

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

THOMAS DREWRY,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N11A-02-006 JAP
	)	
AIR LIQUIDE-MEDAL, LLC	)	
and UNEMPLOYMENT INS	)	
APPEAL BOARD,	)	
	)	
Appellees.	)	

Submitted: November 10, 2011  
Decided: December 13, 2011

**MEMORANDUM OPINION**

oc: Prothonotary

cc: Thomas A. Drewry, Wilmington, Delaware  
Appellant—*Pro Se*

Dana R. Jelepis, Esquire, Wilmington, Delaware  
Attorney for Air Liquide-Medal, LLC

Katisha D. Fortune, Esquire, Department of Justice,  
Wilmington, Delaware  
Attorney for Appellee U.I.A.B

**JUDGE JOHN A. PARKINS, JR.**

Under Delaware law an unemployed person who cannot work because of a physical disability cannot receive unemployment benefits until that person's condition improves to the point where he or she is "available for work." In this case, the Unemployment Insurance Appeals Board determined that the claimant/appellant, Thomas Drewry, was not available for work between December 27, 2009 and the end of 2010 because of a physical disability and was therefore not entitled to unemployment benefits for that period. Mr. Drewry now appeals from the Board's factual finding and ultimate conclusion.

### **Factual and Procedural Background**

Air Liquide employed Mr. Drewry from January 2, 2006 through December 10, 2009 as a chemical operator.<sup>1</sup> He filed for unemployment benefits effective August 29, 2010 claiming that he was discharged for medical reasons, claiming he suffered from right knee stiffness and pain that limited his

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<sup>1</sup> Record of the Case, 14 (hereinafter "R at \_\_").

ability to stand,<sup>2</sup> and was therefore unable to perform his duties.

Two physicians evaluated Mr. Drewry. On January 7, 2010, Dr. Minn Saing, Mr. Drewry's orthopedist, stated that Mr. Drewry could not work at his usual occupation, but could perform other work on a full time basis.<sup>3</sup> In February 2010, Dr. Saing again made the same determination.<sup>4</sup> On July 14, 2010, Dr. Peter Bandera signed a Medical Certification stating that Mr. Drewry's ability to support or care for his children was reduced, he could not work at his usual occupation, and he could not participate in classroom training for an estimated 5-12 months going forward.<sup>5</sup> Additionally, Dr. Bandera noted that Mr. Drewry could only perform sedentary work.<sup>6</sup> It was not until January 10, 2011, Dr. Saing signed a Medical Certification stating that Appellant was able to work at his usual occupation.<sup>7</sup>

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<sup>2</sup> R at 14.

<sup>3</sup> R at 5.

<sup>4</sup> R at 6.

<sup>5</sup> R at 7.

<sup>6</sup> R at 7.

<sup>7</sup> R at 49.

Turning to the administrative proceedings, the Appeals Referee found on that Mr. Drewry was able to do sedentary work, but would need training for such work.<sup>8</sup> In the hearing before the Referee, Mr. Drewry testified that he had not done sedentary work since being in the Air Force 31 years ago.<sup>9</sup> The Referee ruled that Appellant “is not able to work and is not available for work”<sup>10</sup> and was thus not eligible to receive unemployment benefits. Appellant appealed that decision to the Board.

The Board reversed the Referee’s decision and awarded benefits as of January 10, 2011.<sup>11</sup> The Board found that, after the Referee’s decision, Mr. Drewry’s doctor released him for his usual work as of January 10, 2011. Accordingly, the Board determined that he was able and available to work<sup>12</sup> and was entitled to benefits as of that date. The Board upheld the Referee’s decision that Mr. Drewry was not entitled to benefits

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<sup>8</sup> R at 15

<sup>9</sup> R at 32.

<sup>10</sup> R at 15 (noting that the Referee affirmed the decision of the Claims Deputy and earlier proceedings in this matter were not made part of the record).

<sup>11</sup> R at 46 (noting that the effective date to receive benefits is post the Referee’s determination).

