SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

June 17, 2013

John J. Klusman, Jr., Esquire
Andrew W. Lukashunas, Esquire
Tybout, Redfearn & Pell
750 Shipyard Dr., Suite 400
P.O. Box 2092
Wilmington, DE 19899

Kenneth F. Carmine, Esquire
Tiffany M. Shrenk, Esquire
Potter, Carmine & Associates, P.A.
840 N. Union Street
P.O. Box 30409
Wilmington, DE 19805

RE: *State of Delaware v. Kimberly Disharoon*
C.A. No. S13A-01-003 RFS
Submitted April 15, 2013

Dear Counsel:

Employer State of Delaware ("the State") appeals a decision of a workers' compensation hearing officer[1] granting Claimant Kimberly Disharoon's petition for total disability benefits. The hearing officer's decision is reversed for the reasons explained below.

Facts and posture. The following facts are of record. In January 2010,

[1]*See* Title 19 *Del.C.* § 2301(B) authorizing the Department of Labor to appoint hearing officers.

Claimant injured her left ankle, left knee and low back in the course of her duties as a para transit bus driver for the State. She received workers' compensation benefits until November 2010 when Robert Keehn, M.D., a board-certified orthopedic surgeon employed by the State, released her to work to full capacity. Claimant returned to her job in November 2010 but was unable to perform because of pain related to the work accident. Being unable to perform her job duties, Claimant was released from her employment January 1, 2011. Claimant has not worked since November 2010, but has continued to seek medical treatment for her low back and left knee.

Between November 2010 and September 2011 Claimant saw four doctors who advised her to work in sedentary jobs because of back problems related to the work accident. She did not obtain such employment.

Claimant also sought medical attention for her left knee pain. She consulted with three physicians who made various attempts to resolve her problems without success. These doctors also released her to sedentary desk type work.

In September 2011, Claimant was put on a medical no-work status by Bruce Grossinger, D.O., who is board-certified in neurology and pain management. Dr. Grossinger treated Claimant for back pain related to the work accident. Claimant petitioned for total disability benefits based on an inability to sit for very long and because of the effects of her pain medication. In April 2012, the Industrial Accident Board ("IAB") denied her petition, finding that Claimant had failed to prove a recurrence of total disability.

In May 2012, Claimant began treatment with Craig Morgan, M.D., a board-certified orthopedic surgeon. Dr. Morgan recommended left knee surgery. At this time, Claimant stopped looking for work because of the impending operation, although Dr. Morgan did not take her out of work until after the surgery.

The operation was performed August 29, 2012. Dr. Morgan placed Claimant on a medical total disability from August 29 through October 19, 2012, after which he believed she could do light duty desk work. Claimant stated that she was unaware of Dr. Morgan's release to desk duty until the week of the hearing. She then made an appointment to begin the vocational rehabilitation process through the Department of Labor.

The State paid the costs of and related to the surgery, agreeing that the knee operation was related to the work accident and that the medical costs were reasonable and necessary.

Claimant filed a petition for total disability benefits for the approximately seven post-op weeks recommended by Dr. Morgan.

The hearing on December 14, 2012. Based on the agreement of Dr. Morgan and Dr. Keehn, the parties stipulated that the left knee surgery was reasonable and necessary and related to Claimant's 2010 work accident. They also stipulated that Claimant was totally disabled for the period recommended by Dr. Morgan, August 29, 2012 through October 9, 2012. Claimant testified on her own behalf and Drs. Morgan and Keehn testified briefly by deposition.

In this case, the hearing officer granted Claimant's petition for total disability benefits, finding that there was no evidence that Claimant voluntarily removed herself from the work force for any reason other than the work accident.

Standard of review. On an appeal from an administrative decision, this Court's role is to determine whether the agency's factual findings are supported by substantial evidence and the decision is free from legal error.[2] Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion.[3]

Discussion. The State argues first that unemployment benefits are wage replacement benefits and that Claimant had no wages because she did not work since November 2010. Second, the State argues that the hearing officer erred in concluding that Claimant did not voluntarily remove herself from the work force for reasons unrelated to her work accident. Third, the State argues that the hearing officer erred in the application of *Mladenovich v. Chrysler Group, LLC*[4] to the facts in the case at bar.

