IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT JACKSON,	)	
	)	
Claimant-below, Appellant,	)	
	)	C.A. No: N10A-10-011 JRS
v.	)	
	)	
PEP BOYS,	)	
	)	
Employer-below, Appellee.	)	

Date Submitted: September 28, 2011
Date Decided: December 13, 2011

Upon Appeal from the Industrial Accident Board.

AFFIRMED.

ORDER

This 13th day of December, 2011, upon consideration of the appeal of Robert Jackson ("Jackson") from the decision of the Industrial Accident Board ("the Board"), which granted his Petition to Determine Additional Compensation Due,[1] yet denied his request to amend previously executed compensation agreements to reflect a higher average weekly wage, it appears to the Court that:

[1] The Industrial Accident Board of the State of Delaware, Decision on Petition to Determine Additional Compensation Due, Hearing No: 1305221 (September 15, 2010) ("IAB Decision") at 16.

1. Jackson sustained a compensable work injury to his low back and left leg on February 12, 2004, during the course and scope of employment with Pep Boys as an Assistant Manager.[2] In connection with this injury, he received disability payments from Pep Boys' workers' compensation insurance carrier.[3] Jackson was unaware of how the carrier calculated the amount of compensation to which he was entitled.[4] Following his return to work in 2005, in March of 2006, Jackson began seeking a variety of medical treatment in connection with the return of low back pain and left leg symptoms.[5] Following spinal surgery in January of 2008, Jackson entered into compensation agreements with Pep Boys that indicated the amount of payment he would receive for his recurrent disability.[6]

2. At the Board hearing upon his petition, Jackson sought temporary total disability benefits from September 29, 2006 until January 15, 2008, as causally related to the subject injury, as well as reformation of the compensation agreements to reflect an average weekly wage of $650.00.[7] The Board granted Jackson's petition insofar as it awarded Jackson temporary total disability benefits for the requested time period, along with witness and attorneys' fees.[8] This appeal is limited to the Board's denial of

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[2] IAB Decision at 2, 8.
[3] *Id.* at 8.
[4] *Id.*
[5] *Id.* at 3, 11, 12.
[6] *Id.* at 8, 10, 12-14.
[7] *See id.* at 2.
[8] *Id.* at 16.

Jackson's request to amend the compensation agreements to reflect the higher average weekly wage.

3. The Board found that Jackson entered into two (2) compensation agreements with Pep Boys and received benefits in accordance with the terms of those agreements.[9] Jackson believed that the compensation rate indicated on the agreements was the same rate of compensation that he received in 2004.[10] The first of the two agreements provided Jackson with temporary total disability benefits, beginning on January 16, 2008, and indicated, in pertinent part, that Jackson will "receive compensation at a rate of $315.89 per week based upon an average weekly wage of $473.83...."[11] The second agreement provided temporary partial disability benefits, beginning on January 16, 2009, and was similarly based on the average weekly wage of $473.83.[12]

4. Jackson testified that, based upon a recently discovered document, his weekly wage while working at Pep Boys prior to the date of his accident-causing injury was actually $650.00.[13] Jackson produced a record of his bi-weekly paychecks while employed at Pep Boys that indicates his bi-weekly gross pay varied from

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[9] *Id.* at 8.

[10] *Id.*

[11] *Id.* at 13. This agreement is appended to the Delaware Department of Labor, Division of Industrial Affairs, Transcript of Administrative Hearing (December 30, 2009) ("Tr.") as "Employer's 1" and was approved by the Department of Labor on August 15, 2008.

[12] *Id.* This agreement is the second page of "Employer's 1" and was approved by the Department of Labor on March 13, 2009.

[13] *Id.* at 12.

$410.00 to $1,517.99 during the time period from July 25, 2003 through June 11, 2004.[14] The Board noted, however, that "[a]ccording to Claimant's own testimony, his hours varied and his paychecks varied."[15] The Board also indicated that bi-weekly paychecks in an amount of at least $1,300.00 ($650.00 multiplied by two) were issued after, rather than before, the subject accident.[16]

5. Jackson also produced a copy of a pay stub from Pep Boys covering the pay period of August 1, 2004 until August 14, 2004.[17] According to this document, Jackson's weekly rate of pay as of May 14, 2004 was $650.00.[18] The Board noted, again, that these wages also relate to a time period after the subject work accident.[19]

