant's neck, causing neck pain and headaches.[21] Dr. Moran further testified that Claimant has been totally disabled from work since November 2004 through the time of Dr. Moran's testimony taken on October 13, 2005.[22]

Dr. Bednar testified on behalf of Employer. Dr. Bednar testified Claimant has restricted motion in her neck, a positive Wright's test, a positive Sperling's test on the right, limited right shoulder motion, a positive Tinel sign, and grip strength deficiencies in the right hand.[23] Dr. Bednar diagnosed Claimant with cervical spondylosis and ulnar neuropathy right cubical tunnel pre-existing the problems present on a cervical x-ray conducted April 14, 1999, less than six months after the incident giving rise to this action.[24] Dr. Bednar testified the symptoms he diagnosed could not have resulted from the November 1998 incident because it was too early for them to show up on an x-ray the following April.[25] Dr. Bednar also testified an EMG performed on Claimant on January 8, 1999 was a normal study, showing no evidence of a contusion or neuropraxic injury to the nerve or

[20] *Id* at 27.
[21] *Id*.
[22] *Id* at 15-16.
[23] *Appellee Answering Brief* Exhibit 4 (Dr. Bednar Deposition) at 9-11.
[24] *Id* at 14.
[25] *Id*.

evidence of significant compression. It is for these reasons Dr. Bednar opined the changes in the July 21, 2005 EMG are not the not result from the November 1998 incident.[26] Dr. Bednar concluded Claimant could work in a sedentary capacity with restrictions.[27]

Claimant has received compensation for various periods of total and partial disability related to the injuries sustained in the November 1998 incident.[28] Apparently, Claimant voluntarily ended her total disability in May 2005.[29] Claimant's petition sought total disability benefits beginning June 30, 2005 through the present.

Contentions of the Parties

Employer argues Claimant's current neck ailments are not causally related to the work incident.[30] Employer also argues Claimant has not proven she suffered a recurrence of total disability since voluntarily terminating her disability benefits. According to Employer, Claimant must prove she suffered such a recurrence between the time Claimant voluntarily terminated her disability benefits and June 30, 2005, the date from which she

[26] *Id* at 15.
[27] *Id* at 21-22.
[28] IAB No. 1136671 Decision at 2.
[29] *Appellant Opening Brief* at 12; the exact date Claimant voluntarily terminated her benefits nowhere appears in the record. Employer references the date as May 2005. Neither Claimant nor the Board ever reference an exact date from which to measure the time Claimant must show she suffered a recurrence. In addition, no documentation appears in the record to indicate when the benefits were terminated. Therefore, the Court will accept the May 2005 date as correct.
[30] *Appellant Opening Brief* at 6.

seeks additional compensation due to a recurrence of her injury.[31] Claimant argues that her ailments are related to the work incident and that there was clearly a recurrence in Claimant's symptoms as evidenced by her termination from Total Care Physicians because of the increased severity of her symptoms.[32]

Applicable Law

"As a general rule, total disability, once established, continues until the employer is able to show the availability of regular employment within the employee's capabilities. After a voluntary termination of total disability benefits, however, the burden is on the injured claimant to establish his right to additional benefits."[33] "The term recurrence is used in common parlance to describe the return of a physical impairment, regardless of whether its return is or is not the result of a new accident. As applied in most workmen's compensation cases, however, it is limited to the return of an impairment without the intervention of a new or independent accident."[34]

In order to award compensation to Claimant due to a recurrence of total disability the Board must have found Claimant's current ailments are

[31] *Appellant Opening Brief* at 12-14; *Appellant Reply Brief* at 9-11.
[32] *Appellee Answering Brief* at 13-14.
[33] *McGlinchey v. Phoenix Steel Corp*., 293 A.2d 585, 587 (Del. Super. Ct. 1972).
[34] *Disabitino & Sons, Inc. v. Facciolo*, 306 A.2d 716, 718 (Del. 1973).

causally related to the work incident[35] and that Claimant has suffered a recurrence of those ailments that entitle her to total disability benefits. The record supports the Board's determination that the current ailments are related to the work place injury. However, the Court finds the record lacks substantial evidence from which the Board could have found Claimant suffered a recurrence of total disability.

The Court finds this case analogous to *Publisher's Circulation Fulfillment v. Humber*.[36] In *Publisher's* the Employer admitted compensability of an August 18, 2000 accident and reached an agreement with the claimant to pay total disability from August 19, 2000 to October 27, 2000. The claimant petitioned the Industrial Accident Board claiming a recurrence of injury from October 27, 2000. The Board found a recurrence of injury and awarded compensation prospectively from October 27, 2000 through June 11, 2001. The Superior Court reversed the determination of the Board because there was no finding of a recurrence after the expiration of the compensation agreement as required by the legal standard of proof for a recurrence of injury. The Court summarized the holding as follows:

> The Board awarded Humber additional compensation from October 27, 2000, to June 31, 2001, finding a recurrence to have occurred. While it uses the word "recurrence," its findings

[35] *West v. Ponderosa Steak House*, 1998 WL 281195 at *3 (Del.Super.); *Publisher's Circulation Fulfillment v. Humber*, 2003 WL 1903777 at *2 (Del.Super.).
[36] 2003 WL 1903777 (Del. Super.).

> of fact failed to identify what happened on October 27th to qualify as a recurrence. The Board's finding of recurrence, which necessarily would have to have been after the termination agreement expired, is, beneath the veneer, a finding that a recurrence occurred on August 18, 2000.[37]

Further authority for this construction of the burden to prove a recurrence is found at *Bradley v. Waco Scaffolding & Equip*.[38] In *Bradley* the claimant had voluntarily terminated his total disability benefits and then sought additional compensation due to a recurrence of injury. The court held:

> Neither doctor testified that there was a change in the claimant's condition between the time he voluntarily terminated his temporary total disability benefits and the filing of the petition to the Board. Without such a change, as the Board correctly held, no finding could have been made that Bradley had suffered a recurrence.[39]

Similarly, in *West v. Ponderosa Steakhouse*,[40] the Board was called upon to determine whether a claimant was entitled to additional benefits based upon a recurrence of injury after a voluntary compensation agreement ended. The Board found the claimant had not carried the burden of proving a recurrence and the court affirmed, holding:

> Neither doctor testified that Claimant's condition changed between the time she signed the Agreements as to Compensation and the filing of the Petition to Determine

[37] *Id* at *2.
[38] 1997 WL 819131 (Del. Super.).
[39] *Id* at *2.
[40] 1998 WL 281195 (Del. Super.).

> Additional Compensation Due. Without such a change, the Board could not possibly make a finding that Claimant suffered a recurrence. Therefore, the Board's decision to deny Claimant's Petition to Determine Additional Compensation Due of total disability is affirmed.[41]

The cases cited above reaffirm that the burden is on the Claimant to prove she had suffered a recurrence after a termination of benefits. The record lacks substantial evidence from which the Board could have made such a determination.

While the petition considered by the Board was to determine additional compensation due to a recurrence of total disability,[42] nearly the entire testimony at the hearing and the decision focus on the causal connection of the original work incident to Claimant's current ailments.[43] Counsel for both Employer and Claimant focused solely on that issue at the Board hearing in this matter. However, this focus by counsel does not alleviate the Board's duty to determine whether Claimant suffered a recurrence of disability. The record does not reflect the circumstances surrounding Claimant's termination of benefits. The precise issue of whether Claimant's conditions had worsened between the time of the

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[41] *Id* at *4.
[42] IAB No. 1136671 Decision at 2.
[43] IAB No. 1136671 Decision at 10, in relevant part:

> The evidence presented on this point supports Dr. Moran's view. Although Dr. Bednar stated Claimant's work-related neck sprain resolved, it is not clear what evidence he is relying on to form that judgment. There has been no presentation of any evidence to suggest that Claimant has ever been pain-free, at least with respect to the neck, since the November 1998 accident.

termination of benefits and June 30, 2005, when she seeks additional compensation, was never addressed.

Essentially, the Board found Claimant suffered a compensable injury on November 24, 1998. However, the Board never addressed whether Claimant suffered a recurrence of total disability between the time benefits terminated and June 30, 2005. This was the precise issue to be addressed at the hearing and it was not answered. In fact, Dr. Moran, whom the Board found to be more credible than Dr. Bednar,[44] actually testified it was his opinion Claimant had been disabled from work since November 2004,[45] which indicates Claimant's condition had not changed since that time. Dr. Moran did not testify her condition had worsened between the time benefits terminated and June 30, 2005.

Employer argues Claimant voluntarily terminated her benefits in May 2005 and seeks benefits for a recurrence beginning June 30, 2005, and that, therefore, she must show a recurrence between May 2005 and June 30, 2005. Claimant responds to this argument by stating Claimant's condition clearly changed as shown by her inability to maintain her job at Total Care Physicians, where Claimant represents she last worked in approximately April 2004. Therefore, there are inconsistent contentions regarding when

[44] IAB No. 1136671 Decision at 11.
[45] *Dr. Moran Testimony* at 15-16.

Claimant's benefits terminated. The record lacks substantial evidence to determine which of these time periods correctly represents the actual period Claimant's benefits terminated. Any ailments Claimant suffered from when she voluntarily terminated her benefits must have gotten worse between that time and June 30, 2005. The record does not provide substantial evidence the Board could rely on to reach this conclusion.

Without substantial evidence in the record to support a finding of a recurrence of total disability, this Court is constrained to reverse the findings of the Board. This matter shall be remanded to determine when Claimant's disability benefits terminated and whether there was a recurrence of injury between that time period and June 30, 2005.

Conclusion

For the reasons set forth herein the decision of the Industrial Accident Board is **REVERSED** and **REMANDED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge