

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

ANGEL FRANCISCO,	)	
	)	
Employee-Below/Appellant,	)	
	)	
v.	)	C.A. No.: N13A-04-012 CEB
	)	
NATURAL HOUSE, INC.,	)	
	)	
Employer-Below/Appellee.	)	

Date Submitted: January 23, 2014
Date Decided: April 16, 2014

MEMORANDUM OPINION.

*Upon Consideration of
Appeal From the Unemployment Insurance Appeal Board.*
AFFIRMED.

Michael I. Silverman, Esquire and D. Miika Roggio, Esquire, SILVERMAN, NCDONALD & FRIEDMAN, Wilmington, Delaware. Attorneys for Employee-Below/Appellant.

John Gilbert, Esquire and Amy M. Taylor, Esquire, HECKLER & FRABIZZIO, P.A., Wilmington, Delaware. Attorneys for Employer-Below/Appellee.

BUTLER, J.

INTRODUCTION

Angel Francisco (“Claimant”) and Natural House, Inc. (“Employer”) have cross-appealed the March 18, 2013 decision of the Industrial Accident Board (“Board”). After hearing argument on Employer’s petition to terminate total disability benefits, the Board terminated Claimant’s total disability benefits and granted Claimant partial disability benefits at the rate of compensation of \$53.79 per week.

On appeal, Claimant argues that the Board erred when it failed to find Claimant to be a *prima facie* displaced worker, thereby terminating his total disability benefits. Employer, on cross-appeal, argues the Board erred in finding Claimant was entitled to partial disability benefits, because it is urged that his loss in earning power was not due to work injury, but rather to his undocumented worker status. After review, the Court finds both aspects of the Board’s decision to be based on substantial evidence and free from legal error. Therefore, the decision of the Board is **AFFIRMED**.

FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2009, Claimant, while in the course and scope of his employment, suffered a severe crush injury to his left arm. Since the accident, Claimant received total disability benefits of \$270.78/wk, based on his average

weekly wage of \$406.15. Employer subsequently filed a petition seeking to terminate total disability benefits, and a hearing was held on February 8, 2013.

At the hearing, two doctors testified. The first, Dr. Evan Crain, who had been treating Claimant about 3 months after the accident, released him to medium duty work, which allowed lifting between 20-50 pounds. However, Dr. Crain noted that Claimant would never recover to the point where he could do full, unrestricted work, and would need to be restricted from repetitive use of his left hand and grasping. The second doctor, Dr. Jerry Case, concluded that medium duty restrictions were appropriate, after noting that Claimant had residual limited motion, numbness, and weakness, but could perform fulltime work with lifting restrictions of 10 pounds on the left arm only, and no restrictions on the right arm.

In addition to the physicians, Claimant also testified. Claimant stated that he is Guatemalan born, and cannot speak, read or write English, nor can he read or write Spanish, other than his name. He also has difficulty understanding some Spanish speakers because he speaks a specific Guatemalan dialect. Despite being right hand dominate, Claimant testified that he is limited in his physical activities because he feels pain daily on his left arm and it is difficult for him to lift things without feeling like his “forearm will explode.” Also limiting his ability to work is Claimant’s lack of social security card, green card, visa, or working papers. Prior to his injury, Claimant performed landscaping jobs.

Finally two vocational experts testified. The first, Shelli Palmer, prepared a labor market survey (“LMS”) that identified eleven jobs that she believed to be consistent with Claimant’s vocational and physical capabilities based on a review of his medical records and meeting with Claimant personally. Dr. Case also approved all these jobs. The jobs identified in the LMS would require Claimant to predominately use his right hand for most of the work and manipulation, with assistance from his left hand. In addition, there were Spanish-speaking employees at these jobs, so she did not believe language would be a barrier to employment. However, she felt that it was not possible to place Claimant in a job because of his legal/residency status. The second expert, Jose Castro, testified that he did not believe Claimant could do any jobs that Ms. Palmer noted in the LMS, because they all require some use of both of Claimant’s hands repetitively. However, Castro conceded that Claimant could work if the job did not require repetitive use of his left hand.

On March 18, 2013, the Board issued a written decision terminating Claimant’s total disability benefits. The Board determined that the Claimant was medically capable of working in a medium duty capacity with restrictions on repetitive use of his left arm. After considering the testimony and Claimant’s obvious physical impairment, mental capacity, education, training, and age, the Board was not convinced that Claimant is displaced from the competitive labor

market, primarily because he is still capable of medium duty work, is only 30 years old, and has unrestricted use of his right arm. The Board also noted that any difficulty finding work that flows from the legal residency status was not relevant to their determination. Finally, the Board found that Claimants efforts were not a reasonable job search. Claimant only conducted a limited job search through the efforts of his attorney's paralegal during one afternoon and through the assistance of Shelli Palmer on one day. There is no evidence he made any attempts on his own to find a job, even through friends or relatives.

Even if Claimant could prove he was a displaced worker or could provide evidence of reasonable efforts to secure employment, the Board determined that there was available regular employment within the Claimant's abilities. After considering the evidence of Ms. Palmer, Mr. Castro, the doctors, and the Claimant, the Board concluded that Claimant would be able to perform several of the jobs in the survey where he could predominantly use his right hand.

