IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GENERAL MOTORS CORPORATION,	)	
	)	
Employer-Below, Appellant,	)	
	)	C.A. No. N11A-02-010 MMJ
v.	)	
	)	
TILLMAN STEWART,	)	
	)	
Claimant-Below, Appellee.	)	
	)	
	)	

Submitted: June 27, 2011
Decided: September 29, 2011

On Appeal from a Decision of the Industrial Accident Board
AFFIRMED

MEMORANDUM OPINION

Lori Brewington, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorney for General Motors Corporation

Robert P. LoBue, Esquire, Wilmington, Delaware, Attorney for Tillman Stewart

JOHNSTON, J.

General Motors Corporation ("GM") has appealed the February 2, 2011 decision of the Industrial Accident Board ("Board"). The Board granted Tillman Stewart's ("Claimant") Petition to Determine Additional Compensation Due. Additionally, Claimant was awarded attorney's fees and payment of his medical witness fees.

Employer contends that the Board's decision to grant partial disability benefits to Claimant constituted legal error and was not supported by substantial evidence.

FACTUAL AND PROCEDURAL CONTEXT

On July 9, 2007, while working on GM's assembly line, Claimant sustained a low back injury after an iron pole fell and hit him on the back. Following his injury, Claimant took leave from work for two and a half weeks. GM acknowledged that this injury was compensable, and Claimant was awarded $2,115.18 for the period of July 19, 2007 to August 12, 2007.

On July 15, 2010, Claimant filed a Petition to Determine Additional Compensation Due, seeking compensation for partial disability from April 1, 2010 and ongoing. On November 16, 2010, a hearing was held by the Board. Claimant's Petition was granted.

Claimant's Treatment

Prior to his July 9, 2007 injury, Claimant experienced back problems. In 1995, Claimant sustained a ruptured disk while working for GM in Texas, and subsequently underwent surgery. Claimant was out of work for nearly a year following surgery.

In September 1997, Claimant saw Dr. Harsha Oza for treatment for his low back. According to Dr. Oza's records, Claimant indicated that although his back had improved since his surgery in 1995, it occasionally bothered him. No further evidence was put on the record regarding Dr. Oza's treatment of Claimant.

Claimant's medical care remained undocumented until July 2007 when he sustained his low back injury at the GM plant in Delaware. On July 9, 2007, the same day as his injury, Claimant was seen by GM's nurse who advised Claimant to see his own physician. Claimant's physician diagnosed him with lumbar radiculopathy, low back pain, and right thigh numbness. Claimant was advised to, and in fact did, take two and a half weeks off work after sustaining his injury.

Following his injury, the company doctor at the local GM plant requested that Claimant undergo an MRI.[1] A review of the MRI revealed

[1] The record is silent as to when the MRI was performed.

status post right hemilaminectomy at L5 which was consistent with the surgery performed on Claimant in Texas in 1995. The MRI also showed: abnormalities of the right lateral recess stenosis at L5, significant spinal canal stenosis and bilateral recess stenosis at L3-4 with disc bulge, and slight bilateral recess stenosis at L4-5.

Claimant was examined by Dr. Stephen Roman on October 10, 2007. Dr. Roman recommended that Claimant participate in physical therapy and consider epidural steroid injections if he did not see improvement. Claimant was also prescribed Celebrex. Dr. Roman believed that Claimant would be able to continue full-time, regular duty work at GM.

In August 2008, Claimant was seen by Dr. Stephen Rodgers. Claimant complained of back pain as well as pain in his legs. Claimant indicated that he was unable to sit for long periods and had difficulty getting up. Claimant stated that his primary care physician had prescribed him medication.[2]

Dr. Rodgers performed a physical examination on Claimant and observed scarring in Claimant's low back consistent with the surgery performed on him in Texas. Dr. Rodgers noted increased muscle tone in the low back, moderately decreased lumbar range of motion and sluggish

[2] The record does not indicate what medications Claimant was prescribed.

reflexes, but no signs of an active radiculopathy. Dr. Rodgers then calculated Claimant's percentage of permanent impairment, due to all injuries, to be 27%.

In September 2008, Claimant was examined by Dr. Errol Ger, who concurred with Dr. Rodgers' permanency rating. Claimant was again examined by Dr. Ger in April 2009. Dr. Ger opined that Claimant should be restricted to full-time sedentary work and that such restrictions were permanent. According to Dr. Ger, Claimant's work restrictions were attributable to osteoarthritic changes in the back.

Claimant was again seen by Dr. Rodgers in October 2010 for a follow-up appointment. Claimant indicated that the pain in his legs and back was the same as in August 2008, but was exacerbated by cold and rainy weather. Claimant further indicated he was unable to turn or twist as he had before, and that he had difficulty sitting for long periods of time. Claimant stated that Dr. Eugene Ryfinsky, his family physician, had prescribed him Prednisone and Percocet.

At the October 2010 appointment, Dr. Rodgers performed a physical examination on Claimant. Dr. Rodgers' findings were similar to what he had observed in August 2008 – Claimant was still limited in his range of motions and suffering from back pain. As a result of his findings, Dr.

Rodgers recommended that Claimant be restricted to sedentary work or light duty work with accommodations. Dr. Rodgers believed these restrictions to be permanent.

On November 9, 2010, a week before the hearing, Claimant was seen by Dr. Ryfinski.[3] Claimant received conservative treatment for his back pain and indicated that he was still taking Prednisone and Percocet.

Claimant's Condition and Work Experience

Claimant retired from GM on September 1, 2008, after 30 years with the company. Claimant initially started in the parts department at GM before eventually being transferred to the assembly line. Claimant's position on the assembly line required bending and twisting as well as operating a welding gun. Claimant had been working on the assembly line for approximately one year before sustaining his injury on July 9, 2007. Following Claimant's injury, he continued to work full-time without work restrictions for another year. When Claimant had completed 30 years with GM, he decided to retire due to the pain from his injury.

Within two weeks of retiring, Claimant began looking for work at various businesses. Claimant was unable to secure employment until April 1, 2010, when he started full-time, seasonal work at the Ocean Spray plant in

[3] The record does not indicate when or how many times Claimant was seen by Dr. Ryfinski.

Bordentown, New Jersey. Claimant's job at Ocean Spray was to inspect bottles, and he was compensated at a rate of $9.25 per hour. Claimant worked steadily until he was laid off in October 2010. Claimant, however, fully anticipates being called back to Ocean Spray in 2011 when work becomes available. In the meantime, Claimant has been looking for gainful employment.

The Hearing

Dr. Rodgers testified that due to all the work-related injuries Claimant sustained during his time with GM, he had a permanent impairment rating of 27%. As a result of his July 2007 injury, Dr. Rodgers opined that Claimant's best chance for a return to gainful employment would be sedentary work or light duty work with accommodations. According to Dr. Rodgers, these work restrictions were permanent; therefore, Claimant would not be fit for work on an assembly line.

The Claimant testified that after sustaining his injury in July 2007, he was in significant pain. He took leave from work for approximately two and a half weeks before being notified by GM that he must return or risk losing his job. Claimant explained that he returned to work, despite the pain in his low back, because he wanted to accumulate 30 years of employment at GM.

According to Claimant, once he accrued 30 years, he decided to retire due to the ongoing pain in his legs and back.

Claimant testified that within two weeks of retiring from GM, he began looking for employment opportunities consistent with the work restrictions recommended by Drs. Rodgers and Ger. Claimant stated that he visited approximately 100 different businesses and submitted numerous applications but was unable to find work. Eventually, in April 2010, Claimant secured full-time, seasonal employment at Ocean Spray where he made $9.25 per hour. Claimant worked steadily until October 2010 when he was laid off by Ocean Spray. Thereafter, Claimant testified, he again applied to numerous businesses in search of employment.

Patrick Law, a former employee of GM's human resources department, testified that Claimant voluntarily retired from GM after accepting a special compensation package. According to Law, had Claimant not retired from GM, he would have been able to continue employment with the company despite the fact that GM's Delaware plant was closing. Law further testified that if work restrictions been in place for Claimant, he would have entered GM's ADAPT[4] process. Law, however,

[4] ADAPT stands for "Accommodating Disabled People in Transition."

candidly admitted that GM likely would not have been able to place Claimant in any GM facility due to his permanent sedentary restrictions.

Alyssa Tease, a vocational case manager, prepared a labor market survey that identified seven jobs that met Claimant's work restrictions. The average weekly wage of these seven positions was between $371.20 and $428.57 with a median wage of $400.00 per week. The survey also confirmed that GM did not have positions available which would accommodate Claimant's work restrictions.

The Board's Opinion

Although the Board found Claimant's retirement from GM to be voluntary, it determined that Claimant had not intended to remove himself from the labor force in September 2008. According to the Board, Claimant's subsequent return to work in April 2010 at the Ocean Spray plant clearly demonstrated his intent not to remove himself from the labor market. Therefore, because Claimant didn't retire in the "traditional" sense, the Board found that he was not barred from receipt of partial disability benefits.

The Board further found that upon Claimant's return to work in April 2010, he suffered a recurrence of his work-related injury. The Board observed that when Claimant retired from GM in September 2008, there were no work restrictions in place. However, when Claimant re-entered the

labor force following retirement, he was subject to sedentary or modified light duty work restrictions. This change in Claimant's condition, the Board found, sufficiently demonstrated that Claimant suffered a recurrence.

As a result of this recurrence, the Board found that Claimant's earning capacity had diminished. In reaching this conclusion, the Board rejected GM's assertion that Claimant could have remained with GM had he not retired (and thus maintained his earnings). Based on the testimony of Law and Tease, the Board found that GM would not have been able to accommodate Claimant's sedentary or light duty work restrictions.

Therefore, in order to determine Claimant's earning capacity following his injury, the Board relied upon Claimant's actual earnings at Ocean Spray. There, Claimant earned $370.00 per week, which was $949.07 less per week than what he earned at GM. Claimant, therefore, was entitled to partial disability benefits at a maximum compensation rate of $592.25 per week beginning on April 1, 2010 and ongoing.

STANDARD OF REVIEW

On appeal from the Industrial Accident Board, the Superior Court must determine if the Board's factual findings are supported by substantial evidence in the record.[5] "Substantial evidence" is less than a preponderance

[5] *Histed v. E.I. DuPont deNemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

of the evidence but is more than a "mere scintilla."[6] It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] The Court must review the record to determine if the evidence is legally adequate to support the Board's factual findings. The Court does not "weigh evidence, determine questions of credibility or make its own factual findings."[8] If the record lacks satisfactory proof in support of the Board's finding or decision, the Court may overturn the Board's decision. On appeal, the Superior Court reviews legal issues *de novo*.[9]

PARTIES' CONTENTIONS

GM claims that the Board erred as matter of law in finding that Claimant was entitled to partial disability benefits after he voluntarily retired from his employment with GM. According to GM, substantial evidence was presented to establish that Claimant intended to remove himself from the labor market when he retired in 2008, thus precluding him from receiving partial disability benefits. GM argues that had the Board addressed Claimant's lackluster efforts at securing employment, both prior to and after working at Ocean Spray, such intent would be apparent.

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[6] *Richardson v. Perales*, 402 U.S. 389, 401 (1971).
[7] *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[8] *Olney*, 425 A.2d at 614.
[9] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

In the alternative, GM argues that assuming, *arguendo,* that Claimant was entitled to partial disability benefits, the Board erred in awarding him ongoing benefits. According to GM, partial disability benefits should be awarded only for the period during which Claimant actually returned to the labor market – that is, when Claimant was seasonally employed by Ocean Spray. Thus, GM claims, Claimant is entitled to, at most, partial disability compensation from April 2010 to October 2010.