6. Notwithstanding the inconsistency in his documented earnings, Jackson testified that he was a salaried employee at Pep Boys who was paid $650.00 per week.[20] According to Jackson, if he worked more than forty hours per week he was paid a salary of $650.00, but if he worked less than forty hours per week he was treated as an hourly employee.[21] Despite this alleged cap on weekly earnings, at no time did Jackson ever complain to Pep Boys when his bi-weekly paycheck was less

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[14] *Id.* at 13, 14. This pay-check record is appended to Tr. as the first page of "Claimant's 2."
[15] *Id.*
[16] *Id.* at 13.
[17] *Id.* This pay stub is appended to Tr. as the second page of "Claimant's 2."
[18] *Id.*
[19] *Id.* at 13, n. 5.
[20] *Id.* at 8. Tr. at 55-56.
[21] *See* IAB Decision at 8. Tr. at 56.

than $1,300.00.[22] Although Jackson testified that his rate of pay was $16.25 per hour, as a full-time employee,[23] he also testified that his rate of pay was determined on a weekly basis - - it was "supposed to be $650.00 each week."[24]

7. The Board found that Jackson failed to meet his initial burden of proving his average weekly wage was $650.00 per week and, therefore, declined to amend the compensation agreements on the basis of mutual mistake.[25] In reaching this determination, the Board took into account, *inter alia*, that Jackson previously agreed with Pep Boys that his average weekly wage rate was $473.83 and that, although he did not know how the disability payments were calculated, Jackson surmised that such payments were also based on his average weekly wage rate of $473.83.[26] The Board noted that Jackson's average weekly rate for the twenty-six weeks preceding the work accident was $473.83, which is the amount that Jackson agreed was his average weekly wage.[27] Within its decision, the Board also cited to 19 *Del. C.* § 2302(a) and (b), as amended in 2007, as authority for its focus on the amount of Jackson's wages prior to the subject accident.[28]

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[22] Tr. at 69.

[23] *See* IAB Decision at 13. Tr. at 40.

[24] Tr. at 72. Despite direct and re-direct examination by his own counsel and cross-examination by opposing counsel, two (2) Board Members also examined Jackson in an attempt to clarify his rate of pay. *See* Tr. at 69-72.

[25] IAB Decision at 12-13.

[26] *Id. See* Tr. at 59-60.

[27] IAB Decision at 13.

[28] *Id.* at 14.

8. The grounds for Jackson's appeal are that the Board erred as a matter of law and fact in ruling: (a) that his average weekly wage at the time of the accident was $473.83; and (b) that the prior compensation agreements, therefore, should not be reformed. Essentially, Jackson contends that the Board should have found him to be an hourly employee and calculated his weekly wage at $650.00 in accordance with the version of 19 *Del. C.* § 2302(b) that existed at the time of his injury.[29] By extension, Jackson contends that the compensation agreements should be reformed to comport with the former statutory formula, as it applies to hourly employees, such that they reflect an average weekly wage of $650.00.[30]

9. Pep Boys' contends, *inter alia*, that the compensation agreements, which indicate an average weekly wage of $473.83, are binding and only subject to modification upon Jackson's showing of mutual mistake.[31] In reply, Jackson urges this Court to focus its appellate review solely upon whether the Board correctly applied the amended version of 19 *Del. C.* § 2302. In so doing, he essentially urges the Court to overlook the record support for the Board's factual findings that his wage rate was expressed in weekly terms and that he failed to present evidence that his weekly wage was something other than what he previously agreed to in the

[29] Appellant's Opening Brief ("Opening Br.") at 10, 11.
[30] *Id.*
[31] Appellee's Answering Brief at 5-8.

compensation agreements.[32]

10. This Court has jurisdiction to hear and determine appeals from the Board.[33] The scope of review is narrow. "[I]t is well established that the appellate court does not sit as trier of fact, rehear the case, or substitute its own judgment for that of the Board."[34] Questions of law, however, are subject to *de novo* review. In that instance, the appellate court must determine whether the Board erred in formulating or applying legal precepts.[35] Therefore, the "only role of the appellate court is to determine whether the decision of the Board is supported by substantial evidence and free of legal error."[36] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[37] In its review, "the Court will consider the record in the light most favorable to the prevailing party below."[38]

11. The Court initially considers whether the Board was required to apply 19 *Del. C.* § 2302 as it existed at the time of the subject accident to calculate the amount

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[32] Appellant's Reply Brief ("Reply Br.") at 4. In his reply, Jackson softens his position on the $650.00 weekly wage amount and reformation. He now requests that a further Board hearing be ordered to determine whether reformation is warranted.