However, the Board did grant claimant partial disability benefits, which focuses on the difference between an injured worker's wages before and that worker's "earning power" after a work-related injury. The Board noted that the jobs identified by the LMS paid an average of \$325.46 per week full time. Claimant earned \$406.15 per week at the time of his injury, so his loss of earnings due to injury is \$80.69. The Board concluded that Claimant will receive partial

disability benefits at the compensation rate of \$53.79 per week, which is two-thirds of his lost earning power.

STANDARD OF REVIEW

The Court's review of an administrative appeal is limited to determining whether the Board's decision was supported by substantial evidence and free from legal error.¹ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² Further, the Board's decisions are reviewed for an abuse of discretion in the absence of legal error, with alleged errors of law reviewed *de novo*.³ The Court will find an abuse of discretion when the Board "exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."⁴ Ultimately, the Court "will not intrude on the [Board's] role as trier of fact by disturbing the [Board's] credibility determinations or factual findings."⁵

¹ See, e.g., *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308, 309 (Del. 1975); *Meacham v. Delaware Dept. of Labor*, CIV.A. 01A-08-808, 2002 WL 442168, at *1 (Del. Super. Ct. Mar. 21, 2002).

² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

³ *Miller v. Garda CL Atl., Inc.*, CIV.A.N10A-04-002JRS, 2011 WL 1344900, at *1 (Del. Super. Ct. Apr. 7, 2011).

⁴ *McIntyre v. Unemployment Ins. Appeal Bd.*, CIV.A.07A-12-001 PLA, 2008 WL 1886342 (Del. Super. Ct. Apr. 29, 2008) (citation omitted), *aff'd*, 962 A.2d 917 (Del. 2008).

⁵ *Toribio v. Peninsula United Methodist Homes, Inc.*, CIV.A. 08A02001PLA, 2009 WL 153871 (Del. Super. Ct. Jan. 23, 2009).

DISCUSSION

A. The Board's Decision to Terminate Total Disability Benefits Was Based on Substantial Evidence and Free From Legal Error

On appeal, Claimant argues that the Board erred in terminating his total disability benefits when it failed to determine that Claimant was a *prima facie* displaced worker. Claimant states that the Board's decision is not supported by facts evidencing that Claimant possesses the necessary education, training, or skills to qualify him to be anything other than a general laborer.

A claimant may be considered totally disabled economically while only partially disabled physically.⁶ In these cases, the claimant must show that he is either *prima facie* displaced or that he has made a reasonable job search but has failed to secure employment as a result of his work injury.⁷ A *prima facie* displaced worker refers to a worker who, while not completely incapacitated from working, is so disabled as a result of a compensable injury that he is no longer regularly employable in any well-known branch of the competitive labor market.⁸ The general elements to consider are: 1) the degree of obvious physical

⁶ *Huda v. Continental Can Co.*, 265 A.2d 34, 35 (Del. 1970).

⁷ *Franklin Fabricators v. Irwin*, 306 A.2d 734, 736 (Del. 1973).

⁸ *Chrysler Corp. v. Duff*, 314 A.2d 915, 917 (Del. 1973).

impairment, coupled with: a) the claimant's mental capacity; b) education; c) training; and d) age.⁹

Based on the evidence presented during the Board's February 8, 2013 hearing, the Board concluded that Claimant is capable to returning to work. The Board considered the testimony of two doctors who both agreed that Claimant is able to be released to medium-duty work, with lifting, repetitive use, and grasping restrictions on his left arm, and no restrictions on his dominant right arm. There is no indication that Claimant cannot still enter the workforce as a general laborer. The fact that Claimant is only 30 years old, is bilingual, able to lift up to 50 pounds, and has no other physical or mental restrictions further supports his ability to return to work as a general laborer.

In addition to the testimony of the two physicians, two vocational experts also supported the position that Claimant was still able to return to the workforce in a medium-duty capacity with restrictions. Ms. Palmer noted that the only reason she was unable to place him was because of his legal residency status, not the fact that he could only perform restricted medium-duty work. Any difficulty finding work as a result of claimant's residency status is not relevant to the determination of

⁹ *Id.* at 916, 917; *Faciolo Paving v. Harvey*, 310 A.2d 643 (1973).

prima facie displacement, because it is unrelated to the work injury.¹⁰ On balance, the Board found that Employer's evidence of suitable jobs available in the competitive markets weighed against finding Complainant to be *prima facie* displaced from the job market.

Although the Court concedes that finding employment may be more difficult for Claimant, the fact remains that he is still regularly employable in a reduced capacity. Therefore, the Board's factual finding that Claimant is physically capable of returning to work is supported by substantial evidence and free from legal error.

B. The Board's Decision to Grant Partial Disability Benefits Was Based on Substantial Evidence and Free From Legal Error

On cross-appeal, Employer argues that the Board erred when it determined that Claimant was entitled to partial disability on the basis that his loss in earning capacity was not due to his work injury, but rather to his legal residency status, which removed him from the labor force. Claimant contends that because undocumented workers are not legally permitted to work in the United States, they have no loss in earning power to be compensated for.

