



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSE CAMPOS,)
)
 Appellant -Below,)
 Appellant,)
) No. 33, 2014
 v.)
)
 DAISY CONSTRUCTION) Court Below-Superior Court
 COMPANY) of the State of Delaware
)
 Appellee-Below,) in and for New Castle County
 Appellee.) C.A. No. N13A-07-002 ALR

CORRECTED APPELLEE'S ANSWERING BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

Nature of Proceedings 1

Summary of Argument 3

Statement of Facts 4

I. The Board’s Decision Was Free From Legal Error 8

 A. Question Presented 8

 B. Scope of Review 8

 C. Merits of Argument 8

Conclusion 22

TABLE OF AUTHORITIES

CASES:

<u>Allen v. Megee Plumbing & Heating</u> , 1996 LEXIS 236 (Del. Super.)	17, 18
<u>Biss v. Zeneca</u> , 1998 LEXIS 680 (Del. Super.)	17
<u>Bustos v. Castle Constr. of Del., Inc.</u> , 2005 LEXIS 322 (Del. Super. 2005).....	13
<u>Bustos v. Castle Constr.</u> , 894 A.2d 405 (Del. 2006).....	13
<u>Bundy v. Corrado Bros.</u> , 1998 Del. LEXIS 184 (Del. Super.).....	8
<u>Coffin v. Chrysler Corp.</u> , 1998 LEXIS 311, *3 (Del. Super.)	17
<u>Coffin v. Chrysler Corp.</u> , 1998 LEXIS 477 (Del.).....	17
<u>Delaware Valley Field Services v. Saul Melgar Ramirez</u> , 61 A.3d 617 (Del. 2013).....	6, 7, 14, 15, 20
<u>Histed v. E.I. DuPont deNemours & Co.</u> , 621 A.2d 340 (Del. 1993).....	8
<u>Hudson v. Intervet, Inc.</u> , 1999 LEXIS 518 (Del. Super.).....	18
<u>Johnson Controls, Inc. v. Fields</u> , 758 A.2d 506 (Del. 2000).....	7, 8, 9, 10, 11, 13
<u>Reinforced Earth Co. v. Workers' Comp. Appeal. Bd. (astudillo)</u> , 810 A.2d 99 (Pa.).....	18, 19

STATUTES:

8 U. S. C. § 1324a.....	3, 9, 11, 12, 13
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NATURE OF PROCEEDINGS

This matter is before the Supreme Court on the Appeal of Jose Campos (hereinafter "Claimant") from the Industrial Accident Board's (hereinafter the "Board") decision dated June 26, 2013.¹ The decision was rendered following a Hearing on May 24, 2013 regarding a Petition for Review brought by Daisy Construction Company, (hereinafter "Employer") seeking a termination of Claimant's total disability benefit entitlement.² Claimant also filed a Petition alleging entitlement to permanent impairment that was addressed during the May 24, 2013 Hearing, but this Petition is not relevant to the present appeal.

Claimant was injured in a compensable work accident on June 30, 2011. Claimant received total disability benefits for a time, and ultimately returned to work for the employer in a modified duty position within claimant's work restrictions at no wage loss. Claimant subsequently underwent surgery in November 2011 and was again totally disabled. Claimant was released to work by Dr. Jerry Case, and Employer filed its Petition for Review on September 6, 2012. This matter was heard by the Board on May 24, 2013 and the Board issued a Decision dated June 26, 2013 confirming that claimant was not totally disabled and

¹ Jose Campos v. Daisy Construction Company, IAB No. 1369894, 26 June 2013 (attached as Exhibit A to Appendix to Appellant-Below Appellant's Opening Brief). (Decision - ___) refers to the page number of this Decision.

² A copy of the Transcript of the June 26, 2013 Hearing is attached as Exhibit 2 to Appendix to Appellant-Below Appellant's Opening Brief. Citations to this Transcript are indicated as (Tr-___).

finding that he was not a displaced worker, thereby terminating his right to total disability benefits and granting the Employer's Termination Petition. The Board also found that claimant was not eligible for partial disability benefits because he had no decrease in earning capacity. Work was found to be available within claimant's medical restrictions at no wage loss.

Claimant filed an Appeal to the Superior Court disputing the Board's ruling that Claimant is not eligible to receive partial disability benefits. On January 16, 2014, the Superior Court affirmed the Board's decision. On January 24, 2014, claimant appealed the decision of the Superior Court to this Court. Claimant's Opening Brief was filed on March 10, 2014. This is Employer's Answering Brief.

SUMMARY OF ARGUMENT

- I. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN AFFIRMING THE BOARD'S TERMINATION OF DISABILITY BENEFITS TO MR. CAMPOS.

DENIED.

Claimant's reliance on legal precedent regarding forfeiture and purported divestment of accrued workers compensation benefits is misplaced. The question properly before this Court is one of causation, and not one of forfeiture. The Superior Court properly affirmed the Board's decision. The Board correctly ruled that claimant was ineligible for partial disability benefits because the employer demonstrated the availability of work within claimant's restrictions at no wage loss to claimant. Employer successfully demonstrated that claimant's inability to work had nothing to do with any work related injury or physical restrictions, but rather had to do with claimant's unavailability to work due to his status as an undocumented worker and pursuant to 8 U.S.C. § 1324a. In other words, claimant's unavailability to work was not casualty related to a loss in earning capacity brought about by work related physical restrictions, but was due to unrelated unavailability mandated by federal law. This Court should affirm the Superior Court's ruling in its entirety.

STATEMENT OF FACTS

On June 30, 2011, Claimant sustained a compensable work injury to his left shoulder and mid-low back. The work accident was accepted as compensable and claimant was paid total disability benefits at the rate of \$474.30 weekly based on a date of accident average weekly wage of \$711.45.³ Claimant missed several days from work and returned to a position with Employer pursuant to the work release of his treating Physician, Dr. Crain. Employer placed claimant in a light duty position at no wage loss. Claimant subsequently stopped going to work in November of 2011 due to surgery unrelated to this appeal that addressed claimant's shoulder problems (Decision - 6).

During the processing of Claimant's worker's compensation insurance claim, Employer's insurance carrier requested verification of claimant's social security number. Claimant's social security number, which was provided to the Employer prior the implementation of the Department of Homeland Security's e-verify system, proved to be invalid. (Transcript – 22). On November 7, 2011 the Employer sent a letter to the claimant requesting his correct social security number. After receiving no response, Employer had no choice but to notify Claimant via a letter sent December 16, 2011 that pursuant to federal law his employment had to be terminated. Edward Stepp, the employer's witness at the Board Hearing,

³ A joint stipulation of facts was presented to the Board including this information. (Decision - 2).

testified that claimant was a good employee, that a job within claimant's restrictions was available, and that Employer would rehire Claimant if able to do so lawfully (Decision – 6-7; Tr – 24-25).

The Employer filed a Petition to Review Compensation Agreement for the purpose of terminating ongoing total disability benefits on September 6, 2012 based on the findings of the Employer's defense medical expert, Dr. Case, who issued a report and later testified via deposition that the claimant was capable of returning to full-time work in a sedentary duty capacity, and that upon resolution of pain claimant would only have minor restrictions (Tr-18). Dr. Kalamchi was claimant's treating physician and conducted a surgery to claimant's lumbar spine on April 18, 2012. Dr. Kalamchi also testified via deposition, and noted that the Claimant would be capable of working within full time light duty restrictions so long as he opted not to proceed with any additional low back surgery (Tr-36).

The Claimant testified at the hearing through an interpreter. He confirmed that he had only been out of work a few days after the work accident, and in fact had returned to work in a light duty position until he proceed with shoulder surgery recommended by Dr. Crain (Decision-10). The claimant also testified that at some point Dr. Crain released him to return to work, but that he had not attempted to find new work because the Employer discovered that he had an invalid social security number. The Claimant went on to state that he felt capable of returning to

work, and opined that he would likely be able to work in his prior position as a milling machine operator (Decision -10-11). Claimant's pain had been reduced to a level of 4 on a scale of 10 after receiving an injection to his back, but some of it had returned in the weeks after the injection.

The Board issued its Decision and found that Claimant was medically capable of returning to work in some capacity because continuing to wait on Claimant's decision respecting additional back surgery was found to be unreasonable. (Decision-11). The Board then found that claimant is not a *prima facie* "displaced worker" (Decision – 12-13) and went on to deny partial disability benefits. The Board ultimately rejected Claimant's contention that the Employer was attempting to attain a forfeiture of benefits in contravention of the decision in Delaware Valley Field Services v. Saul Melgar Ramirez, 61 A.3d 617 (Del. 2013). To the contrary, the Board found that the Employer was not arguing for a forfeiture of benefits, but rather that the Employer offered to reemploy Claimant at a modified duty position within his restrictions (Decision- 13-14). The Board found that Claimant's lost earning capacity must be causally related to work injuries, and not to some unrelated factor such as the economy or, as in this case, an unrelated inability to return to work. The Board ruled that Employer met its burden of showing job availability within restrictions at no wage loss, and as a result denied Claimant partial disability benefits (Decision-14).