---

[2]*Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del.2009).

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

[4]2001 WL 379196 (Del.Super.).

1. **Wage replacement**. Total disability benefits provide wage replacement benefits when a claimant is totally disabled as a result of a work-related injury.[5] Employer argues that Claimant is not entitled to total disability benefits because she has not earned wages since prior to her work accident. However, a period of time away from the work force does not necessarily preclude an injured worker from receiving work replacement benefits.[6] The Court notes here that work replacement benefits are different from lost earning capacity available to a partially disabled claimant.

2. **Voluntary removal from the work force**. An individual who voluntarily removes himself from the work force may be disqualified from receipt of disability benefits.[7] If such a claimant fails to submit adequate evidence that he made a good faith effort to seek alternative employment within the limitations of the disability, benefits may be denied.[8]

In this case, at least seven doctors as well as the IAB in April 2012 found that Claimant could perform sedentary work. Dr. Morgan did not take Claimant out of work prior to her knee surgery. Claimant never found sedentary work and the question arises whether she looked for it. At the hearing, the hearing officer asked Claimant some questions. At one point, Claimant said that she looked for sedentary work but had no related skills and did not work after the Board's April 2012 denial of her total disability petition. On direct she stated, over Employer's objection, that she looked for work but stopped in June 2012 because she was facing major knee surgery.

Assuming without deciding that this testimony was admissible and true, it would not constitute substantial evidence of a good faith job search. Claimant did not record any contacts she made, name any potential employers or identify the type of job she sought. She did not submit answers to interrogatories on this topic

---

[5]*Wilson v. Chrysler LLC*, 2011 WL 2083935, *3 (Del.Super.).

[6]*Martin v. Delaware Home & Hospital*, 2013 WL 1411241, *4 (Del.Super.).

[7]*See, e.g., Martin, supra*; *Wilson, supra*; *Hanover Foods v. Webster*, 2006 WL 2338046 (Del.Super.); *Boone v. Syab Services*, 2006 WL 2242755 (Del.Super.).

[8]*Wilson, supra* at *3.

in discovery. The hearing officer focused on Claimant's inability to do the type of work she had done prior to the work accident and the frequency and duration of her medical treatment.

The hearing officer found that Claimant "simply did not feel qualified to perform sedentary type of work." This statement misses the mark.

Claimant did not show that she made a good faith job search. Claimant knew that various doctors found she could perform sedentary work and that the Board had so concluded in April 2012. Yet she took no demonstrable action to obtain sedentary work or to seek training for it until a few days before the December 2012 hearing.

As to the legal standard and burden of proof, the hearing officer relied on *Mladenovich v. Chrysler Group, LLC*[9] for the proposition that an injured worker is entitled to compensation for lost earning capacity without regard for whether or not another job is sought. That principle applies to a worker who retired from full time employment because of a work injury but who wants to continue working in a different capacity.

Thus, in *Mladenovich*, the employer had the burden to show that the claimant had not lost earning power because of any disability related to the work accident. The question of the claimant's job search was not at issue.[10] Unlike *Mladanevoich*, Claimant Disharoon filed a petition for a recurrence and therefore had the burden to show that she remained in the workplace during the relevant time periods. *Mladenovich* is inapposite as to both fact and law.

The hearing officer concluded that there was "insufficient evidence to determine that Claimant voluntarily removed herself from the work force for reasons unrelated to the industrial injury." This finding conflated the different burdens of proof for a petition to terminate, a petition for partial disability as in *Mladenovich* and a petition for a recurrence. It was error for the hearing officer to grant her petition for receipt of total disability benefits.

---

[9]2011 WL 379196 (Del.Super.).

[10]*Id.* at *4 (citing *Rozek v. Chrysler, LLC*, 2010 WL531229, *2 (Del.Super.).

For these reasons, the decision of the hearing officer that Claimant Kimberly Disharoon is entitled to total disability benefits is **REVERSED.** The case is remanded to the IAB to enter an order to this effect and to include in that order appropriate findings as to attorneys' fees and costs.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary