IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

CONNIE FRANKLIN HORNE,	)	
	)	
Claimant/Appellant,	)	
	)	
	)	
v.	)	C.A. No. 06A-08-001-RFS
	)	
GENESIS HEALTHCARE,	)	
	)	
Employer/Appellee.	)	

MEMORANDUM OPINION

Upon Appeal of the Industrial Accident Board. Affirmed.

Submitted: November 9, 2007
Decided: January 31, 2008

Mary E. Sherlock, Esquire, Mary E. Sherlock, P.A., Dover, Delaware, Attorney for Claimant/Appellant.

R. Stokes Nolte, Esquire, Nolte & Associates, Wilmington, Delaware, Attorney for Employer/Appellee.

STOKES, J.

This is my decision regarding Connie Franklin Horne's ("Claimant") appeal of the Industrial Accident Board's ("the Board") decision dated July 6, 2006, regarding the calculation of temporary partial disability benefits. For the following reasons, the Board's decision is affirmed.

STATEMENT OF THE CASE

Claimant's injuries occurred while she was working as a Housekeeping Director at Genesis Healthcare ("Genesis").[1] On April 15, 2004, Claimant injured her knee when she was moving a television set with a co-worker. Subsequently, on April 29, 2004, she injured her low back and felt pain in her right leg when she was moving tables with another worker. Both injuries were acknowledged as compensable.[2]

After Claimant's low back surgery in June, 2005, she began to receive compensation for total disability. On November 18, 2005, Genesis filed a Petition to Terminate Benefits alleging that Claimant was no longer totally disabled. Claimant acknowledged that she was no longer totally disabled. However, she felt entitled to partial disability benefits. On December 1, 2005, Claimant filed a Petition to Determine Additional Compensation Due. Claimant sought payment of medical expenses related to her left knee injury after a fall in October 2005. She argued that the 2005 fall was related to the 2004 left knee injury; therefore, the knee surgery was compensable.

On March 27, 2006, an evidentiary hearing was held on these petitions but it could not be completed. Additional testimony and argument was taken on May 31, 2006. At the

second hearing, Claimant sought to present testimony of a potential employer, Michael Owens, concerning Claimant's job search efforts. Mr. Owens was not listed on the pre-trial memorandum before the hearing on March 27, and his information became known later. Nevertheless, the Board refused to hear Mr. Owens because "it was unfair to the employer for a new witness to be presented merely because of a delay caused by a scheduling problem."[3]

On July 6, 2006, the Board terminated total disability compensation.[4] It found that Claimant's partial disability rate should be $47.47 per week. Its finding was based on a labor market survey ("LMS"). The Board declined to rely on Claimant's actual wages received in her job at that time to determine post-injury earning power. Claimant worked as a receptionist in her former lawyer's firm of Schmittinger & Rodriguez to fill in for someone who was on maternity leave, earning $300 per week. A partial disability award using that figure from her pre-injury salary of $300 would have resulted in a weekly rate of $85.07. The difference amounts to $11,250.00 over 300 weeks of compensation allowed by statute.

Thereafter, Claimant appealed the Board's decision to Superior Court. On July 23, 2007, the Court remanded this matter to complete the record about Mr. Owens' proffered testimony and stated:

> The Board shall consider the proffer and decide if this would be like newly discovered evidence that should have been admitted. Further, the Board is asked to provide an analysis of how it views the credibility of claimant's job search and the

> labor market study with the details provided by the proffer. Presently, this is unknown territory, and the circumstances may, or may not, affect the respective burdens of proof.[5]

On September 4, 2007, pursuant to the letter order of July 23, 2007, a remand hearing was held before the Board. The Board decided that the proferred evidence should have been admitted at the May 31, 2006, hearing.[6] The Board found that Mr. Owens' testimony concerned an event that happened after the first part of the hearing on March 27, 2006; therefore, he could not possibly have been called as a witness before then.[7] The Board considered Mr. Owens' testimony to determine if it would result in any alteration of the Board's July 2006 decision.