<sup>12</sup> R at 46.

prior to January 10, 2011. Mr. Drewry now appeals the latter aspect of the Board's determination.

### **Standard of Review**

The court reviews the Board's decision to determine "whether there was substantial evidence sufficient to support the [Board's] findings[,] and whether they are free from legal error."<sup>13</sup> The court considers the record in light most favorable to the prevailing party before the Board.<sup>14</sup> "The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings."<sup>15</sup> The Board is the judge of witness credibility and responsible for resolving conflicts in testimony, not this court.<sup>16</sup>

### **Discussion**

Mr. Drewry appears to misapprehend the role of unemployment benefits. He seeks benefits for the period that he was "disabled from work,"<sup>17</sup> but that is not the proper role

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<sup>13</sup> *Thompson v. Unemployment Ins. Appeal Bd.*, 25 A.3d 778, 781-82 (Del. 2011) (quoting *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308, 308 (Del. 1975)) (citing *Straley v. Advance Staffing, Inc.*, 2009 WL 3451913, at \*2 (Del. Oct. 27, 2009)) (citations omitted).

<sup>14</sup> See *Thompson*, 25 A.3d at 782 (citing *Pochvatilla v. United States Postal Serv.*, 1997 WL 524062, at \*2 (Del. Super. June 9, 1997)).

<sup>15</sup> *Thompson*, 25 A.3d at 782 (quoting *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1098 (Del. 2006)).

<sup>16</sup> See *Thompson*, 25 A.3d at 782 (citations omitted).

<sup>17</sup> Appellant's Opening Brief at 1.

of unemployment benefits. By law, persons who are unable to work because of a physical disability are disqualified from receiving unemployment benefits until he “became[] able to work and available for work as determined by a doctor’s certificate and meets all other requirements under [§ 3314].”<sup>18</sup> “[T]he term ‘availability’ for employment incorporates both the requirement of ability to work and qualification through skill, training or experience for a particular occupation, commonly expressed in terms of ‘an identifiable labor market.’”<sup>19</sup>

Mr. Drewry bears the burden of showing he is entitled to unemployment benefits.<sup>20</sup> The issue the Board had to consider is whether Mr. Drewry was “available” for work given that he had been cleared for sedentary work, but not his usual job as a chemical operator. “A showing that a person is ready for ‘sedentary, light duty’ work ‘as tolerated’ is not necessarily sufficient by itself to establish that the person is ‘available for work’ for purposes of unemployment compensation.”<sup>21</sup> The record does not indicate a particular type of sedentary

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<sup>18</sup> 19 Del. C. § 3314(8).

<sup>19</sup> *Id.* (quoting *Harper v. Unemployment Ins. Appeals Bd.*, 293 A.2d 813, 816 (Del. Super. 1972)).

<sup>20</sup> See *Petty v. University of Del.*, 450 A.2d 392, 395 (Del. 1982) (citations omitted).

<sup>21</sup> *Briddell v. Unemployment Ins. Appeal Bd.*, 2002 WL 499437, \*3 (Del. Super. Mar. 28, 2002).

employment that Mr. Drewry was qualified to perform prior to January 10, 2011.<sup>22</sup> The Board therefore justifiably concluded that Mr. Drewry’s ability to perform some sort of unspecified sedentary work did not render him “available for work.”

This court will not make its own factual findings, determine witness credibility, or resolve conflicts in testimony.<sup>23</sup> That role is reserved exclusively for the Board. The scope of this court’s review is limited to determining whether there is substantial evidence in the record to support the Board’s finding. The court has carefully reviewed the record and concludes there is substantial evidence sufficient to support the Board’s findings that Mr. Drewry was not available for work until January 10, 2011. The judgment of the Board is therefore **AFFIRMED.**

**IT IS SO ORDERED.**

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John A. Parkins, Jr.  
Judge

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<sup>22</sup> *See id.*

<sup>23</sup> *See Thompson*, 25 A.3d at 782 (citations omitted).