

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR KENT COUNTY**

<b>SALLY JACKSON,</b>	:	
	:	<b>C.A. NO: 09A-09-001 (RBY)</b>
<b>Claimant Below-</b>	:	
<b>Appellant,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>GENESIS HEALTH VENTURES,</b>	:	
	:	
<b>Employer Below-</b>	:	
<b>Appellee.</b>	:	

Submitted: October 12, 2010  
Decided: January 6, 2011

*Upon Consideration of Claimant's  
Appeal from the Decision of the  
Industrial Accident Board*  
**AFFIRMED**

**OPINION AND ORDER**

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for the Claimant Below-Appellant.

R. Stokes Nolte, Esq., Reilly, Janiczek & McDevitt, P.A., Wilmington, Delaware for the Employer Below-Appellee.

Young, J.

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### **SUMMARY**

Sally Jackson appeals from a decision of the Industrial Accident Board denying her claim for total disability benefits. Because the Board's decision is supported by substantial evidence, Jackson's appeal is **DENIED**.

### **FACTS**

Sally Jackson ("Jackson") was employed as a nurse by Genesis Health Ventures ("Genesis") in 1994. That October, Jackson's supervisor asked her to unpack a newly delivered crate containing a wire frame that, once assembled, would be used to store the facility's medical waste. Jackson objected, protesting that the frame was too heavy for her to move safely. Jackson's supervisor disagreed, and again requested that Jackson unpack the crate. Jackson finally acquiesced, and promptly tore the meniscus in her right knee.

Jackson underwent arthroscopic surgery later that month, and Genesis paid Jackson benefits including compensation for medical expenses, total disability, and permanency. Regrettably, the surgery evidently did not eliminate Jackson's pain. Hence, Jackson visited numerous doctors over the next several years in search of additional treatment. Jackson's recovery was hindered by the effect of her allergies and diabetes, which appear to have eliminated conventional anti-inflammatory medications and injections as possible sources of treatment. Instead, Jackson relied on a combination of ice and Tylenol to combat her right knee pain for more than a decade.

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Jackson returned to work as a nurse in 1996, and continued to work in that capacity until retiring in 1999. Although Jackson gave conflicting testimony on this point, the record supports the conclusion that Jackson's only significant work experience after 1999 was a brief stint in staff development at a nursing home in 2005. Jackson quit after five weeks primarily due, according to her, to pain associated with a preexisting back injury. Aside from this, Jackson spent retired life assisting her husband's occasional work in providing music and entertainment to local senior centers.

By 2007, Jackson's knee pain had worsened, and in September she fell in her garage. This accident precipitated yet another series of medical visits, culminating in a total knee replacement surgery in April 2008. The operation was considered a success, although Jackson was readmitted to the hospital in May, where she spent four days recovering from multiple pulmonary embolisms.

On June 23, 2008, Jackson filed a petition with the Industrial Accident Board (the "Board") seeking compensation for the cost of her knee replacement surgery, as well as the cost of her subsequent pulmonary embolism treatment. Jackson also requested total disability compensation from April 29, 2008 to June 9, 2008 to cover the time she spent recuperating in the hospital as a result of her knee operation. In her petition before the Board, Jackson argued that her medical treatment was causally related to her 1994 work accident, and therefore compensable by Genesis.

In its September 1, 2009 decision, the Board found that Jackson's 2008 accident was the direct and natural result of her 1994 accident, and ordered Genesis to pay for the cost of Jackson's 2008 knee replacement surgery and subsequent

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hospitalization for her pulmonary embolisms. The Board, however, denied Jackson's request for total disability benefits, because Jackson had voluntarily removed herself from the workforce, and so did not qualify for total disability compensation. Jackson has filed an appeal with this Court on the sole ground that the Board's decision disqualifying her from receiving total disability compensation was in error.

### **DISCUSSION**

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's findings of fact and conclusions of law.<sup>1</sup> Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>2</sup> This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>3</sup> Errors of law are reviewed *de novo*.<sup>4</sup> Absent errors of law, the standard of review for a Board's decision is abuse of discretion.

Worker's Compensation law has a two-fold purpose: 1) it provides compensation for work-related injuries, and 2) it relieves employers and their

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<sup>1</sup> *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Willis v. Plastic Materials*, 2003 WL 164292 (Del. Super. Ct. Jan. 13, 2003); *Robinson v. Metal Masters, Inc.*, 2000 WL 1211508 (Del. Super. Ct. July 14, 2000).

<sup>2</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Federal Mar. Comm'n* 383 U.S. 607, 620 (1966)).

<sup>3</sup> *Collins v. Giant Food, Inc.*, 1999 WL 1442024 (Del. Super. Ct. Oct. 13, 1999) (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

<sup>4</sup> *Anchor Motor Freight v. Ciabattini*, 716 A.2d 154 (Del. 1998).

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employees of the expenses associated with civil litigation.<sup>5</sup> When determining if a legitimate claim for compensation exists, the relevant inquiry is whether there was a work-connected injury.<sup>6</sup> Once the existence of a work-related injury has been established, the next step is to ascertain the type of benefits due the employee. “Benefits for physical injury ... are of two kinds: wage-loss payments based on the concept of disability; and payment of hospital and medical expenses occasioned by any work-connected injury, regardless of wage loss or disability.”<sup>7</sup> When a work-related injury results in total disability, the employer must pay during the continuance of the total disability compensation equal to 66⅔% of the injured employee's wages.<sup>8</sup>

The dispute in this case centers on Jackson’s claim for wage-loss payments stemming from the time she spent recovering after her April 2008 surgery. As noted above, Delaware’s workers’ compensation law provides for lost wage benefits during any period where a claimant is totally disabled from working.<sup>9</sup> “‘Total disability’ means a disability which prevents an employee from obtaining employment commensurate with [her] qualifications and training.”<sup>10</sup> To establish a claim for total

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<sup>5</sup> *State v. Brown*, 2000 WL 33225298 (Del. Super. Ct. Aug. 7, 2000) *aff’d sub nom. Brown v. State Dept. Of Corr.*, 768 A.2d 467 (Del. 2001); *Lord v. Souder*, 748 A.2d 393 (Del. 2002); *Guy J. Johnson Transportation Co. v. Dunkle*, 541 A.2d 551, 552 (1988).

<sup>6</sup> 1 Larson’s Workmen’s Compensation Law § 1.03 (1999).

<sup>7</sup> 4 Larson’s Workmen’s Compensation Law § 57.10 (1999).

<sup>8</sup> 19 *Del. C.* § 2324.

<sup>9</sup> *Id.*

<sup>10</sup> *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967).

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disability benefits, the claimant must show that he or she was actually incapacitated from earning wages.<sup>11</sup> A determination of total disability requires a consideration and weighing of not only the medical and physical facts but also such factors as the employee's age, education, general background, occupational and general experience, emotional stability, the nature of the work performable under the physical impairment, and the availability of such work.<sup>12</sup> The finder of fact must take into consideration not only the medical testimony but also the facts and circumstances that may relate to the claimant as a 'unit of labor' in his handicapped condition.<sup>13</sup>

The facts and circumstances of Jackson's injury form the genesis of this appeal. The parties do not dispute that Jackson was unable to work following her total knee replacement surgery. What the parties do dispute is whether Jackson's inability to work constitutes a 'total disability' in light of Jackson's prior retirement.

Unlike many other jurisdictions, Delaware's Workers' Compensation Statute does not contain any express provision making injuries compensable after retirement.<sup>14</sup> This is not to say that a worker's retirement constitutes an absolute bar to recovering disability benefits. Voluntary retirement is simply one factor to consider when determining whether an employee is entitled to disability benefits

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<sup>11</sup> *Id.* at 913.

<sup>12</sup> *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).

<sup>13</sup> *Id.* at 261.

<sup>14</sup> *See generally* 75 A.L.R. 5th 339 (originally published in 2000) Eligibility for Unemployment Compensation of Employee who Retires Voluntarily.

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under Delaware law.<sup>15</sup> Still, a worker's voluntary retirement, and the reasons therefore, are important considerations in the analysis. Delaware case law has frequently noted that voluntary retirement from the workplace may disqualify an employee from receiving disability benefits.<sup>16</sup> This is especially true where an employee does not look for work after his retirement, and where the employee is content with his or her retirement lifestyle.<sup>17</sup>

Here, the Board found that Jackson retired in 1999 due to the pain associated with an unrelated back injury. In making this finding, the Board discredited Jackson's statement that she retired due to her knee pain. The Board also found that because Jackson told her treating physician that she was retired, the possibility of her returning to work was never discussed at any time before or after her surgery.

The Board's finding that Jackson voluntarily retired in 1999 is not dispositive. However, when combined with the Board's other findings, which indicate that Jackson had removed herself from the workforce, that her retirement was not due to her work-related injury, and that she never discussed or even attempted to look for work during treatment, it is abundantly clear that the Board's decision is supported by substantial evidence and must be upheld.

This Court's review of the record confirms the Board's analysis. The record

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<sup>15</sup> See *General Motors Corp. v. Willis*, 2000 WL 1611067 (Del. Super. Ct. Sept. 5, 2000); *Chrysler corp. v. Kaschalk*, 1999 WL 458792 (Del. Super. Ct. June 16, 1999); *Sharp v. W.L. Gore & Assocs.*, 1998 WL 438796 (Del. Super. Ct. May 29, 1998).

<sup>16</sup> *Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056 (Del. 2006).

<sup>17</sup> *Brown v. James Julian, Inc.*, (Del. Super. Ct. Jan. 23, 1997).

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discloses that Jackson has not looked for work in the health care industry since 2005. In 2007 she told her treating physician that she was retired from nursing, and thus asked no questions about, and made no arrangements to resume working with restrictions. Jackson's surgery may have left her temporarily unable to work, but, as the Board found, Jackson had no intention of working, because of the pain associated with an unrelated and non-compensable injury. That Jackson has not sought employment of any kind following her successful knee surgery is also instructive.

Taken together, these facts provide substantial evidence for the Board's finding that Jackson was not entitled to total disability benefits following her 2008 knee replacement surgery, and accordingly, Jackson's appeal is denied.

### **CONCLUSION**

Based on the foregoing, the decision of the Industrial Accident Board is **AFFIRMED.**

**SO ORDERED.**

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/s/ Robert B. Young

J.

RBY/sal  
oc: Prothonotary  
cc: Opinion Distribution  
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