Subsequent to the Board's Decision and the affirmation of same by the Superior Court, Claimant filed this Appeal to the Supreme Court of the State of Delaware. Claimant argues that the Board misapplied the law, that the Board's decision is at odds with the Court's Ruling in Ramirez, that the Court's ruling in Johnson Controls, Inc. v. Fields, 758 A.2d 506 (Del. 2000) should be applied to this case, and ultimately that Claimant should be awarded partial disability benefits. Claimant does not appeal the Board's finding with respect to the termination of Claimant's total disability benefits. For the reasons expounded below, employer urges this Court to deny claimant's appeal.

ARGUMENT

I. THE BOARD CORRECTLY FOUND CLAIMANT TO BE INELIGIBLE FOR PARTIAL DISABILITY BENEFITS

A. QUESTION PRESENTED

Did the Board err as of matter of law in finding that claimant should be denied partial disability benefits because employer met its burden of demonstrating job availability at no wage loss?

B. SCOPE OF REVIEW

The scope of review for appeal of a Board Decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law. Histed v. E.I. DuPont deNemours & Co., 621 A.2d 340, 342 (Del. 1993). Giving "strong consideration to an agency's interpretation of statutes", the standard of review of the Board's legal determination is *de novo*. Bundy v. Corrado Bros., 1998 Del. LEXIS 184, *2 (Del. Super.).

B. MERITS OF ARGUMENT

1. Claimant's Reliance On Johnson Controls, Inc. v. Fields Is Misplaced

Claimant cites Johnson Controls v. Fields⁴ for the proposition that employers cannot divest employees of accrued and fixed benefits. (Opening Brief-11).

⁴ Id.

Claimant's assertion that this legal principle is apposite to this case misses the mark. Although forfeiture of benefits resulting from lost earning capacity cannot be implied where an employee is terminated for cause, termination for cause is not tantamount to an injured worker being unavailable to work due to restrictions imposed by federal law. Here, claimant is not merely unavailable to work with a single employer due to disciplinary infractions, but is entirely disqualified from the national labor market because of the mandate articulated by 8 U.S.C. § 1324a.⁵

The employer in Johnson terminated claimant's employment pursuant to an internal disciplinary policy. Johnson, at 508. Employer contended that the only reason claimant was unavailable to work at a job otherwise available with employer at no wage loss was because of claimant's failure to follow disciplinary policies. Id. The Board ruled that "but for claimant's failure to follow employer's disciplinary policies claimant would have been able to work for employer at a light duty position with no loss in earning capacity." Id. This, according to Employer in Johnson, should mean that claimant had no demonstrable loss in earning capacity due to work accident related restrictions, thus rendering claimant ineligible to receive partial disability. The Court in Johnson ultimately ruled that disciplinary

⁵ Referred to as the Immigrant Reform and Control Act, this portion of the United States code prevents employers from hiring individuals who are undocumented workers. It imposes fines for employers hiring undocumented workers, and requires employers to take the remedial action of discharge in the event that a worker's undocumented status is discovered after the date of hire. 8 U.S.C. § 1324a(2). In essence, claimant is contending that employer's compliance with federal law amounts to unilateral actions taken to change the flow of workers compensation benefits.

actions taken by employers should not be permitted to work a forfeiture of benefits for injured workers, as doing so would amount to a unauthorized change in the flow of worker's compensation benefits unsupported by statutory authority. Id., at 509.

In the case at bar, claimant likens the unilateral disciplinary action taken by employer in Johnson to the compliance of employer in the present case with the requirements of federal law. Claimant attempts to misdirect the court's attention by focusing on the "action" that employer allegedly took to "investigate claimant's social security number," and concludes that this investigation is the same as the employer in Johnson attempting to control the flow of workers compensation benefits. (Opening Brief – 11-13). Claimant attempts to bolster the strength of this argument by focusing on the legal principle, referred to by this Court in Johnson, that an employee's benefits become fixed at the time of the work accident. Therefore, so claimant's argument goes, the flow of benefits cannot be interrupted or altered by later events. Claimant goes on to describe his discharge as the result of a "late discovery" by employer of an invalid social security number, and contends that employers cannot alter the "fixed and accrued" nature of injured workers' benefits by finding a reason to terminate their employment after a work accident. Claimant's argument relating Johnson to this case fails for two separate but equally important reasons.

First, claimant's argument must fail because it conflates unilateral actions with decisions compelled by federal law. In the case at bar, employer did not choose to discharge claimant because of an internal disciplinary policy. To the contrary, employer's witness testified that employer had provided modified duty employment for claimant in the past and would prefer to hire claimant back if at all legally possible. (Decision – 6-7). The quality of the action taken by employer here is substantively different than the quality of the action taken by the employer in Johnson. Here, employer had no choice in the matter of whether claimant should remain an employee.⁶ Rather, claimant's status was dictated by federal statute to fall within a category of persons prohibited from working in the United States. 11 U. S. C. § 1324a(1) states in relevant part that "It is unlawful for a person or other entity—(A) to hire, or recruit, or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment." Id. 11 U. S. C. § 1324a(2) states in relevant part that "It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." Id.

⁶ As noted *supra*, employer was required to discontinue claimant's employment and barred from rehiring pursuant to the mandate delineated in 11 U. S. C. § 1324a.

Employer's actions do not constitute a later firing of an employee after workers compensation benefits have accrued. Employer's actions are properly described as the discovery of information regarding an employee's status that prevent employer from continuing claimant's employment under the clear requirements of federal law noted *supra*. Indeed, claimant's status is such that he is unable to be employed anywhere or within any industry in this country, not as a direct result of any action taken by employer, but as a direct result of claimant's status and policy decisions made by the Congress of the United States. Claimant's efforts to obfuscate this matter by recasting employer's actions as unilateral interference in the flow of worker's compensation benefits are incorrect, and should be rejected by this Court.

Second, claimant's argument must fail because to accept it would in effect provide a windfall for undocumented workers when employers of same comply with 11 U. S. C. § 1324a. As is detailed fully below and noted above, the job available for claimant is within his work restrictions at no actual loss in earnings. However, claimant is nonetheless disqualified from work within the national labor market because he has been designated as unavailable to work according to 11 U. S. C. § 1324a. Employer complied with the requirements of federal law, and did not rehire claimant a second time once it became aware of his legal unavailability to work.

Pursuant to the logic and public policy decisions that Congress made in adopting the Act, employer did precisely what it was meant to do in following the requirements of 11 U. S. C. § 1324a. Claimant contends that he should receive benefits, even though he is disqualified from work as a result of his legal status, even though there is work available in the open labor market within his restrictions and at no decrease in earnings. (Decision – 13-14). Such a result would be absurd, as claimant would essentially carve out an exception in Delaware law for undocumented workers whereby partial disability benefits would be properly awarded despite the fact that no loss in earning capacity is present. In order to avoid this absurd result, the Court should distinguish Johnson from the present matter and reject claimant’s arguments regarding Johnson in their totality.

2. Partial Disability Benefits Cannot be Awarded When There Is No Loss In Earning Capacity

For partial disability benefits to accrue, an injured worker must have a loss in earning capacity caused by the work accident. Bustos v. Castle Constr. of Del., Inc., 2005 LEXIS 322, *15 (Del. Super. 2005). Affirmed by Bustos v. Castle Constr., 894 A.2d 405 (Del. 2006).

The term “earning capacity” means “earning ability,” taking into consideration factors such as Claimant’s 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. The actual wages a claimant earns and “earning capacity” are not synonymous. Although a discrepancy

between actual wages and earning capacity may raise the presumption of an impairment of earning capacity, that discrepancy is not dispositive.

Id., at *16. Employer provided evidence of job availability at no wage loss to claimant within physical restrictions and with job duties that claimant had performed previously, thus proving that claimant had no loss in earning capacity. (Decision – 13-14). Pursuant to well settled Delaware law, this should end the inquiry into the propriety of awarding claimant partial disability benefits. Throughout the entirety of this litigation, claimant has never disputed the fact that work is available within the claimant's physical restrictions at no wage loss. Interestingly, claimant offers no response to this fact and instead contends that Ramirez permits claimant to receive an award of partial disability benefits where there is no loss in earning capacity. This argument is mistaken because it ignores the fundamental nature of partial disability benefits.

Claimant contends that the Board erred as a matter of law in denying partial disability benefits because Ramirez stands for the proposition that undocumented workers are eligible for workers' compensation benefits (Opening Brief – 14). This argument is a non sequitur. Claimant correctly states the Ramirez stands for the proposition that a worker does not forfeit his workers' compensation benefits because of his immigration status. Delaware Valley Field Services v. Ramirez, 2012 LEXIS 622, *2 (Del. Super.). After this point the correctitude of Claimant's

argument ends. Claimant would have this Court believe that this matter is about attempting to work a forfeit of an undocumented worker's partial disability benefits. In reality, this matter has nothing to do with a forfeiture of benefits due to undocumented status, and everything to do with whether a worker's inability to return to work must be causally related to a work injury. In other words, this case addresses the question of whether a claimant must be denied partial disability benefits where there is no loss in earning capacity.

Claimant's reliance on Ramirez is misplaced. The Employer in Ramirez contended that claimant, who had provided falsified information to Employer in attaining his employment, should simply be denied the ability to recover any benefits precisely because of claimant's status as an undocumented worker. Id., at *8. The Supreme Court rejected Employer's contentions after a comprehensive review of state and federal law, as well as public policy respecting the Workers' Compensation Act. Id., at *31. Ramirez did not address the effect of a claimant's undocumented status in circumstances where there is appropriate work demonstrated to be available within claimant's restrictions at no wage loss. Ramirez concerns issues of general policy, while this matter is specifically about the causal relation of unavailability to work to a work accident.

Given the above, Ramirez is inapposite to this matter. Here, claimant was released to work at various times by his treating physicians and Employer's

defense medical expert (Decision – 10). Claimant acknowledges that he is capable of returning to work, and is aware that work is available to him within his capabilities (Decision – 10-11). Claimant confirmed that Employer had accommodated him in the past, prior to the discovery of claimant’s invalid social security number. Furthermore, Claimant also admits that he did not attempt to return to work because he has an invalid social security number (Tr – 44). At no point has employer attempted to deny claimant’s benefits due to his undocumented status. In fact, employer paid claimant total disability benefits prior to the Board’s decision, and also paid permanent impairment benefits subsequently (Decision – 15). Employer did not argue at the Board Hearing, and does not argue now that claimant should forfeit any portion of his benefits. To the contrary, employer contends that the Board’s decision should be upheld because it is based on well settled Delaware Law.⁷ Claimant’s argument with respect to the Ramirez decision is little more than a red herring.

The actual issue in this matter has to do with whether a claimant should be permitted to recover partial disability benefits when work is available within said claimant’s restrictions at no wage loss. Put differently, the crux of this case is

⁷ The Board has addressed precisely the issue before the Court on a prior occasion. In Krispy Kreme, Claimant was undocumented and sought to recover partial disability benefits. The Board interpreted the statute and found that undocumented status was not a sufficient substitute for a loss in earning capacity related to a work injury in the context of partial disability. See generally Gonzalez v. Krispy Kreme Doughnut, Inc., IAB Hrg No. 1181878 (March 5, 2002).

whether in the State of Delaware partial disability benefits should still only be awarded in cases where a worker has a demonstrated loss in earning capacity. In order for a worker to recover under the statute, their inability to work must be a direct result of a work injury.⁸ Coffin v. Chrysler Corp., 1998 LEXIS 311, *3 (Del. Super.); affirmed by Coffin v. Chrysler Corp., 1998 LEXIS 477 (Del.); Biss v. Zeneca, 1998 LEXIS 680, *1 (Del. Super.). It is well established that the Employer bears the burden of showing that work is available within claimant's restrictions at no wage loss in order to prevent an award of partial disability during a Petition to Review Benefit Entitlement. Allen v. Megee Plumbing & Heating, 1996 LEXSIS 236, *7 (Del. Super.). Here, Employer demonstrated job availability within restrictions at no wage loss because employer had accommodated claimant with such a position previously and was willing and able to do so again, but for the prohibition imposed by 8 U. S. C. § 1324a. Claimant should not be awarded partial disability benefits when the unavailability to work is not due to a work related injury, and when there is consequently no work related loss in earning capacity.

