IN THE SUPREME COURT OF THE STATE OF DELAWARE

MUNSEL HARMON,	§	
	§	No. 338, 2013
Claimant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	Sussex County
	§	
F&H EVERETT & ASSOCIATES,	§	C.A. No. S12A-08-003
	§	
Employer Below,	§	
Appellee.	§	

Submitted: October 9, 2013
Decided: December 20, 2013

Before **HOLLAND**, **BERGER,** and **JACOBS**, Justices.

O R D E R

This 20th day of December 2013, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Munsel Harmon, the claimant-below ("Harmon"), appeals from a Superior Court order affirming a decision of the Industrial Accident Board (the "Board") that awarded Harmon disability benefits for a limited period, less an offset for unemployment benefits paid to Harmon during that period. Harmon appeals, claiming that she is entitled to total disability benefits for the period of disability identified by her physician, and that the offset for the unemployment benefits was improper. We disagree and affirm the Superior Court judgment.

2. On June 6, 2008, Harmon injured her left foot while working as a receptionist for F&H Everett, her employer ("Employer"). Approximately three weeks later Harmon began seeing Dr. Tam, a podiatrist, for left foot pain that she attributed to the accident. Dr. Tam diagnosed Harmon with a ganglion cyst, probably resulting from the injury. On August 15, 2008, Dr. Tam performed surgery to excise the cyst, after which Harmon developed a keloid scar and nerve impingement. Harmon underwent a second surgery on April 22, 2009 to address those postoperative developments. Several months later, Harmon underwent a third surgery on February 16, 2010.[1]

3. Harmon has been out of work since her first surgery in August 2008.[2] She was terminated from Employer's employ on September 30, 2008 and began collecting unemployment benefits shortly thereafter, until August 2010. During Harmon's treatment, Dr. Tam issued five written "no-work orders" instructing Harmon not to work. The first no-work order, dated September 9, 2008, stated that Harmon could return to work on September 10, 2010. The following three no-work orders covered a continuous period beginning August 18, 2010. In the fifth no-work order dated January 11, 2011, Dr. Tam authorized Harmon to return to sedentary work. During his depositions, Dr. Tam testified that, in addition to the

[1] Employer's insurance carrier paid for all three surgeries to Harmon's injured foot.

[2] Dr. Tam's testimony suggests that Harmon has been out of work since July 2008.

written no-work orders, he had instructed Harmon not to work from her first visit in July 2008 until January 2011.[3]

4. On November 10, 2010, Harmon filed a Petition to Determine Additional Compensation Due, seeking an award of total disability benefits. The Board held a hearing on Harmon's petition on March 17, 2011,[4] and issued a decision on March 30, 2011.[5] The Board, crediting Employer's expert witness, awarded Harmon four weeks of total disability following each surgery. The Board also credited Employer with an offset for the period when Harmon received unemployment benefits after her second surgery.[6] In arriving at its decision, the Board concluded that Dr. Tam's disability opinion and no-work instructions were not given in good faith. Accordingly, the Board disregarded Dr. Tam's testimony that Harmon was totally disabled from July 2008 until January 2011.[7]

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[3] Harmon testified that Dr. Tam released her to work after her first and second surgeries. Following her third surgery, she claims, she was instructed not to work until January 2011.

[4] During the hearing, deposition testimony from Dr. Tam and Dr. Crain (Employer's medical expert) was admitted into evidence.

[5] *Harmon v. F&H Everett & Assoc.*, IAB Hearing No. 1340388 (March 30, 2011), at 5.

[6] *Id*. at 13. Although Harmon testified that she received unemployment benefits until August 2010, the Board appears to have credited her testimony that she did not receive unemployment benefits after her surgery in February 2010.

[7] *Id.* at 10-12. The written no-work orders were not admitted into evidence during the first Board hearing.

5. Harmon filed a Motion for Reargument, which the Board denied by order dated May 27, 2011.[8] Harmon appealed to the Superior Court. By letter opinion dated April 24, 2012, the Superior Court reversed, finding that the Board had erred by concluding that Dr. Tam had issued the no-work orders in bad faith.[9] Noting that under *Gilliard-Belfast*[10] a claimant is entitled to rely on a treating physician's written no-work unless the doctor acts in bad faith, the court remanded the case to the Board. The court instructed that the written no-work orders be submitted into evidence and considered by the Board in determining total disability benefits.[11] The Superior Court did not address the offset previously awarded to Employer.[12]

6. At a remand hearing held on July 18, 2012, five no-work orders were produced. In its final (July 2012) decision, the Board awarded Harmon total disability benefits for the time periods covered by the no-work orders for "September 9, 2008 and from August 18, 2010 through January 11, 2011, as well

[8] Order Denying Mot. For Reargument, IAB No. 1340388 (May 27, 2011), at 4. In that order, the Board clarified the details of the offset, and provided that Harmon's disability benefits should be reduced by the amount of unemployment benefits received during the same period. *Id.*

[9] *Harmon v. F&H Everett & Assoc.*, 2012 WL 5458051 (Del. Super. Ct. Apr. 24, 2012).

[10] *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251 (Del. 2000).

[11] *Harmon v. F&H Everett & Assoc.*, 2012 WL 5458051, at *5 (Del. Super. Ct. Apr. 24, 2012). The Superior Court reasoned that actual written orders by a physician are more reliable than after-the-fact testimony. The written no-work orders were only referenced at the March 17, 2011 Board. *Id*.

[12] *Id*.

as for four weeks after each of the three surgeries."[13] The offset to Employer was not addressed. Harmon again appealed to the Superior Court.

7. By letter opinion and order dated May 31, 2013, the Superior Court affirmed both the disability award and the offset for the period when Harmon collected unemployment benefits.[14] Harmon appealed to this Court from that order.

8. We review a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by directly examining the decision of the agency.[15] We review the Board's decision for errors of law and for whether substantial evidence exists to support the Board's findings of fact and legal conclusions.[16] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[17] This Court will not weigh evidence, determine credibility, or make its own factual findings.[18] Errors of law are

[13] *Harmon v. F&H Everett & Assoc.*, IAB Hearing No. 1340388 (July 26, 2012), at 2.

[14] *Harmon v. F&H Everett & Assoc.*, Del. Super., C.A. No. S12A-08-003, Graves, J. (May 31, 2013) (Letter Op.).

[15] *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 380 (Del. 1999).

[16] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (citing *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, at *2 (Del. Super. Ct. Mar. 24, 2008)).

[17] *Id.* (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981)).

[18] *Id*. (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del.1965)).

reviewed *de novo*.[19] Absent errors of law, the standard of review is abuse of discretion.[20] A Board will be found to have abused its discretion only if its decision has "exceeded the bounds of reason in view of the circumstances."[21]

9. Harmon advances two claims of error. First, she claims that the Board misapplied the rule set forth in *Gilliard-Belfast* when it awarded her total disability benefits only for the time periods for which Dr. Tam issued written no-work orders.[22] Second, Harmon claims that the Board erred by awarding Employer an offset for the period when she received unemployment benefits.

10. In support of her first claim, Harmon argues that the Board (and the Superior Court) erroneously applied the bad-faith exception to the *Gilliard-Belfast* rule, under which a claimant is entitled to rely on a doctor's no-work orders absent a showing of bad faith.[23] This argument has no basis in the record. The Superior Court reversed the Board's initial determination that Dr. Tam had acted in bad

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[19] *Id*.

[20] *Glanden v. Land Prep. Inc.*, 918 A.2d 1098, 1101 (Del. 2007) (citing *Digiacomo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del.1986)).

[21] *Person-Gaines*, 981 A.2d at 1161 (quoting *Stanley*, 2008 WL 2410212, at *2).

[22] Specifically, Harmon claims that Dr. Tam's testimony established that, at a minimum, he placed Harmon on no work status as of her second surgery, continuing through January 2011.

[23] Under *Gilliard-Belfast*, "if a claimant is instructed by his treating physician that he or she is not to perform any work, the claimant will be deemed totally disabled during the period of the doctor's order. This rule presumes that the doctor acts in good faith . . . ." *Delhaize America, Inc. v. Baker*, 2005 WL 2219227, at *1 (Del. Aug. 12, 2005).

faith. Accordingly, the Board's final decision did not include a finding of bad faith.

11. Harmon also argues that the Board misapplied the *Gilliard-Belfast* rule by disregarding Dr. Tam's testimony that he gave Harmon oral no-work orders throughout the contested period. This argument fails as well.

