

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

ROBERT J. SETTING,)	
)	
Appellant,)	
)	
v.)	C.A. No. 05A-05-008-JEB
)	
NEW CASTLE COUNTY,)	
)	
Appellees.)	

Submitted: January 3, 2006
Decided: March 8, 2006

*Upon Appeal from the Industrial Accident Board.
Decision Affirmed.*

OPINION

Appearances:

Michael D. Bednash, Esquire, Wilmington, Delaware.
Attorney for Appellant Robert J. Setting.

Tabatha L. Castro, Esquire, Wilmington, Delaware.
Attorney for Appellee New Castle County.

JOHN E. BABIARZ, JR., JUDGE

Claimant Robert Setting has filed an appeal of a decision made by a workers' compensation hearing officer denying his petition for benefits based on a recurrence of total disability. The hearing officer found that Claimant is not now, nor has he ever been, totally disabled. The Court agrees.

Claimant began working as a New Castle County police officer in April 1990. In August 1998, he injured his back in a car accident while driving his patrol car to work. He was taken to Christiana Hospital and treated for back injuries. He did not return to work until October, although was not placed on total disability by a doctor. Some of his medical bills and lost wages were paid by PIP, but no workers' compensation claims were made.

Upon his return to work, Claimant took a position on the Fatal Accident Team, which did not cause him any back pain. In 2000, he returned to his job as a patrol officer, despite pain caused by wearing the gun belt and the protective vest, which are required of County police officers. In May 2003, Claimant started treating with Peter Witherell, M.D., a pain management specialist, who gave him injections for back and hip pain and sent him to physical therapy. Claimant's back pain continued, and he decided he was unable to wear the gun belt.

In January 2004, he stopped working of his own accord. He wrote to his superiors stating that he could not wear the gun belt and asking for a different

position. He also initiated grievance proceedings. In April 2004, the County offered him a sedentary position as an emergency call operator, which he did not accept because of a salary decrease. He was terminated from his employment on June 5, 2004. As a result of the grievance proceedings, a decision was made to reinstate him temporarily on the condition that he was cleared to wear the gun belt by both his own physician and the County's physician. The grievance decision also provided that the period from June 6, 2004 (when he was terminated) through August 15, 2004 (when he returned to work) would be treated by the parties as an unpaid leave of absence. Claimant returned to work on August 16, 2004, as provided by the grievance decision, but again experienced pain from the gun belt. He did not meet with the County's physician, as required by the grievance decision, and was terminated from his employment December 1, 2004. He has not worked since that time, nor has he sought work. He again initiated grievance proceedings, which were pending at the time of the workers' compensation hearing.

Claimant filed for workers' compensation benefits, alleging a recurrence of total disability and seeks benefits for a closed period from June 5, 2004 through August 16, 2004, and an open period from December 1, 2004, and ongoing. The parties stipulated to being heard by a hearing officer, and a hearing was held in April 2005. The hearing officer concluded that Claimant did not carry his burden of proof

to show that he was ever totally disabled and denied the petition. Claimant appealed to this Court, arguing that the hearing officer's decision is not supported by substantial evidence.¹

Claimant testified on his own behalf, explaining that he took himself out of work in January 2004 and that he declined the 9-1-1 operator position because it paid less than his position as a patrol officer.

Claimant's physician, Dr. Witherell, testified by deposition. He stated that Claimant's primary complaints were right low back and hip pain, consistent with mechanical sources of pain. He gave Claimant a series of injections to alleviate the pain, but he never placed him on disability. He was not aware that Claimant was out of work from January 2004 through August 2004. He felt that Claimant's weight could contribute to his back pain. He last saw Claimant in December 2004. He stated that Claimant could work but would recommend that he obtain light duty and limit his lifting and running.

The County presented the deposition testimony of Donald Saltzman, M.D., a board-certified orthopaedic surgeon. Dr. Saltzman reported that Claimant had had several MRI's of his lower spine and that the results were normal. Nor were there any objective physical findings upon examination, although Claimant stated that he still

¹*DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 105 (Del. 1982).

had back pain. Based on the subjective complaints of pain, Dr. Saltzman stated his opinion that Claimant could perform just about any work as long as he did not wear a gun belt.

Patricia Kastner, the County's insurance administrator, testified that she deals with workers' compensation matters and that she was acquainted with Claimant's case. She testified that some of Claimant's 1998 and 1999 medical bills had been paid by PIP but that the County Department of Human Resources had no record of Claimant being totally disabled at any time.

The record shows that Claimant was never placed on total disability by any physician, either following the accident in 1998 or in conjunction with his petition for recurrence. His physician, Dr. Witherell, diagnosed him with mechanical back pain based on Claimant's statements. Dr. Witherell was not familiar with the details of Claimant's accident and could not confirm that it was the cause of Claimant's continuing back pain. The only restriction Dr. Witherell or Dr. Saltzman placed on Claimant is that he not wear a gun belt, and that restriction was based solely on Claimant's report of pain. Every diagnostic study conducted on Claimant was normal, except for degenerative changes typical for a person of Claimant's age. Claimant refused to take a position as a 9-1-1 operator even though it was within his capacity.

The Hearing Officer thoroughly summarized the evidence and concluded that Claimant failed to carry his burden of proof that he was or ever had been totally disabled. This Court finds that the Hearing Officer's decision is free from legal error and based on substantial evidence.

For these reasons, the Hearing Officer's decision denying Claimant's petition for total disability benefits is *Affirmed*.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEBjr/ram/bjw
Original to Prothonotary