

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**DART/STATE OF DELAWARE** )  
 ) CIVIL ACTION NUMBER  
 Employer-below, )  
 Appellant )  
 v. ) 08A-07-005-JOH  
 )  
**ARTHUR WILHELM** )  
 )  
 Employee-below, )  
 Appellee )

*Submitted: January 6, 2009*

*Decided: April 1, 2009*

**MEMORANDUM OPINION**

*Upon Appeal from a Decision of the  
Industrial Accident Board - **AFFIRMED***

*Appearances:*

John J. Klusman, Jr., Esquire, of Tybout Redfearn & Pell, Wilmington, Delaware,  
attorney for Employer-below, appellant

Gary S. Nitsche, Esquire, of Weik Nitsche & Dougherty, Wilmington, Delaware, attorney  
for Employee-below, appellee

HERLIHY, Judge

This case comes to Superior Court as an appeal from the Industrial Accident Board (“Board”). DART filed a petition to terminate benefits to its employee, Arthur Wilhelm (“Wilhelm”) on December 12, 2007. On April 18, 2008, a hearing officer acting for the Board, held a hearing on the merits.<sup>1</sup> The Board issued its decision in favor of Wilhelm on June 20, 2008. An appeal of that finding has been filed by DART. Because the Court finds the opinion of the Board is based on sufficient evidence and its conclusions to be free from legal error, the ruling below is AFFIRMED.

### *Factual Background*

In July 2007, Wilhelm was employed with DART as a para-transit bus driver. His position required him to assist wheelchair-bound passengers onto and off a special DART bus and drive the bus to the appropriate destinations. Wilhelm was helping two passengers exit the bus when one of the passenger’s wheelchair became freed and pinned Wilhelm against the wall of the bus. He sustained lower back and neck injuries as a result of the accident. DART and Wilhelm entered into an agreement in August 2007 for temporary total benefits. In December, DART petitioned to terminate Wilhelm’s benefits claiming he was capable of returning to work.

At the request of DART, Wilhelm had visited with Dr. William Sommers in October 2007. Dr. Sommers concluded that Wilhelm had restrictions and that he should be placed on light-duty work. Wilhelm’s complaints, the doctor stated, were within the

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<sup>1</sup> 19 *Del. C.* § 2301 B(a)(6).

normal range of strains and sprains one would expect to see from the July 2007 accident. He stated it was his understanding that a para-transit driver would only push wheelchair passengers and would not be required to lift them. Taking into consideration his understanding of a para-transit driver and Wilhelm's restrictions from his injuries, Dr. Sommers released Wilhelm to return to his former job because he concluded the duties of a para-transit bus driver were within Wilhelm's restrictions.

Wilhelm also sought concurrent treatment with his family doctor, who referred Wilhelm to Dr. Bikash Bose. Dr. Bose recommended physical therapy and medication for Wilhelm. He found no abnormalities after reviewing Wilhelm's MRI. He referred Wilhelm to Dr. Emmanuel Devotta, an anesthesiologist specializing in pain management. Wilhelm first saw Dr. Devotta in August 2007. Noting that Wilhelm was receiving epidural pain injections from Dr. Devotta, Dr. Bose suggested Wilhelm remain out from work until he received his last injection. On November 9, 2007, however, Dr. Bose released Wilhelm to work without restrictions on November 15, 2007.

However, at the hearing, Wilhelm testified to a relapse of his pain symptoms occurring subsequent to his visit with Dr. Bose when he had been released to return to work. Wilhelm testified to experiencing great pain and numbness while he was shopping. The pain affected his back and legs which he stated limited his movement. Accordingly, he saw Dr. Devotta on November 13, 2007. He explained his current pain and the failure of the injections to provide him with any relief. On that day, Dr. Devotta determined

Wilhelm should refrain from returning to work. Dr. Devotta prescribed pain medication, continued physical therapy and the application of heat to painful areas.

On January 3, 2008, Dr. Devotta asked Wilhelm to take a Functional Capability Evaluation (“FCE”). The FCE results suggested that Wilhelm had a 36 pound lifting restriction when lifting from “floor to knuckle.”<sup>2</sup> This placed Wilhelm outside of the “Medium Physical Demand Level...of a Bus Driver for DART.”<sup>3</sup> However, the FCE stated Wilhelm was capable of performing work in the “Light-Medium Physical Demand Level.”<sup>4</sup> The FCE also indicated that Wilhelm was able to do more than he could perceive he could do and concluded that this was potentially due to Wilhelm’s own symptom magnification. Based on the FCE, Dr. Devotta determined Wilhelm could return to work and cleared him on January 8, 2008, consistent with the restrictions outlined in the FCE.

In March 2008, Wilhelm returned to Dr. Sommers for a second time. Dr. Sommers noted no significant change from Wilhelm’s physical examination in October 2007, even with the information provided by the FCE. Dr. Sommers concluded, again, that Wilhelm should be placed on a fifty pound restriction and could return to DART as a para-transit driver. This opinion was identical to his October 2007 diagnosis.

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<sup>2</sup> IAB Record, Ex. 4. (Functional Capacity Evaluation)

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

During these medical visits, Wilhelm testified that he maintained communication with DART by informing his supervisor of his progress and status. He stated, even as of the date of the hearing, he was still continuing to speak with his DART supervisor. Wilhelm informed DART of his work restrictions and supplemented his comments with his medical information. At the hearing below, Wilhelm stated he was under the impression that he was still employed with DART because they had failed to let him go or notify him otherwise. Wilhelm expressed a desire to return to DART, but stated that he did not believe he could do para-transit work anymore. Further, Wilhelm stated that he regularly inquired on whether a light-duty position within DART had or would open up in the future. He claimed the DART supervisor told him that they were looking for a position with his restrictions but had not found one. During the hearing, DART offered no evidence to rebut Wilhelm's testimony.

### *Parties' Contentions*

DART contends the Board's findings below lacked the requisite competent evidence to support it and, therefore, merit reversal. DART first argues the Board either contradicted itself or misapplied its own findings of fact when it stated: "While I find that [Wilhelm] is physically capable of returning to work in a restricted capacity pursuant to the opinion of Dr. Sommers and the findings of the FCE, I also necessarily must find that [Wilhelm] remains totally disabled under the rule of law espoused in *Hoey*."<sup>5</sup> DART

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<sup>5</sup> *Wilhelm v. DART/State of Delaware*, No. 1306021, at 11 (Del. I.A.B. Apr. 18, 2008).

contends Dr. Sommers' deposition testimony expressly held Wilhelm could return to his para-transit job and this fact was neglected when the Board engaged in its factual determinations. As a result of this factual error, DART submits that the hearing officer proceeded to misapply the rule of law in *Hoey v. Chrysler Motor Corporation*<sup>6</sup> because Wilhelm, pursuant to Dr. Sommers, was never found to be disabled.

Alternatively, DART submits the great weight of the evidence at the hearing shows Wilhelm had no reasonable expectation DART would soon find a light-duty replacement job. It points to Wilhelm's own testimony admitting that he would not be able to return to DART as a para-transit driver with his pain. DART argues that Delaware law does not require an employer like DART to explicitly inform its employees to seek other employment options for compensatory payments to cease. Although DART acknowledges it did not fire Wilhelm or tell him to seek new employment, it contends the record is clear that Wilhelm knew his continued desire to stay on with DART was unreasonable and this fact was not properly applied to the rule of law in the Board's decision.

Wilhelm argues the Board's decision is supported by substantial evidence and was correctly decided. He contends DART has failed to appreciate that Dr. Sommers' opinion placed physical restrictions on Wilhelm. Further, he contends the Board's finding of disability does not preclude a finding that Wilhelm may still be considered totally disabled from a legal standpoint. Wilhelm highlights his own, uncontradicted testimony to support

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<sup>6</sup> 655 A.2d 307, 1994 WL 723023 (Del. Dec. 28, 1994) (TABLE).

the Board's reasonableness determination. He asserts he testified of his consistent communications between him and his DART supervisor. Furthermore, Wilhelm believed he was still employed by DART because he had never been told otherwise. He also testified that he expected DART to offer him light-duty work. Lastly, Wilhelm argues DART failed to call any witnesses on its own behalf and, accordingly, the record as to Wilhelm's belief in future employment is uncontradicted.

### *Standard of Review*

The duty of this Court on an appeal from the Board is to determine whether the decision below is supported by substantial evidence and free from legal error.<sup>7</sup> Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>8</sup> The standard of review "requires the reviewing court to search the entire record to determine whether, on the basis of all of the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."<sup>9</sup> It is within the province of the Board to determine the credibility of witnesses and the factual inferences that are made from those determinations.<sup>10</sup> Only where there is no substantial, competent evidence to support the Board's factual findings may this Court overturn the Board's decision.<sup>11</sup>

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<sup>7</sup> *General Motors Corp. v. Jarrel*, 493 A.2d 978, 980 (Del. Super. 1985).

<sup>8</sup> *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>9</sup> *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980).

<sup>10</sup> *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 158 (Del. 2006).

<sup>11</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965).

## *Discussion*

### *A. The Alleged “Contradiction” of the Board*

DART argues the Board erred, as a matter of law, by making a finding of fact that is contradictory on its face and, therefore, cannot be supported by the evidence. DART takes issue with the following comment made in the Board’s opinion: “[W]hile I find that [Wilhelm] is physically capable of returning to work in a restricted capacity pursuant to the opinion of Dr. Sommers and the findings of the FCE, I also necessarily must find that [Wilhelm] remains totally disabled under the rule of law espoused in *Hoey*.”<sup>12</sup> DART insists the statement is erroneous because such a finding was not that of Dr. Sommers, who expressly released Wilhelm to his former job as a para-transit driver.

Although the opinion of Dr. Sommers and the FCE were not identical, the Court, upon review, is satisfied the Board’s opinion is not inherently contradictory as DART contends. This is because Dr. Sommers and the FCE did, in fact, agree on Wilhelm’s restricted physical condition. Accordingly, the statement which DART takes objection to cannot be labeled as manifest error.

A review of the record below shows that Dr. Sommers, in October 2007, was of the opinion Wilhelm could return to work as a para-transit bus driver with light-duty restrictions. He placed Wilhelm under a fifty pound lifting restriction, but did not believe this restriction prevented Wilhelm from returning to his old post.

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<sup>12</sup> *Wilhelm*, No. 1306021, at 11 (Del. I.A.B. Apr. 18, 2008).



However, more information concerning Wilhelm was gained when the FCE was taken on January 3, 2008. Though not identical to Dr. Sommers opinion, it did substantially agree that Wilhelm had lifting restrictions similar to those outlined by Dr. Sommers. However, the FCE report suggested that Wilhelm be placed on a thirty-six pound lifting restriction. In other words, the FCE considered Wilhelm's injuries to be more substantial than Dr. Sommers. Importantly, the FCE report was undertaken with the specific physical requirements a DART bus driver would typically perform on a normal workday. It concluded Wilhelm did not meet the lifting requirement. On cross-examination, Dr. Sommers acknowledged the thirty-six pound restriction and the FCE's categorization of Wilhelm as unable to meet the "Light-Medium Physical Demand Level." Like Dr. Sommers, the FCE did not preclude Wilhelm from working in a light-duty position. The FCE, however, considered the bus driver position to be outside of Wilhelm's restrictions.

In March 2008, Dr. Sommers saw Wilhelm again but the visit did not change his initial opinion he had made in October 2007. He retained the fifty pound restriction even though he had seen the FCE report. Dr. Sommers still maintained Wilhelm should have been able to return to this current job as a para-transit driver even though the FCE chart comparison recommended otherwise.

Simply put, Dr. Sommers and the FCE differed in the degree of Wilhelm's restriction. The FCE, based on the more stringent restrictions it found, recommended

against Wilhelm returning to work as a para-transit driver. On the other hand, Dr. Sommers, applying his less stringent restrictions, concluded Wilhelm could return to his old job. Ultimately (and most importantly for purposes of this opinion), it can be fairly stated that the two sources of medical opinion agreed that Wilhelm could work and that he should be placed under some degree of restrictions.

Therefore, this Court finds it was not contradictory to rely on both Dr. Sommers opinion and the FCE report to make the factual determination that Wilhelm was “physically capable of returning to work in a restricted capacity.”<sup>13</sup> Both sources of medical testimony agree on this general statement. The Board was entitled to reference both Dr. Sommers and the FCE to make this factual determination. The role of this Court is determine “whether or not there is competent evidence in the record from which the Board’s findings and award could have been reasonably drawn.”<sup>14</sup> The Court finds it to be a competent and reasonable factual conclusion based on the record.

Unfortunately, the Board’s opinion did not explicitly state why it accepted Wilhelm as being physically unable to work as a para-transit driver. While Dr. Sommers found restrictions, he concluded Wilhelm could return to work and carry out the duties of a para-transit driver. The FCE, based upon the DART bus driver requirements, noted Wilhelm did not meet the requirements of a bus driver. The record is devoid of any expert testimony from a vocational expert who could correlate the findings of the doctor with the

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<sup>13</sup> *Wilhelm*, No. 1306021, at 11 (Del. I.A.B. Apr. 18, 2008).

<sup>14</sup> *GMC v. Freeman*, 157 A.2d 889, 892 (Del. 1960).

physical requirements of a para-transit driver. In any event, the absence of this correlation, which was not provided to the Board at the hearing, need not disturb the findings below because this Court has determined the record contains substantial evidence to reasonably conclude Wilhelm was partially disabled.<sup>15</sup> The Court finds the FCE report provided such evidence to make that factual conclusion. The Board was entitled to credit the FCE report and reject the ultimate finding of Dr. Sommers, who opined Wilhelm could return as a para-transit driver.<sup>16</sup>

Furthermore, the Board's partial disability conclusion was supplemented by Wilhelm. He testified concerning his personal belief that he would no longer be able to work as a para-transit bus driver. The primary reason he doubted his ability to return to the job was his inability push and load wheelchair passengers onto the bus. He testified to the difficulty he would have transporting some of his passengers who were overweight or passengers who had unfilled tires on their wheelchairs. DART brought forward no testimony concerning the job duties of para-transit driver. However, an exhibit was attached to the record outlining the specific duties of a para-transit driver.<sup>17</sup>

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<sup>15</sup> In the circumstances of this case, the Court finds the FCE and its author to be competent. DART did not challenge such competency before the Board or in this Court. Perhaps as the party having the initial burden of proof, it should have presented a qualified vocational expert to compare the restrictions of Dr. Sommers and Dr. Devotta to what DART para-transit drivers actually do.

<sup>16</sup> *Alpheaus v. Downtown Visions*, 2003 WL 23274793 (Del. Super. Dec. 10, 2003) (holding that when there is some conflict between medical findings the Board may choose one version as credible).

<sup>17</sup> One of the listed duties of a para-transit driver as documented in Delaware Transit Corporation's (the parent body of DART) job description, states: "Assist

### *B. Wilhelm's Belief of Future Employment*

The Board concluded that Wilhelm was partially disabled to the extent that he could not return to his former job but was capable of light-duty work. Applying this finding of fact to the law, the Board considered whether Wilhelm's belief in a light-duty job through DART was reasonable under the Supreme Court case of *Hoey v. Chrysler Motors Corporation*.<sup>18</sup> Applying *Hoey*, the Board concluded Wilhelm acted in a reasonable manner. The Court finds the Board properly applied the standard of *Hoey*.

In Delaware, an employee may be considered "totally disabled" in a worker's compensation context even when that person is only partially disabled.<sup>19</sup> As the Board correctly stated, the *Hoey* rationale works to classify an employee who is partially disabled as totally disabled when that employee holds a reasonable belief that the employer will find the employee a suitable job within the employee's physical limitations.<sup>20</sup> The test, the Court determined, is whether it is reasonable for a displaced employee to believe that he would eventually be assigned a new job within his work restrictions.<sup>21</sup> The Supreme Court

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customers in wheelchairs onto lift, secure on lift with appropriate restrain system, operate lift to transfer customer into vehicle, secure wheelchair inside vehicle with appropriate restrain system." Appellee's Index, Ex. D.

<sup>18</sup>655 A.2d 307, 1994 WL 723023 (Del. Dec. 28, 1994) (TABLE).

<sup>19</sup> *Huda v. Continental Can Co.*, 265 A.2d 34, 35 (Del. 1970).

<sup>20</sup> *Hoey*, 1994 WL 723023 at \*2.

<sup>21</sup> *Id.*

has held that, “[a] displaced employee...who does not know or have reason to know that she is a displaced employee cannot be expected to seek new employment.”<sup>22</sup>

In *Hoey*, the claimant was found to have held a reasonable belief she would receive a job within her work restrictions. The Court relied on the fact that the claimant was an employee of the company for 17 years and had knowledge of her company’s practice of finding work for their employees who had physical restrictions. Given this knowledge, the Court concluded the employer had the “duty to advise Hoey that it intended to discharge her if it did not intend to provide her with light-duty work.”<sup>23</sup> This was because the employer “was in exclusive control of the decision whether light-duty work would be offered to Hoey.”<sup>24</sup>

Here, Wilhelm testified at length to his subjective belief of his continued employment with DART. Having been employed for 10 years, he stated that he wished to continue accruing seniority. Although Wilhelm admitted he held no hope for returning to DART as a para-transit driver given his physical condition, he stated DART had never communicated to him any intent to fire him. Further, Wilhelm stated he spoke with a DART supervisor on a bi-weekly basis to inquire on whether DART had any light-duty positions in the immediate future and to update the supervisor on his physical status. The DART supervisor, he testified, informed him DART had light-duty positions but none

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

currently available for him. Finally, the Board noted that DART offered no testimony to rebut Wilhelm's account of the facts.

Based on the facts, which are similar to *Hoey*, this Court finds the Board's reasonableness determination is free of legal error. The facts, which are undisputed, show Wilhelm specifically asked DART for light-duty work and was told DART had such positions but none currently available. Given there was no indication by DART to fire him, Wilhelm's hope for a light-duty position was reasonable.

***Conclusion***

For the reasons stated herein, the decision of the Industrial Accident Board is  
AFFIRMED.

**IT IS SO ORDERED.**

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J.