12. Under *Gilliard-Belfast* a claimant is entitled to rely on a treating physician's no-work order. But, in order for that rule to apply, the claimant must first establish that a no-work order was issued.[24] During the Board hearing, the primary evidence presented regarding the oral no-work orders was Dr. Tam's testimony. That testimony was contradicted both by his own medical records and by Harmon's testimony.[25] We cannot conclude, therefore, that the Board abused its discretion in finding that Harmon failed to establish that the oral no-work orders were in fact issued.

12. As for Harmon's second claim, we conclude that the Board did not err as a matter of law by offsetting Harmon's disability award by the amount of unemployment benefits she received during the same time period. Delaware courts have routinely found that workers' compensation benefits should be reduced by the

[24] *Robbins v. Helmark Steel*, 2011 WL 4436762, at *2 (Del. Sept. 26, 2011).

[25] *Harmon*, C.A. No. S12A-08-003, at 7.

amount of any unemployment benefits also received by a claimant.[26] Although the Workers' Compensation Act contemplates full compensation, it is not intended to permit more than one recovery for a single loss.[27] Harmon's position that the Board erred as a matter of law when awarding an offset to Employer is inconsistent with established principles of Delaware law.[28]

13. Harmon makes several arguments to support this claim, none persuasive. First, she contends that the Board lacks statutory authority to adjust an overpayment of unemployment benefits. That argument misapprehends the nature of the offset, which is based not on an overpayment of unemployment benefits, but

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[26] *See Brooks v. Chrysler Corp.*, 405 A.2d 141, 143 (Del. Super. Ct. 1979) ("[W]hile receipt of unemployment insurance benefits does not in and of itself disqualify one from receiving workmen's compensation benefits, '. . . the amount of any disability award should be reduced by the unemployment benefits received.' . . . A single loss of earnings should be compensated by only one recovery."); *see also NVF v. Wilkerson*, 2006 WL 2382799, at *2 (Del. Super. Ct. July 27, 2006) ("A claimant may be eligible for both unemployment benefits and worker's compensation benefits at the same time, but the worker's compensation benefits must be reduced in the amount of the unemployment compensation benefits received."); *Beckhorn v. Guardian Const. Co.*, 1998 WL 733091, at *3 (Del. Super. Ct. Sept. 2, 1998) (explaining the policy to "prevent the employee from receiving compensation for wage losses already being compensated through workers' compensation"). *But see Neuberger v. City of Wilmington*, 453 A.2d 804, 806 (Del. Super. Ct. 1982) ("[T]his Court declines to engage in judicial legislation by reducing Claimant's disability award by the amount he received in unemployment benefits."), *disapproved of by Guy J. Johnson Transp. Co. v. Dunkle*, 541 A.2d 551 (Del. 1988).

[27] *See Guy J. Johnson Transp. Co. v. Dunkle*, 541 A.2d 551, 553 (Del. 1988).

[28] *See Dunkle*, 541 A.2d at 553 (citing *Brooks v. Chrysler Corp.*, 405 A.2d 141 (Del. Super. Ct. 1979); *see also Beckhorn v. Guardian Const. Co.*, 1998 WL 733091, at *4 (Del. Super. Ct. Sept. 2, 1998) (explaining the purpose of allowing one recovery is to prevent a windfall to the employee). *But see State v. Calhoun*, 634 A.2d 335, 337 (Del. 1993) ("[T]here is no basis for imputing double recovery of workers' compensation benefits if the second benefit arises from a source which exists by reason of the employee's payment of a separate consideration."). Harmon has not argued that she paid separate consideration for the unemployment benefits and the workers' compensation benefits.

rather to prevent a claimant's double-recovery for a single injury. Harmon next argues that an offset by the Board unjustly enriches Employer's workers' compensation insurance carrier because it does not replenish the unemployment fund. Harmon provides no support for this argument, and in any event it has no merit, given Delaware's allowance of such offsets. Last, Harmon asserts that the offset works an election of benefits that is prohibited by the Workers' Compensation Act. But, she does not explain how that is so, or provide any other support for this assertion.[29]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[29] Appellant cites 19 Del. C. § 2363 for the proposition that public policy is against an election of benefits choice which is prohibited by the Workers' Compensation Act but fails to elaborate why the offset would constitute an election of remedies.