Mr. Owens testified that he interviewed Claimant to be a receptionist or bookkeeper. The position would have been to keep the books, operate a computer and answer the phone and take messages.[8] He also called Ms. Eileen Hanhauser, the Executive Director of Genesis, to run a reference check on Claimant after the interview. Mr. Owens and Ms. Hanhauser's testimony disagreed on whether or not Ms. Hanhauser condemned Claimant's work performance.[9]

Ultimately, the Board accepted Ms. Hanhauser's evidence that she did not disparage Claimant in any way. This subject was regulated by company policy which only allowed disclosure of the beginning and end dates of employment in these circumstances. The Board believed Ms. Hanhauser followed this personnel rule. Mr. Owens acknowledged that Ms. Hanhauser refused to answer certain questions. The Board felt

Ms. Hanhauser was not haphazard in her adherence to the policy. After sizing up the witnesses, the Board found Mr. Owens assumed Genesis had a negative opinion because Ms. Hanhauser was discrete.

As requested, the Board analyzed how Mr. Owens' evidence affected the credibility of Claimant's job search and the LMS.[10] It determined that the possible position with Mr. Owens' company was not a truly viable job or fair indicator of her earning capacity. Therefore, Mr. Owens' evidence did not affect its previous decision that the higher wage levels of the LMS should prevail over Claimant's lower earnings. The Board found that Mr. Owens never asked why Ms. Hanhauser could not tell him about Claimant's reason for leaving, nor did he run additional reference checks after his talk with Ms. Hanhauser. Also, he never advertised the position as open. The job itself was not filled at the time of the remand hearing, over a year and one half after Mr. Owens interviewed Claimant.

The appeal is limited to the Board's calculation of Claimant's partial disability benefits at the rate of $47.47 rather than $85.07 per week as the medical expenses are no longer in contention. The central question concerns whether claimant's salary with Schmittinger & Rodriguez was the best evidence of post-injury earning power for temporary disability benefit purposes.[11] If so, then the award would be higher, at $85.07, because her wages at the firm were lower than what was reported available in the LMS.

Potentially, the validity of the LMS might be questioned if Genesis undercut Claimant's job search so that no jobs were available to her.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the appellate Court is to determine whether the agency's decision is supported by substantial evidence and free of legal error.[12] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[13] Substantial evidence is "more than a scintilla, but less than a preponderance."[14] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[15] It merely determines if the evidence is legally adequate to support the agency's factual findings.[16]

DISCUSSION

Did the Board err as a matter of law in its calculation of partial disability compensation pursuant to 19 *Del. C.* §2325, and is its decision supported by substantial evidence? After review, I find that its decision after remand is well-reasoned and correct.

Claimant argues that the salary received at her current job was the best evidence of her earning power. Genesis supports the Board's position, which relied on the jobs

identified in the LMS. Claimant asserts that the Board erred in its decision because the LMS is flawed, and, consequently, it cannot qualify as substantial evidence.

Partial disability is defined as the "period of time in which an injured employee suffers a partial loss of wages as a result of his injury."[17] Title 19 of the *Delaware Code* states that the extent of partial disability is the difference between pre-injury wages and post-injury earning power.[18] Earning power is a function of the employee's "age, education, general background, occupational and general experience, the nature of the work performable with the physical impairment, the availability of such work and so on."[19]

The term "earning power" is not synonymous with actual earnings or wages received, but rather with one's ability to earn.[20] An employee's post-injury wages is evidence of current earning capacity and creates a presumption that such wages are an accurate reflection of the employee's earning power. However, this presumption may be rebutted by showing that the post-injury compensation is an unfair criterion of the employee's earning power.[21]

The Board, in its initial decision, found that post-injury compensation is an unfair criterion partly because:

> [c]laimant's actual wages paid to her by her own attorney do not constitute a fair criterion of her earning power. The law firm has an interest in keeping Claimant's pay low, believing that additional compensation would come her way by virtue of a partial disability award.[22]

Claimant argues that this point should be disregarded because it is essentially nothing more than speculation. For sure, there is no evidence that her former law firm manipulated Claimant's wages or that her wages were lower than other similarly situated employees. Yet, after review of the whole record, the Board had different evidence upon which to give the LMS persuasive effect and to rebut the presumption.

Claimant argued that the LMS was flawed for several reasons. The labor market expert, Mr. Danny O'Neal, considered only three employers and duplicated jobs to make eleven positions. Claimant asserted that some positions identified may not be realistically feasible, and the mere acceptance of job applications is not adequate evidence of job availability.[23]

However, the Board could rationally find that the LMS was a better indicator of earning power on the record. Mr. O'Neal testified that he verified the positions existed in the market place. He physically inspected job locations to confirm that they were consistent with Claimant's work restrictions.[24] He also explained the challenges presented to find employers who were willing to participate:

> MR. O'NEAL: Because when I spoke with employers the first thing they would say to me, I don't want to talk to you. I don't want to talk to anyone like you. And this market has become very cold and harsh to vocational counselors trying to conduct job development simply because they know if they talk to us they gonna [sic] be subpoenaed, so therefore the jobs were available and they were well within her restrictions. I could not list them because of that.[25]

In the LMS, Mr. O'Neal also considered important factors, such as Claimant's previous employment history, education, vocational training, medical and vocational limitations to match potential employers compatible with Claimant's profile.[26]

Moreover, Claimant's reliance on the Superior Court decision of *Abex v. Brinkley* is misplaced.[27] In *Abex*, information on generally available jobs in the market place was not germane to a claimant's earning power where the specialist did not talk to potential employers and did not try to fit employment opportunities with work-related restrictions. Rather the proper focus must be on jobs that are available and reasonably tailored to a claimant's circumstances.[28] *Abex* is inapposite because "in *Abex* there was no indicator that a labor market survey was conducted."[29] Additionally, "[t]he labor market survey was not required to guarantee that each employer would hire her. It is sufficient for the survey to identify available positions."[30]

Finally, "[t]he Board has the discretion to accept one opinion over another, if the decision is supported by substantial evidence. The opinion that the Board ultimately adopts will be considered substantial evidence for purposes of appellate review."[31] The Board confirmed its initial decision in its remand hearing that the LMS is a better indicator of earning power after weighing the strength of all the evidence. There is a reasonable basis in the evidence and law to sustain the result.

CONCLUSION

Considering the foregoing, the Board's decision after remand is affirmed.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary
cc: Industrial Accident Board

ENDNOTES

1. *Franklin-Horne v. Genesis Healthcare*, IAB Hearing Nos. 1252327 & 1255840, at 2 (July 6, 2006).

2. *Id*.

3. *Franklin-Horne v. Genesis Healthcare*, IAB Hearing No. 1255840, at 122-128 (May 31, 2006).

4. *Franklin-Horne v. Genesis Healthcare*, IAB Hearing Nos. 1252327 & 1255840, at 29 (July 6, 2006).

5. *Horne v. Genesis Healthcare*, 2007 WL 2105941 at *2 (Del. Super. July 23, 2007) (ORDER). Despite a heavy schedule, the Board returned the case in a timely fashion.

6. *Franklin-Horne v. Genesis Healthcare*, IAB Remand Hearing No. 1252327, at 7 (October 5, 2007).

7. *Id*.

8. *Id*. at 4.

9. *Id*. at 5-9.

10. IAB Remand Hearing, at 9.

11. Claimant's pre-work accident wage was $427.60 per week. Her weekly wage at Schmittinger & Rodriguez was $300. Multiplying the difference of $127.60 by the compensation rate of 66 2/3% yields $85.07. If her earning capacity was $356.40, based on the LMS, then the figure of $71.20 would be multiplied by 66 2/3%, giving the result of $47.47 used by the Board.

12. *Alfree v. Johnson Controls*, 1997 Del. Super. Lexis 474 at *14 (Del. Super. Sept. 12, 1997) (citing *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960)).

13. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

14. *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981).

15. *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66 (Del. 1965).

16. 29 *Del.C.* § 10142(d).

17. *Globe Union, Inc. v. Baker*, 310 A.2d 883, 887 (Del. 1973).

18. 19 *Del.C.* § 2325.

19. *Chrysler Corp. v. Williams*, 282 A.2d 629, 631 (Del. Super. 1971), *aff'd*, 293 A.2d 802 (Del. 1972).

20. *Ruddy v. I.D. Griffith & Co.*, 237 A.2d 700, 703 (Del. 1968).

21. *Id.* at 703.

22. IAB Hearing Nos. 1252327 & 1255840, at 20 (July 6, 2006).

23. Claimant cites *Abex v. Brinkley*, 252 A.2d 552 (Del. Super. 1969); *Nepi v. County Insulation*, IAB Hearing No. 1106424 (June 14, 2001, at 11).

24. *Franklin-Horne v. Genesis Healthcare*, IAB Hearing No. 1252327, at 77-78 (May 31, 2006).

25. IAB Hearing No. 1252327, at 91.

26. *Id.* at 75.

27. *Abex v. Brinkley*, *supra.*

28. *Id.*

29. *Wyatt-Helie v. Playtex Apparel*, 2006 WL 2904459 at *5 (Del. Super. June 15, 2006). In *Wyatt*, the Board found a labor market survey to be more persuasive than actual wages to calculate partial disability compensation.

30. *Id.*

31. *Id.* at *4.