[33] 19 *Del. C.* § 2350.

[34] *Standard Dist., Inc. v. Hall*, 897 A.2d 155, 157 (Del. 2006) (citing *Johnson v. Chrysler*, 213 A.2d 64, 66-67 (Del. 1965)).

[35] *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Hudson State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990).

[36] *Standard Dist., Inc.*, 897 A.2d at 157.

[37] *James Julian, Inc. of Delaware v. Testerman*, 740 A.2d 514, 519 (Del. Super. 1999) (citations omitted).

[38] *General Motors Co. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Aug. 16, 1991).

of wages in the compensation agreements entered into by the parties in 2008 and 2009 - - after the effective date of statutory amendment. Jackson has not presented any authority in support of his position that the Board was required to apply a prior version of the statute,[39] and the Court's review of Delaware case law likewise has not revealed any authority that would support Jackson's position. In the absence of such authority, the Court will consider the language of 19 *Del. C.* § 2302 (both before and after the 2007 amendment) as it pertains to this issue.

12. As of February 12, 2004, the date of Jackson's accident, § 2302 ("Wages; definition and computation; valuation of board and lodging") read, in pertinent part:

> (a) The term 'wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident....
>
> (b) If the rate of wages is fixed by the day or hour, the employee's weekly wages shall be taken to be that rate times the number of days or hours in an average work week of the employee's employer at the time of the injury....

Prior to the amendment, "it [had] generally been acknowledged that the language in

[39] Opening Br. at 10, 11. In addition to concluding that the pre-amendment "version of § 2302 was the version that the Board was required to apply," Jackson argues, via footnote, that "[t]he Board has held that the new method of calculating wages applies only to those workers injured on or after the effective date of the statute (January 17, 2007)," without citing any authority. *See also* Reply Br. at 6. It warrants mention that the Court is "not obligated to do 'counsel's work for him or her.'" *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del. Super. Nov. 12, 2008) (internal citations omitted).

this section [was] ambiguous."[40] Within a discussion of the interplay between the statutory subsections, *Howard* noted that "subsection (a) establishes the time period that is to be looked at to find the proper 'money rate' to apply (namely the rate 'at which the service rendered is recompensed under the contract of hiring at force at the time of the accident'), while subsection (b) sets forth the rules to follow in order to transform this rate into a weekly wage."[41] The court clarified, however, that "if the money rate under the contract of hire was already expressed as a weekly rate, no such transformation would be needed."[42]

13. The effective date of the most recent amendment to 19 *Del. C.* § 2302, which Jackson contends was improperly applied, is January 17, 2007.[43] The statute as amended (and in its present state) reads, in pertinent part:

> (a) "Average weekly wage" means the weekly wage earned by the employee at the time of the employee's injury at the job in which the employee was injured, including overtime pay, gratuities and regularly paid bonuses (other than an employer's gratuity or holiday bonuses) but excluding all fringe or other in-kind employment benefits....
>
> (b) The average weekly wage shall be determined by computing the total wages paid to the employee during the 26 weeks immediately preceding

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[40] *Howard v. Peninsula United Methodist Homes*, 2003 WL 22701467, at *4 (Del. Super. Nov. 17, 2003) (citing *Furrowh v. Abacus Corp.*, 559 A.2d 1258, 1259 (Del. 1989); *Howell v. Supermarkets Gen. Corp.*, 340 A.2d 833, 836 (Del. 1975); *State v. Muehleisen*, 1998 WL 733754, at *3 (Del. Super. June 18, 1998)).

[41] *Howard*, 2003 WL 22701467, at *4 (citing 19 *Del. C.* § 2302).

[42] *Id.* at *4, n. 4. The court further noted that "[t]his is why the first sentence in subsection (b) pointedly mentions that it is to be used when the rate is fixed 'by the day or hour.'" *Id.* This footnote acknowledges that "the statute is silent about if the employee is paid an annual salary."

[43] 76 Del. Laws ch. 1, § 5 (2007).

the date of injury and dividing by 26, ...

Our Supreme Court has recognized that the intent of the General Assembly in amending section 2302(b) was "merely [to]clarify[ ] - - not chang[e] - - the calculation of an injured employee's average weekly wage rate."[44] The Court further explained how this "desire for continuity signals that the legislative intent underlying the new formulation of section 2302(b) is the same as it always has been - - namely, to compensate injured employees for their lost earning capacity rather than for their lost income."[45] Accordingly, neither the statutory language of section 2302(b) nor the underlying legislative intent supports Jackson's contention that the Board committed legal error by applying the prior version of the statute.

14. The Board referred to the amended version of the statute in its analysis of Jackson's earnings simply to emphasize that its scope of review was limited to those wages that Jackson received prior to the subject accident.[46] As both the amended and pre-amended provisions of 19 *Del. C.* § 2302 are consistent with respect to the Board's purpose for relying upon the statute, the Board committed no error in referring to the amended statute. Next, the Court will turn to whether Jackson's argument finds adequate support in the factual record.

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[44] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 539 (Del. 2011) (citing 76 Del. Laws ch. 1, § 5 (2007)).

[45] *Id.* at 539 (citing *Howell v. Supermarkets Gen. Corp.*, 340 A.2d 833, 836 (Del. 1975)).

[46] IAB Decision at 14.

15. Upon careful review of the Board's decision and the record below, it appears that the Board determined that Jackson was a weekly, not hourly, employee whose weekly wages were something other than the amount ($650.00) proffered by Jackson. Although Jackson initially testified that his rate of pay was $16.25 per hour on a full-time basis,[47] he also testified (inconsistently) that he was a salaried employee and paid at the $650.00 weekly rate.[48] Moreover, nowhere in the documents offered by Jackson is an hourly wage rate indicated that supports his position.[49] Rather, the sole document offered by Jackson that indicated his earnings for the time period prior to the compensable accident showed that his paycheck varied in both hours and bi-weekly gross pay.[50] Indeed, Jackson's own testimony reflects that he repeatedly expressed his wage rate in weekly terms.[51] Although Jackson argues on appeal that "there is no dispute" that he was an hourly employee, and that his weekly wage should be calculated accordingly,[52] there is sufficient evidence within the record to support the Board's finding that Jackson's argument in this regard was contrary to the evidence.

17. The Court must now consider whether the Board correctly declined to reform the compensation agreements. Pursuant to 19 *Del. C.* § 2344, as cited by the

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[47] IAB Decision at 13. *See* Tr. at 40.
[48] *Id.* at 8. Tr. at 55, 56.
[49] *See id.* at 13-14. *See also* Claimant's 2 (first and second pages).
[50] *See id. See* Claimant's 2 (first page).
[51] *See id.* at 12-14. Tr. 53-56.
[52] Opening Br. at 11.

Board, when an employer and injured employee memorialize, sign and file a compensation agreement, which is approved by the Department of Labor, the agreement is final and binding unless modified in accordance with 19 *Del. C.* § 2347.[53] Pursuant to the implied authority granted under 19 *Del. C.* § 2347,[54] reformation of a compensation agreement is appropriate in limited circumstances that include mutual mistake.[55] The party seeking reformation is obligated to present the evidence justifying the modification.[56]

18. In this appeal, Jackson does not substantively address the theory of mutual mistake. In his reply papers, Jackson argues that whether the compensation agreements should be reformed based on mutual mistake is not on appeal.[57] Rather, he argues that the Board's purported legal error warrants a further hearing to address whether reformation would be appropriate.[58] As already determined, the Board did not commit legal error in calculating Jackson's wage rate. Accordingly, based on Jackson's acknowledgment that he has not argued mutual mistake, the Court need not address this issue further. The Court is satisfied that the Board correctly determined

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[53] IAB Decision at 12.

[54] 19 *Del. C.* § 2347 explicitly authorizes the Board to review agreements and "make an award ending, diminishing, increasing or renewing the compensation previously agreed upon...."

[55] *Ohrt v. Kentmere Home*, 1996 WL 527213, at *7 (Del. Super. Aug. 9, 1996).

[56] *C. Braun and Co. v. Mason*, 168 A.2d 105, 107 (Del. 1961)("In our opinion the effect of 19 *Del. C.* § 2344 and 19 *Del. C.* § 2347 is to place upon a party seeking to modify an award by subsequent review the burden of establishing by a preponderance of competent evidence that the former award should be modified.")

[57] Reply Br. at 4.

[58] *Id.*

that Jackson did not prove that the amount of his wages was something other than what is reflected within the prior compensation agreements. Accordingly, the Board properly determined that that there was no basis to reform the agreements.

19. Based on the foregoing, the decision of the Board denying Jackson's request to amend previously executed compensation agreements to reflect a higher average weekly wage is **AFFIRMED**.

IT IS SO ORDERED.

Joseph R. Slights, III, Judge

Original to Prothonotary

cc: Michael R. Ippoliti, Esq.
H. Garrett Baker, Esq.