IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PORFIRIO MARTINEZ,	:	
	:	C.A. No. 06A-12-004 WLW
Claimant-Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
PROPAK LOGISTICS, LLC,	:	
	:	
Employer-Below,	:	
Appellee.	:	

Submitted: June 20, 2007
Decided: October 2, 2007

ORDER

Upon Appeal of a Decision of the
Industrial Accident Board. Affirmed.

Walt F. Schmittinger, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Appellant.

H. Garrett Baker, Esquire of Elzufon Austin Reardon Tarlov & Mondell, P.A., Wilmington, Delaware; attorneys for the Appellee.

WITHAM, R.J.

This is an appeal of an Industrial Accident Board ("Board" or "IAB") decision dated July 24, 2006. The Board conducted an evidentiary hearing on Porfirio Martinez's ("Claimant") Petition to Determine Additional Compensation Due seeking compensation for unpaid medical expenses causally related to injuries sustained while working for Propak Logistics, LLC ("Employer") as well as medical witness and attorney's fees and Employer's Petition for Review seeking to terminate Claimant's total disability benefits. The Board granted Employer's Petition and terminated Claimant's ongoing disability benefits in favor of partial disability benefits and awarded medical witness and attorney's fees. The only issue Claimant raises on appeal is the Board's termination of the Claimant's temporary total disability benefits. Employer avers that Claimant is no longer medically disabled and is capable of performing full-time, sedentary work. In response, Claimant argues that he remains medically disabled or in the alternative, that he is a displaced worker. For the following reasons, the decision of the Board shall be ***affirmed***.

FACTS

Claimant is a sixty-seven-year-old man who resides in Dover, Delaware. He has no formal education and does not speak English. Claimant speaks Spanish, but he cannot read or write Spanish. Before Claimant worked as a laborer for Employer, he was a self-employed contractor in the Dominican Republic, and he worked as a truck driver and in the construction industry.

While Claimant was employed by Employer, he was struck by pallets on three

separate occasions and sustained injuries to his knee, back, and neck.[1] Following the third accident, Claimant went to the emergency room and was diagnosed with cervical, dorsal, and back contusion. Since the August 2004 industrial accident, Claimant has neither attempted to return to work nor sought alternative employment.

Employer accepted Claimant's injuries as compensable and paid Claimant temporary total disability benefits from August 6, 2004 through March 21, 2006. In March 2006, Employer filed a petition to terminate said benefits. Since the date of the filing, the Workers' Compensation fund has paid Claimant's benefits in the amount of $253.33 pursuant to 19 *Del. C.* § 2347.

Dr. Asit Upadhyay began treating Claimant on October 25, 2004. His diagnosis was dorsal strain/sprain with chronic low back pain. Dr. Upadhyay cleared Claimant to work in a sedentary or light duty capacity in early 2005. However, Dr. Upadhyay subsequently changed his opinion in 2005 and totally disabled Claimant from working. The basis for Dr. Upadhyay's change of opinion was that Claimant's condition was not improving with treatment. According to Dr. Upadhyay, Claimant had poor sitting and standing tolerance and it was unlikely that Claimant could be dependable and present himself for work on a consistent basis.

Dr. Jerry Case, a board-certified orthopedic surgeon, examined Claimant on March 14, 2006 and June 8, 2006 at the request of Employer. Upon reviewing Claimant's medical records and considering Claimant's subjective complaints, Dr.

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[1] On July 5, 2004, Claimant was struck in the thigh and knee. Claimant injured his lower back on July 20, 2004. On August 5, 2004, Claimant sustained an injury to his neck and upper back.

Case opined that Claimant was capable of working full-time in a sedentary position as of March 2006 with certain restrictions, including limitations on heavy lifting and the ability to move around periodically.

The only significant point of disagreement between Drs. Case and Upadhyay is Claimant's capacity to work. Both doctors agree that Claimant suffered a strain/sprain type injury in his low back during the 2004 industrial accidents and that Claimant's condition has remained relatively consistent since Dr. Upadhyay began treatment in October 2004. According to Dr. Upadhyay, Claimant is totally disabled from all work due to his ongoing low back pain and his poor sitting and standing tolerance. On the other hand, Dr. Case believes that Claimant is capable of performing full-time, sedentary work.

The Board found Dr. Case's opinion regarding Claimant's ability to work more persuasive than that of Dr. Upadhyay. The Board stated that Dr. Upadhyay's records regarding Claimant's work status are "confusing" and "outright contradictory." Since Claimant's condition has remained essentially unchanged, the Board is not persuaded that Dr. Upadhyay's change of opinion regarding Claimant's work status is justified. Thus, the Board accepted Dr. Case's opinion that as of March 14, 2006 Claimant was capable of working in a full-time, sedentary capacity.

Joseph Lucey, a vocational consultant for Perry & Associates, LCC, testified on behalf of Employer. Mr. Lucey identified five positions in the Labor Market Survey (LMS) all of which accommodate Spanish-speaking employees and are within the physical restrictions suggested by Dr. Case. Mr. Lucey does not believe that

Claimant's age, inability to speak English, or his physical condition will put him at a disadvantage in the applicant pool for these positions. Additionally, he does not believe that the two year gap in Claimant's employment history will be problematic because his injuries are a legitimate reason for his temporary unemployment.

Regarding Claimant's total disability benefits, the Board concluded that Claimant is no longer totally disabled. The Board held that Claimant has not met his burden of proving that he is a *prima facie* displaced worker or that he conducted a reasonable job search. The Board does not believe that Claimant's physical impairment coupled with his age and difficulties with the English language render him unemployable in any well-known branch of the competitive labor market. The testimony of Mr. Lucey as well as Claimant's own testimony suggest that Claimant has the skills to enable him to remain competitive for select sedentary jobs despite his injuries and restrictions. However, the Board found that Claimant continues to have some disability that could affect his earning capacity. Thus, Claimant is entitled to partial disability benefits at the rate of $80.00 per week from the date of the decision.

STANDARD OF REVIEW

The scope of review for an appeal of an IAB decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.[2] Substantial evidence equates to "such relevant evidence as a reasonable mind might

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

accept as adequate to support a conclusion."[3] On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] Instead, this Court reviews the case to determine if the evidence is legally sufficient to support the Board's factual findings.[5] The Board has the discretion to accept the testimony of one expert over that of another when the evidence is in conflict and the opinion relied upon is supported by substantial evidence.[6] When an expert's opinion is based in large part on the patient's statements and the trier of fact finds the underlying facts to be different, the trier of fact is free to reject the expert's testimony.[7] In reviewing the record for substantial evidence, this Court must consider the record in the light most favorable to the party prevailing below.[8]

DISCUSSION

When an employer files a petition to terminate total disability benefits, the employer bears the initial burden to show "that the employee is no longer totally

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

[4] *Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (*quoting Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

[5] *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3.

[6] *Leisure v. BFI Waste Systems*, 2006 WL 1148730, at *5 (Del. Super.).

[7] *Id.*

[8] *Spencer v. Suddard*, 1997 Del. Super. LEXIS 519, at *6.

incapacitated for the purpose of working."[9] If met, the burden shifts to the employee to prove that he is a "displaced worker."[10] A worker is displaced if he "is so handicapped by a compensable injury that he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if he is to be steadily employed."[11] An employee may be able to show a *prima facie* case of being a displaced worker given an obvious physical impairment coupled with age, education, training, mental capacity, or other non-enumerated factors.[12] Alternatively, if a *prima facie* case cannot be proven, then the employee may still attempt to show that he is a displaced worker[13] by showing that he "has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury."[14] If the employee can demonstrate that he is a displaced worker, then the burden shifts back to the employer to show the availability of work within the employee's restrictive abilities.[15]

Claimant incorrectly argues that he should be deemed displaced because he is

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[9] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).

[10] *Id.*

[11] *Id.* (quoting *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967)).

[12] *Torres*, 672 A.2d at 30 (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)).

[13] And thus deemed "totally disabled" for the purposes of the Delaware Workers' Compensation Law, 19 *Del.C.* §§ 2101–2397.

[14] *Torres*, 672 A.2d at 30 (quoting *Franklin Fabricators*, 306 A.2d at 737).

[15] *Id.* (citing *Franklin Fabricators*, 306 A.2d at 737).

similarly situated to other injured workers who were subsequently deemed displaced. Instead, each displaced worker claim is based on its own set of unique circumstances.[16] As the fact-finder, the Board considers those facts and circumstances that relate to Claimant's ability to work in relation to Claimant's medical history.[17] Those facts and circumstances include the employee's age, education, general background, occupational and general experience, emotional stability, the nature of the work to be performed under the physical impairment, and the availability of such work.[18] While another case may be similar to that of Claimant, that case is not determinative to the outcome of this case; and this Court will not reverse the Board's holding simply because the two cases appear to be similar.[19]

The Board may accept the testimony of one medical expert over another.[20] The Board accepted the medical opinion of Dr. Case, Employer's expert, over that of Dr. Upadhyay. The Board then concluded that Employer met its initial burden of proving that Claimant is no longer medically "totally incapacitated for the purpose of

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[16] *Rash v. Wilkinson Roofing and Siding*, 1995 WL 656824, at *3 (Del. Super. 1995).

