IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

LUIS CASTRO,	:	
	:	C.A. No. K12A-06-001 WLW
Employee-Appellant,	:	
	:	
v.	:	
	:	
CLEAN DELAWARE, LLC,	:	
	:	
Employer-Appellee.	:	

Submitted: December 12, 2012
Decided: March 28, 2013

ORDER

Upon An Appeal from the Decision of the
Industrial Accident Board.
Granted.

Jonathan B. O'Neill, Esquire of Kimmel Carter Roman & Peltz, P.A., Newark, Delaware; attorney for Employee-Appellant.

Nancy Chrissinger Cobb, Esquire of Chrissinger & Baumberger, Wilmington, Delaware; attorney for Employer-Appellee.

WITHAM, R.J.

ISSUE

Whether the Industrial Accident Board's award of temporary partial disability benefits is based upon substantial evidence.

FACTS

This matter stems from a controverted claim for a work-related injury Claimant Luis Castro ("Claimant") sustained on July 8, 2010, while working as a service technician for Appellee Clean Delaware, L.L.C. ("Clean Delaware"). As stated in an injury report filed on July 9, 2010, Claimant was lifting a propane tank when he felt and heard a pop in his left wrist. Claimant was diagnosed with a fracture of the scaphoid bone,[1] and was placed on light duty until he underwent surgery on September 22, 2010. After approximately two weeks of no work following the surgery, Claimant again returned to work in a modified, light-duty capacity. A second surgery was performed on February 2, 2011 to correct the non-union of the same fracture. Claimant returned to work several weeks later, but, after five days, his treating physician, Dr. Richard DuShuttle ("Dr. DuShuttle"), indicated that Claimant would need a third surgery and removed him from work.[2] Claimant remained on total disability until March 3, 2011, when Dr. DuShuttle released Claimant to return to work in a light-duty capacity. For those weeks between October 7, 2010, and March 3, 2011, that Claimant received total disability benefits, he received compensation at

[1] The scaphoid bone is one of the carpal bones of the wrist. It is situated between the hand and the forearm on the radial side of the wrist. It is also known as the navicular bone.

[2] Claimant underwent a third surgery on March 14, 2012. The compensability of that surgery is not at issue in this appeal.

a rate of $213.33 per week. On August 29, 2011, Clean Delaware filed a petition to terminate Claimant's total disability benefits, alleging that Claimant is capable of returning to work in a modified capacity. On May 4, 2012, the Industrial Accident Board ("the Board" or "IAB") held a hearing to consider Clean Delaware's petition.

At the hearing, Dr. Menachem Meller ("Dr. Meller") testified by deposition on Clean Delaware's behalf. Dr. Meller testified that he examined Claimant on September 7, 2011. Dr. Meller testified that, after reviewing Claimant's relevant medical records, the mechanism of injury, and his own findings from his clinical examination of Claimant, he had diagnosed Claimant with a left wrist sprain or overuse syndrome. Given the nature of the lifting incident and the radiographic findings, Dr. Meller opined that the fracture of the scaphoid bone in Claimant's wrist was most likely a fracture that pre-dated the lifting incident in question. Dr. Meller testified that he believed Claimant embellished his symptoms and compromised his own recovery by smoking and neglecting to use his wrist splint. When asked to opine on Claimant's actual work capabilities, Dr. Meller stated that he believed that Claimant was capable of working full-time with light-duty limitations as to his left arm.

Dr. DuShuttle then testified by deposition on Claimant's behalf. Dr. Shuttle first examined Claimant on July 28, 2010, diagnosing Claimant with a closed navicular fracture of the left wrist. Basing his opinion largely on the history that Claimant gave, as well as his own review of Claimant's records, Dr. DuShuttle opined that Claimant's fracture was an old injury that was asymptomatic prior to the July 8, 2010 accident but which became symptomatic after this accident. Dr. DuShuttle

further testified that the scaphoid bone is a sensitive bone with a precarious blood supply rendering its ability to heal unpredictable. When asked about Claimant's present work capabilities, Dr. DuShuttle noted that a third surgery has been scheduled for Claimant after which he will be out of work for three to four weeks. DuShuttle agreed with Dr. Meller that Claimant was capable of returning to work with light-duty restrictions if Claimant chose not to go through with the third surgery.

Claimant testified that he remained in constant pain in the period preceding his third surgery in March 2012, and quantified his pain as a seven and a half or eight on a scale of ten. When questioned by the Board, Claimant testified that he continues to have pain in his left wrist even after the third surgery. He admits, however, that he sometimes drives a car. He denied that he had any pre-existing injury to his left wrist prior to the July 8, 2010, work accident.

Following the hearing, the Board granted Employer's petition to terminate Claimant's total disability benefits, finding that the evidence clearly demonstrated that Claimant has been medically capable of working since March 3, 2011. The Board then found that Claimant is not a *prima facie* displaced worker because there was nothing to suggest that Claimant's English-language deficits or physical limitations serve as a presumptive barrier to future employment. Finding that Claimant made no effort to undertake a reasonable job search to establish his status as a displaced worker, the Board terminated Claimant's total disability status.

However, based on the testimony of Dr. Meller and Dr. DuShuttle, the Board did conclude that Claimant was entitled to partial disability benefits. In calculating this compensation award, the Court noted that Employer did not furnish a labor

market survey, but rather offered to stipulate that Claimant's average weekly wage was $290.00. Satisfied that Claimant could earn no more than the minimum wage of $7.25 an hour, the Board found this valuation to be an appropriate estimation of Claimant's present earning capacity. Applying the formula set forth in 19 *Del. C.* § 2325, the Board calculated that Claimant was entitled to partial disability benefits at a rate of $20.00 per week.

On appeal, Claimant argues that the Board's decision to grant Employer's petition to terminate Claimant's total disability benefits was not supported by substantial evidence. Specifically, Claimant contends that Employer failed to carry its burden of establishing that there is available work in the labor market which complies with Claimant's restrictions. As a result, Claimant argues, the Board had no guidelines with which to calculate Claimant's post-injury earning capacity, and arbitrarily determined that Claimant was capable of earning $7.25 an hour. Claimant concludes that, since Employer offered the Board little more than an unsupported stipulation of fact from which to determine Claimant's post-injury earning capacity, the Board's decision to terminate Claimant's total disability benefits was not supported by substantial evidence. Employer has not filed a response to this appeal.

Standard of Review

This Court enjoys limited appellate review of the factual findings of an administrative agency.[3] The role of this Court is to determine whether the Board's

[3] *Neal v. Perdue Farms,* 2012 WL 1415710, at *1 (Del. Super. Ct. Mar. 7, 2012).

factual findings are supported by substantial evidence.[4] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[5] As the Court performs this duty, it views the facts in a light most favorable to the prevailing party below.[6] Only where there is no satisfactory proof in support of the factual findings of the Board may this Court overturn the Board's decision.[7]

DISCUSSION

In the present case, the Board was tasked with calculating Claimant's partial disability compensation award. Title 19, Section 2325 of the *Delaware Code* provides that the measure of compensation to be paid for injuries resulting in partial disability "shall be 66⅔% of the difference between the wages received by the injured employee before the injury and the *earning power* of the employee thereafter."[8] "Earning power," as used in this section, is not synonymous with actual earnings; rather, it is synonymous with earning capacity or earning ability.[9] Certain factors must be taken into account when determining a claimant's earning capacity,

---

[4] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman,* 164 A.2d 686, 688 (Del. 1960).

[5] *Olney v. Cooch,* 425 A.2d 610 614 (Del. 1981) (*quoting* Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)).

[6] *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

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

[8] 19 *Del. C.* § 2325.

[9] *Ruddy v. I.D. Griffith & Co.*, 237 A.2d 700, 703 (Del. 1968).

including age, education, general background, occupational and general experience, the nature of the work to be performed with the physical impairment, and the availability of such work.[10] In his appeal, Claimant does not find fault with the Board's determination as to his disability status, but rather argues that the Board's calculation of his partial disability benefits award was arbitrary and capricious because it did not rely upon a labor market survey.

Relying on *Turbitt v. Blue Hen Lines,*[11] Claimant argues that the Board improperly used information known only to itself to calculate Claimant's earning capacity. In *Turbitt*, the claimant offered expert medical testimony to support his contention that he suffered from a partial impairment of the spine. The Board, relying only on its own experience and expertise, rejected the expert's opinion and drew its own estimation of claimant's impairment.[12] In reversing the decision of the Board, the Supreme Court held that although the Board is free to discount the testimony of any witness on the basis of credibility, it must provide specific, relevant reasons for doing so.[13] More pertinently, the court reiterated that the Board's role as a fact-finder is limited to those findings and evidence in the record.[14] The Board may not rely on

---

[10] *Chrysler Corp. v. Williams,* 282 A.2d 629, 631 (Del. Super. Ct. 1971).

[11] 711 A.2d 1214 (Del. 1998).

[12] *Id.* at 1215.

[13] *Id.*

[14] *Id.* at 1216.

its own "'institutional experience' or administrative expertise" to create evidence.[15] As such, "an award of compensation cannot be supported by facts ascertained by the Board, but not put into evidence so as to permit scrutiny and contest."[16]

CONCLUSION

The Court finds that the Board's determination as to Claimant's earning capacity is not based on substantial evidence contained in the record before it. Rather than engaging in the fact-intensive inquiry noted above, the Board accepted Employer's computation of Claimant's present earning capacity without affording Claimant an opportunity to refute that valuation with his own evidence. Given that there is a dearth of evidence in the record relating to any effect on Claimant's present earning capacity, the Board's decision relating to Claimant's partial disability compensation award is REVERSED and REMANDED for a rehearing. On remand, all parties will have the opportunity to present evidence relating to Claimant's present earning capacity. This will establish a complete record from which the Board may then articulate a decision.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

---

[15] *Id.*

[16] *Id.*