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

Henry C. Davis, Esquire
Doroshow, Pasquale, Krawitz & Bhaya
28535 Dupont Boulevard, Suite #2
Millsboro, Delaware 19966

John Gilbert, Esquire
Amy M. Taylor, Esquire
Heckler & Frabizzio
The Corporate Center
800 Delaware Avenue, Suite 200
P.O. Box 128
Wilmington, Delaware 19899

RE: ***Guyer v. Atlantic Realty Management*,**
C.A. No. S12A-02-001

Date Submitted: January 28, 2013
Date Decided: April 24, 2013

On Appeal from the Industrial Accident Board's Decision
on Employer's Petition to Terminate Benefits: AFFIRMED

Dear Counsel:

Jerry Guyer appeals a decision the Industrial Accident Board ("Board") that terminated Mr. Guyer's total disability status and awarded Mr. Guyer partial disability benefits. The Board's decision is affirmed for the reasons set forth below.

PROCEDURAL BACKGROUND

While employed by Atlantic Realty Management ("Employer"), Mr. Guyer suffered a compensable work accident on February 9, 2010. Mr. Guyer received total disability benefits at the weekly rate of $459.01 as a result. On June 1, 2011, Employer filed a Petition to Terminate Benefits

with the Board. A hearing was held before the Board on December 16, 2011. By way of written decision mailed January 3, 2012, the Board found Mr. Guyer's total disability status was terminated as of the date of the filing of Employer's termination petition. The Board awarded Mr. Guyer compensation for partial disability from that date at the rate of $227.17 per week as well as medical expert witness fees. Mr. Guyer filed a timely appeal of that decision with this Court. Briefing is complete and the matter is ripe for decision.

DISCUSSION

A. Standard of Review

The review of the Board's decision is confined to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's findings of fact.[1] The Supreme Court and this Court have emphasized the limited appellate review of an agency's findings of fact. The reviewing Court must determine whether the administrative decision is supported by substantial evidence.[2] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] Questions of law are reviewed *de novo*.[5]

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[1] *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

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

[3] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

[4] *Johnson*, 213 A.2d at 66.

[5] *Delhaize America, Inc. v. Baker*, 2002 WL 31667611, at *2 (Del. Super.).

B. The Board Hearing

Much of the testimony presented at the hearing concerned the nature and extent of Mr. Guyer's injuries. These matters are not at issue on appeal and the Court will confine its summary of the record to the evidence presented regarding the labor market survey and Mr. Guyer's job search efforts.

Richard DuShuttle, M.D., a board-certified orthopedic surgeon and Mr. Guyer's treating physician, testified via deposition on behalf of Mr. Guyer. For a period of time, Dr. DuShuttle had Mr. Guyer under a no-work order. On June 1, 2010, Dr. DuShuttle released him to sedentary employment.

Shellie Palmer, senior vocational case manager and Associate Vice President at Perry & Associates, testified on behalf of Employer. At Employer's request, Ms. Palmer performed a job survey. She relied on Mr. Guyer's medical file to establish his relevant work experience and background. Ms. Palmer limited her search to jobs that satisfied Mr. Guyer's work restrictions: permanent sedentary duty with unlimited sitting and occasional reaching above the shoulder permitted but bending, squatting, kneeling, or crawling prohibited. Ms. Palmer confined her search to jobs within Kent and Sussex Counties in light of Dr. DuShuttle's recommendation that Mr. Guyer's commute not exceed two hours, round trip. Dr. DuShuttle also ruled out any job that would require Mr. Guyer to enter and exit his car frequently. Ms. Palmer prepared a report dated October 24, 2011, covering jobs posted between May 27, 2011, and September 12, 2011.

After the initial Board hearing was continued, she prepared an addendum to the report of jobs posted through November 15, 2011. Because Craig Smucker, M.D., Employer's medical expert and a board-certified orthopaedic surgeon, expressed reservations about Mr. Guyer's ability to handle

the physical requirements of three of the jobs included in the October 24th labor market survey, those positions were removed from the updated November 15th survey. The November 15th survey included eleven jobs. Ms. Palmer testified that she contacted each employer listed on the survey to determine whether the job was available at the time it was advertised. She further confirmed with each employer that it would accept, and consider, an application from someone with the same background and work restrictions as Mr. Guyer. The eleven jobs included are not the only jobs that were available but they comprise a representative sample. In the days leading up to the hearing, Ms. Palmer testified she had been able to identify additional job openings that satisfied Mr. Guyer's work restrictions.

On cross, Ms. Palmer told the Board she was not involved in communicating the availability of any job to Mr. Guyer. She further stated that some of the positions included in the labor market survey have been filled.

Mr. Guyer testified on his own behalf at the hearing. He graduated from high school with a culinary certification from Sussex Vocational Technical High School. He worked as a dispatcher for the Milford Police Department from March 1986 through 2006. He then went to work for Employer in the maintenance department. At some point in 2009, Mr. Guyer became Employer's septic truck operator. Mr. Guyer has a commercial driver's license as well as a Class F Delaware onsite waste water treatment and disposal system license.

Mr. Guyer documented his notes regarding his job search in a two-page document he created on November 2, 2011.[6] Mr. Guyer testified he inquired about the jobs on the labor market survey

[6] Mr. Guyer apparently worked off of the survey dated October 24th. There is no indication in the record that he applied for any jobs included on the updated survey.

and applied for the positions online. He did not retain copies of the applications. Mr. Guyer also consulted job listings via a daily email he received from snagajob.com. Employer terminated Mr. Guyer in January of 2011. Mr. Guyer was aware that he had been released to sedentary work duty in June of 2010.

Upon questioning by the Board, Mr. Guyer stated that he applied for the jobs at the direction of his attorney's paralegal. He stated that if had heard from any of the employers, aside from one job that involved surveillance, he would have refused a job offer due to his physical condition. Mr. Guyer had not been seeking employment until he received a copy of the labor market survey from his attorney.

Mr. Guyer testified that, although he had been released to sedentary duty by his treating physician, he did not feel he was able to return to work. In particular, Mr. Guyer was concerned about dropping something and being unable to pick it up. Mr. Guyer said the jobs included in the labor survey were no longer available when he went to apply in November. Nevertheless, he submitted applications "just to have it on the record." Mr. Guyer did not discuss any physical restrictions he might have with any prospective employer. Mr. Guyer reiterated that he has concerns about what type of job he would physically be able to handle.

Mr. Guyer testified that Employer did not offer him a modified job duty after he was authorized to return to work in a sedentary capacity.

Carol Beard, general manager for Employer, also appeared at the Board hearing. Employer has eight employees and oversees the management of eight manufactured home communities, six of which are in Delaware and two of which are located in Pennsylvania. Ms. Beard told the Board Employer that, although Employer has made temporary adjustments to accommodate employee

injuries in the past, Employer does not have any permanent sedentary work.

C. Merits

Mr. Guyer argues the Supreme Court's recent decision in *Watson v. Wal-Mart Associates* has implications in this case. In *Watson*, the Supreme Court held: "[I]f the burden shifts to the employer to establish that there are jobs available within the claimant's limitations, a job survey will not automatically satisfy that burden. The employer must establish that the listed jobs are actually 'available.' If the claimant applied for most of the same jobs listed in the employer's survey without success, then the survey alone is insufficient to satisfy the employer's burden."[7] Mr. Guyer asserts Employer's labor market survey failed to satisfy Employer's burden in both the total disability context and the partial disability context. Mr. Guyer asserts the employer has the burden of showing the jobs were actually available and communicating to the claimant that the jobs were available.

1. Total Disability

The Court is satisfied the Board's termination of Mr. Guyer's total disability benefits is supported by substantial evidence and free from legal error. From the medical evidence, the Board found that Mr. Guyer was not totally disabled. Further, it concluded Mr. Guyer was neither a *prima facie* displaced worker nor was he actually displaced. Accordingly, the Board found Mr. Guyer's total disability status was terminated as of the filing date of Employer's termination petition – June 1, 2011.

President Judge Vaughn recently summarized the displaced worker doctrine:

> The displaced worker doctrine recognizes that a worker who is not totally disabled may nonetheless be entitled to total disability benefits under Delaware's Workers' Compensation law. Under that doctrine, the employer has the initial burden to show

[7] 30 A.3d 775, 778 (Del. 2011).

> that the claimant is no longer totally incapacitated for the purpose of working. If the employer satisfies its burden, the burden shifts to the claimant to demonstrate that [he] is a "displaced worker." The employee may establish that [he] is a displaced worker in one of two ways: (1) by making a *prima facie* showing that [his] physical impairment, coupled with [his] mental capacity, education, training, or age, renders [him] displaced; or (2) by demonstrating that [he] has made reasonable efforts to secure suitable employment, but because of the injury has been unsuccessful. There is an inference that the employer refused to hire the claimant because of [his] partial disability if the claimant advises prospective employers that [he] has a physical limitation, and [he] does not get the job. Finally, assuming that the claimant can demonstrate that [he] is a displaced worker, the burden shifts back to the employer to establish the availability of regular employment within the claimant's capabilities.[8]

The Board found that Mr. Guyer is physically capable of working in some capacity. That finding is clearly supported by the medical expert testimony presented to the Board. Both experts testified that Mr. Guyer was capable of full-time sedentary work. This finding is not disputed on appeal. The Board next concluded Mr. Guyer is not a *prima facie* displaced worker. Mr. Guyer's age, education, work experience, education and mental capacity all support this finding and this finding is not challenged on appeal.

The Board then turned to the question of whether Mr. Guyer had been actually displaced; that is, whether Mr. Guyer had demonstrated he had made reasonable efforts to secure suitable employment but because of his injuries had been unsuccessful. The Board found that Employer's inability to accommodate Mr. Guyer's need for sedentary employment did not constitute strong evidence of displacement in light of Employer's small size and lack of sedentary employment opportunities. The Board considered Mr. Guyer's job search and found:

> Apart from contacting Employer, Claimant's job search efforts were minimal. His employment was terminated in January of 2011 and he knew his own doctor had released him to sedentary work. Nevertheless, Claimant did not bother to look for

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[8] *Dixon v. Delaware Veterans Home*, 2013 WL 422885, at *3 (Del. Super.) (citations omitted).

> other employment at that time. Even when Employer's termination petition was filed on June 1, 2011, Claimant made no effort to find employment. Claimant admits that he did not start looking for work until the end of October or early November and then only because his attorney's office had advised him to do so. He candidly admitted that he considers himself more disabled than his doctor does and that he would not have accepted a job from most of the employers on the labor market survey if it had been offered to him. He just wanted the applications "on record." None of this resembles an objective good faith effort by Claimant to find a job.
>
> Claimant stated that he applied on-line to the employers listed on the survey, although he did not see the listed positions as still being open. He has not received a response from these applications. The employers have not rejected the applications, but apparently they have not offered employment either. Claimant also made vague assertions that he explored job listings that are sent on a daily basis from snagajob.com. However, he provided no print out of these efforts, depriving Employer of any chance to investigate the viability of his alleged job search efforts.
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> It has been stated that if "the claimant advises prospective employers that he has a physical limitation, and he does not get the job, there is an inference that employer turned the claimant down because of the partial disability." *Watson*, 30 A.3d at 780 n.4 (citing *Keeler v. Metal Masters Foodservice Equipment Co*, 712 A.2d 1004, 1005 (Del. 1998)). In this case, there is no evidence that any employer has actually turned Claimant down. Claimant's testimony is that he received no response. Taking this into account along with the other evidence of Claimant's minimal and delayed efforts to try to find work, the Board concludes that Claimant has not engaged in a good faith job search. In addition, the Board accepts Ms. Palmer's testimony that, even as of the day of this hearing, some of the listed employers still had suitable and available job opportunities. As such, Claimant has failed to meet his burden of proof that, more likely than not, he is actually displaced.[9]

Mr. Guyer argues that the labor market survey did not demonstrate that jobs were available contemporaneously with the time Mr. Guyer was looking for work; that is, after he received the labor market survey. The Board found the burden had not yet shifted back to Employer to establish the availability of regular employment within the Mr. Guyer's capabilities.

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[9] Board Decision, dated January 3, 2012, at pp. 14-15.

The Court affirms the Board's decision. Mr. Guyer offered only vague assertions that he looked for work. He frankly admitted he did not look for work for ten months after his termination. Moreover, he had no contact with any prospective employers and it is undisputed he did not inform any prospective employer of his physical limitations. Accordingly, he is unable to demonstrate that he made a reasonable job search but, because of his injuries, was unsuccessful. The adequacy of the labor market survey need not enter into the equation in affirming the termination Mr. Guyer's total disability.

2. Partial Disability

The Board proceeded to consider whether Mr. Guyer was entitled to compensation for partial disability. Finding that Mr. Guyer still has work restrictions related to his work injury that could reasonably affect his earning capacity, the Board considered what Mr. Guyer's current "earning power" is. Mr. Guyer argued before the Board, as he does before this Court, that the same rationale behind the *Watson* decision should apply to the calculation of partial disability benefits based on a labor market survey. The Board held:

> While the Board agrees that Claimant's earning capacity should be based on jobs that were "actually available" and "contemporaneous," the Board does not conclude that, for purposes of calculating partial disability, these jobs need to be available on the actual day of the hearing. Rather, the available jobs should be available contemporaneous with the time when Claimant was capable of working and should have been looking for work. As noted earlier, Claimant knew he was released to return to work and knew that he was not going to return to work at Employer during the entire time span covered by the labor market survey. As such, each of the jobs listed on the survey were "actually available" contemporaneous with the time when Claimant was obligated to be looking for work. Therefore, the Board is satisfied that the survey reflects an accurate representation of what Claimant can realistically expect to earn on the competitive labor market.[10]

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[10] Board Decision, dated January 3, 2012, at pp. 18-19.

Claimant argues that the only jobs that may be used to make the partial disability benefits calculation were those that are available to the claimant at the time he was made aware of the job through the labor market survey. Otherwise, Mr. Guyer contends the carrier will collect information on the labor market but withhold it, rendering claimants unable to apply for the available jobs.

The Court disagrees. Employer does not have a duty to conduct a claimant's job search for him. As Mr. Guyer is aware, *Watson* concerned the employer's burden in a total disability matter. The Supreme Court held that the small labor market survey indicating the possible availability of six jobs was insufficient to *overcome* the claimant's unsuccessful job search.

While a labor market survey may not be superficial, for purposes of calculation of partial disability benefits the survey in this case was adequate. Ms. Palmer testified the jobs she included in the survey were available when they were advertised. The survey was conducted during the time frame when Mr. Guyer should have been, but was admittedly not, seeking employment. The prospective employers told Ms. Palmer they would accept and give the same consideration to an application submitted by someone with Mr. Guyer's work restrictions. The survey was not an exhaustive list of jobs available but a representative sample. All of this evidence is uncontradicted. Ms. Palmer's testimony that some of the jobs had been filled by the time of the hearing is not enough to render the survey inadequate to use for determination of partial disability benefits. The Board's decision regarding an award of partial disability benefits is supported by substantial evidence and free from legal error.

CONCLUSION

Considering the foregoing, the Board's decision is free from legal error and supported by substantial evidence and, as such, the decision is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

oc: Prothonotary
cc: Industrial Accident Board