[17] *Ham v. Chrysler Corp*., 231 A.2d 258, 261 (Del. 1967).

[18] *Id.*

[19] *Rash*, 1995 WL 656824, at *3 (Del. Super. 1995).

[20] *Reese v. Home Budget Ctr*., 619 A.2d 907, 910 (Del. 1992) ("The Board, of course, was free to choose between the conflicting diagnoses [of two doctors] and either opinion would constitute substantial evidence for purposes of appeal."); *see also DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982).

working."[21] The opinions of the two experts were largely in agreement except for the determination of whether Claimant was able to work. Relying upon his findings that the Claimant was taking very little pain medication and he was no longer in active treatment, Dr. Case concluded that the Claimant was able to work in a full-time sedentary capacity. Ultimately, Dr. Case found that there was nothing "seriously wrong" with Claimant. The Board found substantial evidence that Dr. Upadhyay's records regarding Claimant's work history were incorrect and contradictory.

"Total disability" does not have to be complete physical impairment. It is a disability which prevents the employee from obtaining employment in proportion to his qualifications and training.[22] The degree of compensability depends on the impairment to Claimant's earning capacity.[23] The Board found that Claimant did not meet his burden of proving a *prima facie* "displaced worker" case nor did he present any evidence that he conducted a reasonable job search. While the Board regarded Claimant's lack of formal education, age, and difficulties with speaking, reading, and writing English, the Board did not believe that these factors rendered him unemployable in any well-known branch of the competitive labor market. Furthermore, Claimant's past employment history as a contractor in the Dominican Republic suggested that he was able to acquire new skills. The Board found

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[21] *Torres*, 672 A.2d at 30.

[22] *M. A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967).

[23] *Id.*

substantial evidence that Claimant had the mental capacity to learn new skills and compensate for his inability to read and write.[24] Since Claimant obtained his job with Employer in his late sixties, the Board does not believe that Claimant's age is a barrier. The Board found substantial evidence to conclude that Claimant was no longer totally disabled, but was partially disabled. Employer conceded, through its experts, that Claimant's work-related injuries and subsequent work restrictions diminished his earning capacity. Therefore, Board properly found Employer responsible for partial disability benefits to Claimant.

A Labor Market Survey ("LMS") can provide substantial evidence of availability to work within the perimeters of the particular claimant's capability. With any finding of job offerings, there must be a reasonable opportunity for the claimant to gain employment.[25] The purpose of an LMS is to present a representative sample of jobs in the current labor market and to show whether or not suitable employment is available to a claimant.[26] Here, the LMS dated March 21 through June 22, 2006 was current and reflected the available jobs at the time of the July 2006 hearing. Mr. Lucey considered Claimant's age, educational background, employment history, geographic location, physical restrictions set forth by Dr. Case, and language

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[24] Claimant learned the trade by observing another contractor and teaching himself. He supervised employees and directed them to write out paperwork for his business on his behalf.

[25] *Abex Corp. v. Brinkley*, 252 A.2d 552, 554 (Del. Super. 1969).

[26] *Sabo v. Pestex, Inc.*, 2004 WL 2827902, at *3 (Del. Super. 2004).

deficiencies.[27] He identified and personally observed the five positions. Mr. Lucey contacted each of the employers represented in the survey to confirm that someone with Claimant's background would be qualified. Thus, the LMS constitutes substantial evidence of the availability of work to Claimant.

CONCLUSION

The Board relied upon substantial evidence to conclude that Claimant did not meet his burden of proving that he was a "displaced worker." In failing to establish proof of being a displaced worker, Claimant did not show that he had a *prima facie* case or that he made reasonable efforts to find employment which were unsuccessful due to the injury. Based on the foregoing, the Board's decision is ***affirmed***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

[27] *See Boone v. Syab Srvs.*, 2006 WL 2242755, at *4 (Del. Super. 2004) (relying on similar factors in denying claim that LMS was defective).