When there is evidence that a claimant has a continuing disability that could reasonably affect his earning capacity, the employer must not only show that the

¹⁰ See, e.g., *Gonzalez v. Crispy Kreme Doughnuts, Inc.*, IAB Decision, Hrg. No. 1181878 (Mar. 5, 2002).

employee is no longer totally disabled, but also show that there is no partial disability.¹¹ The purpose of partial disability benefits is to compensate injured employees for the loss in earning power caused by the work accident.¹² Partial disability focuses on the difference between an injured worker's wages before and the worker's earning power after a work-related injury.¹³ The claimant is only entitled to continued compensation so long as his actual earnings are reduced.¹⁴

Where a statute is unambiguous and there is no reasonable doubt about its meaning, the court must give effect to the literal meaning.¹⁵ The Delaware Workers' Compensation Act ("Act") defines an employee as "every person in service . . . under any contract of hire, express or implied, oral or written, or performing services for a valuable consideration."¹⁶ This definition makes no exclusion of undocumented workers. Moreover, this Court has determined that the

¹¹ *Waddell v. Chrysler Corp.*, CIV.A. 82A-MY-4, 1983 WL 413321, at *3 (Del. Super. Ct. June 7, 1983).

¹² *Am. Consumer Indus., Inc. v. Fehl*, 391 A.2d 224 (Del. Super. Ct. 1978).

¹³ 19 Del. C. § 2325.

¹⁴ *Ernest DiSabatino & Sons, Inc. v. Apostolico*, 260 A.2d 710 (Del. Super. Ct. 1969), *aff'd*, 269 A.2d 552 (Del. 1970), and *aff'd sub nom. Magness Const. Co. v. Waller*, 269 A.2d 554 (Del. 1970).

¹⁵ *Hudson Farms, Inc. v. McGrellis*, 620 A.2d 215, 217 (Del. 1993).

¹⁶ 19 Del. C. § 2301(10).

Act is to be liberally construed and does not exclude undocumented workers.¹⁷ Based on a plain reading of the Act and supporting case law, undocumented workers are entitled to receive partial disability provided their loss in earning power is related to the workplace injury.

The Board made clear that their determination of Claimant's disability status was based on his workplace injury rather than his undocumented worker status. After analyzing the potential jobs Claimant would be eligible in the LMS, the Board determined the average salary of these jobs and subtracted that figure from the salary he was earning with Employer prior to the injury. When conducting this analysis, the Board did not take into consideration Claimant's legal residency status, but rather based their determination solely on his loss in earning power due to his workplace injury.

Employer contends that the Board's decision to grant Claimant partial disability benefits contravenes the Court's holding in *Campos v. Daisy Construction Company*.¹⁸ In *Campos*, the Court held that the employee was not entitled to partial disability benefits because his inability to obtain employment was unrelated to the workplace injury. However, the issues in *Campos* are distinguishable from those in the present case. The employee in *Campos* was released to return to the

¹⁷ *Delaware Valley Field Servs. v. Ramirez*, CIV.A. 12A-01-007JOH, 2012 WL 8261599, at *4-6 (Del. Super. Ct. Sept. 13, 2012).

¹⁸ CV N13A-07-002 ALR, 2014 WL 643067 (Del. Super. Ct. Jan. 16, 2014).

job he had prior the accident working in the same capacity. The employee even testified that he was able to complete the same tasks he could prior to the injury. His former employer would permit him to return provided he showed a valid Social Security number, which he was unable to do. The Court held that the employee was displaced from the labor market due to his legal residency status rather than his injury.

Unlike the employee in *Campos*, Claimant is unable to return to work in the same capacity as before the incident. He is limited to medium-duty work with further restrictions, whereas prior to his workplace injury, he was able to perform any type of heavy-duty work with no restrictions. In addition, unlike the employee in *Campos*, Claimant claims that he is unable to complete the same tasks he had in his prior employment because of the pain he experiences. Because of these limitations, Claimant may only work in jobs which generally have a lower salary than his prior job. Therefore, Claimant's partial disability benefits are based on his workplace injury.

Finally, the Court notes that were it to accept Employer's position that undocumented workers are not entitled to partial disability benefits based solely on their legal residency status, it would contravene the purpose of the Act. The Act is intended to benefit injured workers.¹⁹ Employers should not be able to avoid their

¹⁹ *Estate of Watts v. Blue Hen Insulation*, 902 A.2d 1079, 1081 (Del. 2006).

liability to injured workers solely based on the employee's residency status. Further, Employer's position leaves little incentive for employers to maintain safe working conditions for undocumented workers. Without this incentive, a distinct and numerically large group of individuals may be subjected to unsafe work environments.

Therefore, based on a public policy consideration and the Board's written opinion, the Court is satisfied that the Board's decision to grant partial disability benefits is supported by substantial evidence and free from legal error.

CONCLUSION

Based on the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Charles E. Butler
Charles E. Butler, Judge

Original to Prothonotary