IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DELAWARE HOME AND HOSPITAL	:	
	:	C.A. No.: K11A-07-001 (RBY)
Employer-Appellant	:	
	:	
v.	:	
	:	
EDITH MARTIN,	:	
	:	
Appellee.	:	

Submitted: November 23, 2011
Decided: February 21, 2012

Upon Consideration of Appellant's
Appeal of the Decision of the
Industrial Accident Board
REVERSED AND REMANDED

OPINION AND ORDER

Christine P. O'Connor, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware for Appellant.

Walt F. Schmittinger, Esq., and Kristi N. Vitola, Esq., Schmittinger and Rodriguez, P.A., Dover, Delaware for Appellee.

Young, J.

SUMMARY

Delaware Home and Hospital appeals the Industrial Accident Board's award of total disability benefits to Edith Martin. The Board abused its discretion by considering evidence not provided in discovery. The decision is **REVERSED** and **REMANDED**.

FACTS

Edith Martin (Claimant) was employed by Delaware Home and Hospital (Appellant) as a dietary aid for $458.37 per week. On August 15, 2007, Claimant suffered injury to her knees in an industrial accident. Appellant conceded that Claimant's injury was compensable. Accordingly, Appellant paid Claimant benefits stemming therefrom.

On August 27, 2007, Claimant began treatment with Dr. Glen Rowe. She underwent surgery both in 2008 and in January 2011. Following her second surgery, Dr. Rowe placed Claimant on total disability status from January 21, 2011 to March 30, 2011. Claimant filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board (the Board). Claimant's petition sought to recover total disability benefits for the time period during which Dr. Rowe placed her on total disability status.

A hearing was held on the matter. Appellant argued that Claimant was not entitled to total disability benefits because she left employment voluntarily. Specifically, Appellant argued that total disability benefits are "wage replacement benefits." Accordingly, because Claimant was unemployed and without wages to replace, Appellant argued that she was not entitled to benefits.

Claimant argued that she did not leave the workforce voluntarily. She testified that she has not worked since May 2008. She testified that, since that time, she had attended vocational rehabilitation to learn to be a cashier at Goodwill. Claimant could not perform that job. In March 2010, Claimant earned a degree in Medical Billing and Coding from the Harris School of Business. She has sought employment in that field, but has found none. She applied to work with Capitol Cleaners and to work as a volunteer foster grandparent. She has not been able to find employment in those areas either.

Appellant objected to Claimant's testimony. Appellant twice requested Claimant to produce any information or documentation regarding Claimant's job search efforts since her industrial accident. The requests sought documents regarding Claimant's efforts, information upon which Claimant would rely at the hearing, and a list of employers to which Claimant applied. Claimant did not provide Appellant with the information to which she testified. Instead, Claimant informed Appellant that she had turned over all documents and that Claimant received Social Security payments. Claimant argued that further information was not subject to Appellant's requests, because it was not memorialized in a document. The Board admitted the evidence over Appellant's objection.

The Board found that Claimant was entitled to total disability benefits for the above referenced time period. In its final order, the Board found that Claimant did not leave the workforce voluntarily. Rather, the Board found that Claimant "has not been able to find employment despite her job search efforts." The Board noted that Claimant has attempted to locate employment, but has failed to find any. The Board

held that claimant had not voluntarily withdrawn from the workforce.

STANDARD OF REVIEW

An appeal from an administrative board's final order to this Court is restricted to a determination of whether the Board's decision is free from legal error and whether the Board's findings of fact and conclusions of law are supported by substantial evidence in the record.[1] Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."[2] Questions of law are reviewed *de novo*.[3] "Absent error of law, the standard of review for a Board's decision is abuse of discretion."[4] "The Board commits an abuse of discretion when it 'exceeds the bounds of reason' in light of the circumstances, or 'so ignores recognized rules of law or practice' as to produce an injustice."[5] "If the record reveals that the Board based its decision on improper or inadequate grounds, an abuse of discretion has occurred and the Court must reverse the decision."[6]

DISCUSSION

Appellant raises two issues on appeal. First, Appellant argues that the Board

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[1] 29 *Del. C.* §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

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

[3] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154 (Del. 1998).

[4] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159 (Del. 2009).

[5] *Id.* (quoting *Floudiotis v. State*, 726 A.2d 1196 (Del. 1999)).

[6] *Id.*

erred by allowing Claimant to testify about her school attendance and job search efforts. Additionally, Appellant asserted that the Board erred by awarding benefits, because Claimant was unemployed leading up to her total disability. The Court finds that the Board abused its discretion by admitting Claimant's testimony. For the reasons set forth herein, the decision is **REVERSED** and **REMANDED.**

The Board expressly considered Claimant's testimony regarding her schooling and job search efforts. Appellant had requested information relative to this sort of activity on two occasions. Claimant did not disclose the information on the theory that it was not memorialized in any document. Hence, according to Claimant, the information was not subject to Appellant's discovery requests. Claimant claims that listing her efforts in response to Appellant's request would be tantamount to answering an interrogatory. According to Claimant, interrogatories are not included in discovery for matters before the Board. This sort of razor thin distinction could appear to border on what was once referred to as "unhandsome dealing." Not having the information in some formalized, written form is decidedly not the equivalent of not having the information.

"The Board is not bound by the formal rules of evidence."[7] "The Board may relax the rules of evidence and allow the proceedings to be less formal than a trial."[8] "The Board may not, however, relax rules which are designed to ensure the fairness

[7] *Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995) (citing 19 *Del. C.* § 2121).

[8] *Id.*

of the procedure."[9] "It is fundamental that the right to confront witnesses, to cross-examine them, to refute them, and to have a record of their testimony must be accorded unless waived."[10] "'Nothing is more repugnant to our traditions of justice than to be at the mercy of witnesses one cannot see or challenge, or to have one's rights stand or fall on the basis of unrevealed facts that perhaps could be explained or refuted.'"[11]

Appellant could not have cross-examined Claimant effectively without having been made aware of Claimant's job search efforts. Claimant's job search efforts spoke to the voluntariness of her withdrawal from the workforce directly. That issue was significant to the Board's determination. Admitting the testimony despite Claimant's failure to produce the information caused the Board's decision to rest upon unrevealed facts.

Claimant's characterization of the request as an interrogatory may be fair. Claimant's suggestion that Appellant is not entitled to an answer thereof, however, is not. Claimant argues that nothing in the Board rules indicates that interrogatories are permitted. The fact that the rules do not suggest interrogatories does not mean, necessarily, that they are not allowed. Claimant does not present any authority to the contrary. The request was proper. Appellant was entitled to the information.

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[9] *Id.*

[10] *Id.* (citing *Gen. Chem. Div., Allied Chem. & Dye Corp. v. Fasano*, 94 A.2d 600, 601 Del. Super. 1953)).

[11] *Id.* (quoting 3 Arthur Larson, *The Law of Workmen's Compensation* § 79.83(a) (1995)).

It may well be that the information as presented is completely accurate. It very well may be that, after Appellant has the opportunity to investigate the claims, it will realize, and the Board will again find, that Appellee's claims are supportable. That will be a matter for a new consideration, however.

CONCLUSION

The Board abused its discretion by allowing Claimant to testify to her job search efforts. The decision is **REVERSED** and **REMANDED** for determination with full evidentiary presentation after full discovery and disclosure.

SO ORDERED this 21st day of February, 2012.

/s/ Robert B. Young
J.

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