In response, Claimant contends that the Board's decision to award ongoing partial disability benefits was supported by substantial evidence. Claimant accepts the Board's finding that his retirement was voluntary, but claims that substantial evidence was presented to demonstrate that he did not intend to remove himself from the labor force. Furthermore, Claimant argues, his continued search for employment after being laid off from Ocean Spray entitles him to ongoing partial disability benefits.

DISCUSSION

The Board properly found that Claimant did not intend to remove himself from the labor force.

Traditional retirement can disqualify an employee from receiving worker's compensation benefits.[10] "This is especially true where an

[10] *General Motors Corp. v. Willis*, 2000 WL 1611067, at *2 (Del. Super.) (citing *Chrysler Corp. v. Kaschalk*, 1999 WL 458792, at *3 (Del. Super.)).

employee does not look for work after his retirement and where the Claimant is content with his or her retirement lifestyle."[11] However, even a fully voluntary retirement does not preclude the receipt of partial disability benefits.[12] Indeed, Delaware case law makes clear that an employee who voluntarily retires can still collect partial disability benefits stemming from a pre-retirement industrial accident if he does not intend to remove himself or herself from the job market.[13] While securing employment may be indicative of one's intent to not remove himself or herself from the job market, it is not dispositive.[14] Rather, such intent may be demonstrated by the Claimant "submit[ting] adequate evidence that he made a good faith effort to seek alternative employment within the limitations of the disability."[15]

Here, the Board found insufficient evidence to characterize Claimant's retirement as being "compelled" by a work injury; as such, Claimant's retirement was treated as voluntary. Notwithstanding that determination, the Board found that Claimant was entitled to partial

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[11] *Willis,* 2000 WL 1611067, at *2 (citing *Brown v. James Julian, Inc*., 1997 WL 34816437, at *2 (Del. Super.)).
[12] *See id.*
[13] *Willis,* 2000 WL 1611067, at *2. *See also Estate of Jackson v. Genesis Health Venture*, 23 A.3d 1287, 1290-91 (Del. 2011); *Wilson v. Chrysler, L.L.C.*, 2011 WL 2083935, at *3 (Del. Super.).
[14] *Rozek v. Chrysler, L.L.C*., 2010 WL 5313229, at *2 (Del. Super.).
[15] *Wilson*, 2011 WL 2083935, at *3. *See also Jackson*, 23 A.2d at 1291; *Rozek*, 2010 WL 5313229, at *1-2;

disability benefits because he had not intended to remove himself from the job market. According to the Board, Claimant's return to work in April 2010 clearly demonstrated his intent not to remove himself from the labor market.

The Court finds that the Board's finding was supported by substantial evidence. As the Board properly observed, Claimant sought and actually secured employment at Ocean Spray in April 2010 after retiring from GM. In so doing, Claimant plainly evinced his intent not to remove himself from the labor force.

Moreover, and contrary to GM's assertion, Claimant's effort in securing employment prior to April 2010 was not a relevant consideration in determining whether he intended to remove himself from the labor force. Because Claimant only sought partial disability benefits beginning on his first day of employment with Ocean Spray – April 1, 2010 – his prior efforts in securing a job should not have, and in fact, did not have, any bearing on the Board's determination.

Claimant is entitled to ongoing partial disability benefits since he has demonstrated a loss in earning capacity.

Because Claimant did not retire in the "traditional" sense, he was still eligible for partial disability benefits. "Partial disability refers to the period of time during which an injured employee suffers a partial loss of wages as a

result of a compensable injury."[16] Thus, in order for a Claimant to receive partial disability benefits post-retirement, he must establish a recurrence of his work-related injury[17] which has resulted in a diminished earning capacity.[18]

Here, the Board found that Claimant, in fact, suffered a recurrence of partial disability since his retirement from GM which diminished his earning capacity. Accordingly, the Board awarded Claimant partial disability compensation from April 1, 2010 forward.