Although not directly on point because the burden has been shifted, cases respecting a claimant's burden to prove partial disability benefit entitlement on a Petition to Determine Compensation Due are nonetheless instructive. It is well

⁸ This is also the case particularly concerning partial disability benefits. The statute states that one may recover partial disability benefit entitlement "For injuries resulting in partial disability for work..." 19 Del. C. § 2325. Here, there are no injuries resulting in partial disability because claimant has a modified duty position available within his restrictions. Since there is no injury resulting in partial disability, benefits for partial disability should not be afforded Claimant.

established in such cases that a Claimant must prove that the loss of earning capacity was caused by work injuries. Hudson v. Intervet, Inc., 1999 LEXIS 518, *8 (Del. Super.). Here, the Court is confronted with a worker who is unavailable not because of work injuries, but because of a reason wholly unrelated to the work accident or claimant's medical problems caused by the work accident. The only conclusion that can be drawn given such a situation is that, pursuant to well established Delaware law, the Board properly denied claimant partial disability benefits.

Delaware cases reveal various instances in which a claimant is unavailable for reasons not related to a work injury, where the propriety of awarding partial disability benefits was in question. If a claimant is unavailable to work for issues unrelated to the work accident, whatever they may be, Delaware law requires that partial disability benefits not be awarded. See generally Allen at *9. Although claimant's situation is unfortunate, Employer urges the Court not to set aside decades of precedent and well established Delaware law in order to arrive at an award of partial disability for the Claimant.

Other jurisdictions have also addressed the issue of partial disability benefits in the context of undocumented workers, and have come to results similar to the Board's ruling. See generally Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (astudillo), 810 A.2d 99 (Pa.). In Reinforced Earth, the Pennsylvania Supreme

Court concluded that employer needs not show job availability in cases where the injured worker is an undocumented alien. Id. at 479. This ruling has little import for the present matter, but the analysis of the Court does. In its analysis, the Court concluded that an undocumented worker would always be unavailable for work because of his undocumented status, and not because of a work injury. Id. at 479. Pennsylvania Courts recognize that a worker's undocumented status is unrelated to work, and therefore should be acknowledged as such. The analysis of similar situations should logically be the same in Delaware, with the appropriate results for this jurisdiction flowing from Delaware's law; namely, that claimant is not owed partial disability benefits because he has no work related loss in earning capacity, or put alternatively, because claimant's unavailability for work is not related to a work injury.

3. Claimant's Public Policy Argument, As It Was Before The Superior Court, Is Not Germane Here

Claimant also contends that the decision of the Board is contrary to Public Policy and the purpose of the Workers' Compensation Act. This argument is predicated upon the notion that Claimant's forfeiture argument is correct. For the reasons outline above, it is not, and Claimant's Public Policy argument should therefore be rejected as not germane to this appeal.

Claimant contends that permitting a supposed forfeiture of benefits in this case will result in unscrupulous employers permitting unsafe workplace conditions,

in contravention to the public policy considerations noted in Ramirez. (Opening Brief – 17-19). This argument ignores the fact that claimant has been paid permanent impairment benefits, total disability benefits, and medical benefits. To conclude that a ruling in this case based on causation would vitiate the purpose of the act to promote safe workplaces is an attenuated conclusion at best. The fact that claimant has had the full benefit of the Workers’ Compensation Act when legally appropriate renders claimant’s public policy argument a nullity.

Relevant public policy states that the Workers’ Compensation Act, though designed to be liberally construed so as to provide for swift and fair compensation when appropriate, is not designed to be a health care statute. Richards v. State, 1998 LEXIS 637, *4-*5 (Del. Super.). Claimant being terminated from his employment for not having a valid social security number is a work related issue in the broad sense, but not all work related issues are compensable accidents. Id. at *5. Accepting claimant’s argument and awarding partial disability benefits in this case would disrupt the universally accepted purpose of the Workers’ Compensation Act, and would transform it from legislation designed to aid injured workers into a system of support for individuals in regrettable situations that simply cannot attain work, regardless of their injured status or the availability of appropriate work within restrictions. The Court should not permit such a

transformation to occur, as it would be deleterious to the plain meaning and clear purpose of the Worker's Compensation Statute.

CONCLUSION

The Board did not err as a matter of law when it properly considered all of the evidence presented, to include an available job within claimant's medical restrictions provided at no wage loss. The Board's decision is based upon sound and well established Delaware law. This Court should not permit Claimant to rework the purpose of the Worker's Compensation statute and create law in which compensation can be awarded for reasons completely unrelated to a work injury. For the foregoing reasons, the decisions of the Industrial Accident Board and the Superior Court should be affirmed.

WHEREFORE, the Appellee Below-Appellee, Daisy Construction Company, respectfully requests that this Honorable Court affirm the Decision of the Industrial Accident Board granting the Daisy Construction's Company's Petition to Review the Compensation Agreement.

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