

IN THE
Supreme Court of the State of Delaware

JOSE CAMPOS,

Appellant-Below, Appellant,

v.

DAISY CONSTRUCTION
COMPANY,

Appellee-Below, Appellee.

No. 33,2014

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

C.A. No. N13A-07-002

APPELLANT'S REPLY BRIEF

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Timothy E. Lengkeek, Esquire (No. 4116)
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6605
Facsimile: (302) 576-3308
E-mail: tlengkeek@ycst.com

Attorneys for Appellant-Below, Appellant Jose Campos

Dated: April 17, 2014

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ARGUMENT

This Court Should Not Give Its *Imprimatur* to Appellee's Attempt to Avoid Its Workers Compensation Obligations, Which Is Prohibited Under This Court's Prior Case Law

The undisputed facts of this case are as follows:

- (1) The Employer did not verify the Claimant's social security number when it hired him in 2008. A22.
- (2) Four months after the Claimant was injured in 2011, at the request of its workers' compensation insurance carrier, the Employer attempted to verify Claimant's social security number. A29 – A30.
- (3) After it learned the social security number supplied by Claimant when he was hired in 2008 was invalid, the Employer terminated Claimant on December 16, 2011. A26.
- (4) The Employer has had other employees who do not have valid social security numbers, but it has not gone back and checked the social security numbers of the 150 employees it employs. A30.
- (5) Even though the Employer terminated Claimant, its workers compensation carrier arranged for Claimant to be seen by a defense medical examiner on August 14, 2012. A110.
- (6) The defense medical examiner's opinion as of that date was that the Claimant was not able to return to construction work, but was able to perform sedentary duty. A121.
- (7) Thereafter, the Employer's attorney notified Claimant in writing on August 22, 2012 that "[m]y client does not have work available for the claimant, *either with or without restrictions.*" A62.
- (8) Even though its attorney indicated that no work was available, the Employer's risk manager testified at the hearing before the Industrial Accident Board that the Employer would rehire Claimant, "[b]ut for this social security problem." A26.

As set forth above, the Employer deliberately buried its head in the sand by not verifying Claimant's social security number when it hired him. Only after Claimant was injured on the job, and at the request of its workers compensation insurance carrier, did the Employer seek to verify Claimant's social security number. Because Claimant lacked a valid social security number, it terminated Claimant.

Despite terminating the Claimant the prior year, the Employer claimed at the Hearing it would rehire him in a sedentary position, if only he had a valid social security number (which it knew Claimant did not have). Based on that questionable testimony, the Board found that Claimant did not suffer a wage loss. Because this Court rejected a nearly identical argument in *Johnson Controls v. Fields*, 758 A.2d 506 (Del. 2000),¹ Claimant requests that the Board's decision be reversed.

In *Johnson*, the claimant injured his back at work. *Id.* at 507. The employer entered into an agreement to provide total disability benefits to the claimant, but later terminated the claimant for insubordination. *Id.* at 508. The claimant subsequently filed a petition seeking partial disability benefits based on his work restrictions. *Id.* The Board held that the claimant was not entitled to partial

¹ Neither the Superior Court, nor the Industrial Accident Board addressed *Johnson Controls v. Fields* in their opinions, despite the fact that the Claimant raised that case in his closing legal argument at the Hearing (A57) and in his Opening and Reply Briefs before the Superior Court on Appeal.

disability benefits because, but for his termination, he could have returned to work for the original employer under a light duty assignment without any loss of earning capacity. *Id.*

On appeal, the Superior Court reversed, holding that the claimant's discharge for cause did not preclude partial disability benefits. *Id.* On remand, the Board granted the claimant's petition for partial disability benefits. *Id.* Following the Board's decision on remand, both the Superior Court and this Court affirmed the Board's decision. *Id.*

The *Johnson* Court further held that the claimant's benefits accrued at the time of the accident, and his entitlement to benefits, including partial disability, was fixed and could not be altered by later events:

It is well settled in Delaware that the provisions of the Workers' Compensation Act are to be liberally construed to effectuate the statute's intended goal of compensation to the injured employee. The entitlement to benefits accrues to the injured employee at the time of the accident or event that causes injury.

* * *

To permit the employer to claim a forfeiture of compensation through its disciplinary process works a deprivation of benefits already fixed at the time of injury. The employer is of course free to discharge an employee for cause under its disciplinary system; but it cannot thereby transfer the legislatively determined process for the payment of workers' compensation, in the absence of express statutory authority.

Id. at 509-10 (citations omitted).

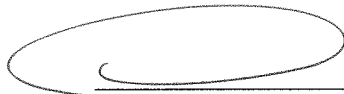
The Employer's attempt to distinguish this case from *Johnson* because the Claimant in this case was terminated because he lacked a valid social security number (as opposed to insubordination) fails. Under *Johnson*, the basis for the termination is irrelevant because termination never allows an employer to avoid its workers' compensation obligations.

The Employer's reliance on several Superior Court opinions predating this Court's opinion in *Johnson* is similarly misplaced. To the extent that those decisions allow an employer to avoid workers compensation benefits as a result of subsequent events, they run afoul of *Johnson*. The Employer's attempt to cherry-pick what it views as favorable quotes from those cases should be rejected.

CONCLUSION

The Employer should not be permitted to pull its head out of the sand, check Claimant's legal status, and now use his lack of a social security number as a sword to defeat his right to partial disability benefits, which Appellant is entitled to because he cannot return to construction work. As such, Appellant Jose Campos respectfully requests that this Court enter an order reversing the decisions of the Superior Court and the Industrial Accident Board.

YOUNG CONAWAY STARGATT & TAYLOR, LLP



Timothy E. Lengkeek, Esquire (No. 4116)
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6605
Facsimile: (302) 576-3308
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