GM does not challenge the Board's finding with respect to Claimant's recurrence or diminished earning capacity. Rather, GM argues that the Board erred in awarding Claimant ongoing partial disability benefits since evidence was presented that he had not been working at Ocean Spray for the three weeks preceding the hearing. GM contends, therefore, that Claimant's "partial disability benefits must be fixed for the limited time period in which he *actually* returned to the competitive labor market."

Section 2325 of Title 19 of the Delaware Code does not require a claimant to secure employment in order to receive partial disability benefits.

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[16] *NVF v. Wilkerson*, 2006 WL 2382799, at *1 (Del. Super.) (citing *Globe Union, Inc. v. Baker*, 310 A.2d 883, 887 (Del. Super. 1973)).
[17] *See* 19 *Del. C.* § 2347; *see also Chubb v. State*, 961 A.2d 530, 535-36 (Del. 2008).
[18] *See* 19 *Del. C.* § 2325; *see also Joynes v. Peninsula Oil. Co.*, 2001 WL 392242, at *5 (Del. Super.) (finding that Claimant seeking partial disability benefits pursuant to 19 *Del. C.* § 2325 must prove "the reduction in his earning ability and that the alleged partial disability is a result of the injury he suffered in his previous work").

Indeed, a Claimant need only demonstrate that he or she is actively seeking employment elsewhere to be eligible for ongoing benefits.[19] Here, the Board found that Claimant's act of securing employment at Ocean Spray in April 2010 clearly made him eligible to receive partial disability benefits. When Claimant was subsequently laid off from Ocean Spray in October 2010, he once again sought employment. The Board clearly found Claimant's testimony regarding his job search after October 2010 to be credible, thereby entitling Claimant to an award of ongoing benefits.

The Court finds that the Board's award of ongoing disability benefits, despite Claimant's lack of employment at the time of the hearing, was supported by substantial evidence. The record establishes that upon being laid off by Ocean Spray, Claimant promptly applied for numerous jobs, including positions with a steel factory and a company that manufactures medicine. Although Claimant's job search, thus far, has been fruitless, that does not bar his petition. Claimant has demonstrated a good faith effort to secure employment since being laid off, and thus, is entitled to ongoing benefits.

[19] *See Wilson*, 2011 WL 2083935, at *3; Rozek, 2010 WL 5313229, at *2.

The Board's failure to explicitly address Claimant's credibility regarding his job search after October 2010 is not fatal.[20] While the Board, as trier of fact, is "permitted to pass on the credibility of witnesses and to accord their testimony the appropriate weight,"[21] there is no requirement that the Board expressly comment on a witness's credibility.[22] So long as the Board's findings "can be determined, by implication, from the ultimate conclusion," the Court will deem such findings to be sufficient.[23]

Although the Board did not expressly state that Claimant's testimony regarding his job search was credible, the Court can infer such a finding from the Board's award of ongoing benefits despite Claimant's current unemployment. The Board's findings, therefore, provide the requisite proof necessary to sustain its ultimate conclusion.

CONCLUSION

The Board did not commit legal error in granting Claimant's Petition to Determine Additional Compensation Due. The Board's decision to award Claimant ongoing partial disability benefits is supported by substantial evidence that Claimant did not intend to remove himself from the labor force

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[20] *See Haveg Indus., Inc. v. Humphrey*, 456 A.2d 1220, 1222 (Del. 1983) ("Reversal is not always required because the Board fails to make its findings in expansive terms.")
[21] *Lemmon v. Northwood Const*., 690 A.2d 912, 913 (Del. 1996).
[22] *See, e.g.*, *Devine v. Advanced Power Control, Inc*., 663 A.2d 1205, 1209-10 (Del. Super. 1995); *Haveg*, 456 A.2d at 1222.
[23] *Haveg*, 456 A.2d at 1222.

upon his retirement from GM. The Board correctly found that Claimant's continued search for employment, after being laid off from Ocean Spray in October 2010, entitled him to an award of ongoing benefits.

THEREFORE, the Court hereby **AFFIRMS** the Board's decision in its entirety.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston