IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARK BECK,	)	
	)	
Employee-Appellant,	)	
v.	)	
	)	C.A. No. 08A-05-001 RRC
WALTON CORPORATION,	)	
	)	
Employer-Appellee.	)	

Submitted: February 10, 2009
Decided: May 8, 2009

On Appeal from the Industrial Accident Board.
AFFIRMED.

MEMORANDUM OPINION

David P. Cline, Esquire, David P. Cline, P.A., Wilmington, Delaware, Attorney for Employee-Appellant.

William D. Rimmer, Esquire, and John D. Ellis, Esquire, Heckler & Frabizzio, P.A., Wilmington, Delaware, Attorneys for Employer-Appellee.

COOCH, J.

I. INTRODUCTION

This case comes to Superior Court as an appeal from a decision of the Industrial Accident Board ("Board") granting in part and denying in part Walton Corporation's ("Walton") Petition to Terminate Benefits. The issue raised by appellant Mark Beck ("Claimant") is whether the Board properly determined Claimant's status as a part-time employee at Walton on the day he was injured, where Claimant worked for Walton as a diesel repairman on a "on call" basis and had never worked a forty hour week with Walton since 2004.

Because the Court finds that the opinion of the Board is based on sufficient evidence and that its conclusions are free from legal error, the decision below is AFFIRMED.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Nature of the Injuries

On March 14, 2005, Claimant sustained lacerations and a displaced mid-shaft fibular fracture when he was struck by car while exiting a truck while working for Walton.[1] Claimant was admitted to a hospital to be

[1] Tr. at p. 23.

treated for his injuries and was discharged on March 17, 2005.[2] Claimant was out of work from the date of his injury until June 16, 2005.[3]

Dr. Steven J. Rodgers, an occupational medicine expert retained by Claimant, testified at the hearing on Walton's Petition to Terminate Benefits that three months was a reasonable period of convalescence, given the nature of Claimant's injuries.[4] Dr. Rodgers testified that, as a result of his injuries, Claimant experienced swelling and cramping in his right calf. Dr. Rodgers further noted that Claimant had a decreased range of motion and a noticeable limp.[5] Dr. Rodgers further testified as to work restrictions he had imposed: 1) when working, Claimant should be able to be off his feet frequently, and 2) standing or walking should be no greater than four hours out of an eight hour day, and for no greater than twenty minutes at any given time without a break.[6] However, on cross-examination, Dr. Rodgers acknowledged that none of Claimant's treating physicians had placed any restrictions on Claimant as a result of his injuries.[7]

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[2] *Id.* at 24.

[3] *Id.* at 29.

[4] *Id.* at 30.

[5] *Id.* at 26.

[6] *Id.* at 27.

Claimant began working again in June 2005 for Legacy Farms, a farming business located in Smyrna.[8] He worked for Legacy Farms on a full-time basis driving a tractor.[9] Dr. Stephen Grossinger, who had conducted a Defense Medical Exam, testified that Claimant's leg was neurologically intact, except for a decrease of sensation in the area near his scar.[10] He concluded that Claimant did not require further medical procedures or physical therapy and indicated that non-narcotic pain medication could be used for occasional aches and pains.[11] Dr. Grossinger also testified that, given the fact that Claimant had been working full-time for over a year and a half when Dr. Grossinger examined him, Claimant was tolerating activity and did not require specific restrictions.[12]

B. Facts Pertaining to Claimant's Employment with Walton

During the hearing, Claimant called Paul Foley, Walton's Chief Operations Officer.[13] Mr. Foley confirmed that on at least four prior

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[7] *Id.* at 42.

[8] *Id.* at 61.

[9] *Id.*

[10] *Id.* at 63.

[11] *Id.*

[12] *Id.* at 64.

[13] *Id.* at 98. Mr. Foley described his position: "I'm basically the foreman."

occasions when Claimant had worked for Walton, Claimant had been paid $28 per hour; however, on the date of Claimant's injury, he was paid $20 per hour.[14] Claimant testified that he agreed to the $20 per hour rate because he was using a Walton truck, instead of his own truck.[15]

On the date of the accident, Claimant was working with William Holden, a full-time Walton employee, Wayne Hurd, a part-time employee, and two unidentified flaggers on a road crew job, setting up road signs in connection with a Delaware Department of Transportation project.[16] Claimant had worked as a driller for Walton on a full-time basis from approximately 1999 to 2004, then earning $12.50 per hour.[17] In 2004 and 2005 Claimant returned to work at Walton occasionally as an equipment repairman.[18] Mr. Foley testified that he would call Claimant or Dempsey Corporation, an industrial equipment repair business, if Walton's full-time repairman was too busy or unavailable to handle needed repairs.[19] Mr. Foley confirmed that when Claimant worked for Walton in 2004 and 2005,

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[14] *Id.* at 83-84.

[15] *Id.* at 142.

[16] *Id.* at 86-87, 101, 106.

[17] *Id.* at 137.

[18] *Id.* at 89-90.

[19] *Id.* at 89.

he worked on a part-time basis, never working a full 40 hour week for Walton.[20] Mr. Foley further testified that on March 14, 2005, he had called Claimant to do repair work; Claimant's services were needed because Roy Meadows, a Walton employee, was out sick that day.[21] On cross-examination, Mr. Foley distinguished Mr. Meadows' duties from Claimant's duties: Mr. Foley stated that Mr. Meadows "did a little bit of everything," and that his duties were not limited to repairs, while Claimant was usually called to do diesel repair work.[22]

Claimant testified that on March 14, 2005, he was paid $20 per hour, while on previous occasions Claimant invoiced Walton $28 per hour, and, on one occasion, $35 per hour, for his services.[23] Claimant explained that he billed Walton $20 per hour on the date of the accident because "I was running their truck so I cut them a break down to $20 for the use [of the truck.]"[24]

Claimant testified that he had begun working for Legacy Farms on a full-time basis driving a tractor for $15 per hour, about three months after

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[20] *Id.* at 90-91.

[21] *Id.* at 97.

[22] *Id.* at 97.

[23] *Id.* at 104.

[24] *Id.*

the accident.[25] He was still working at Legacy Farms at the time of his hearing on August 10, 2007.[26] Claimant testified that he had difficulty going up and down stairs and ladders after the accident, which affected his ability to do the type of diesel mechanic work he had engaged in for Walton and others prior to March 14, 2005.[27]

On cross-examination, Claimant acknowledged that at the time of the accident he was self-employed and that he contracted his services out to anywhere from twenty-six to thirty companies for which he did repair work.[28] Claimant testified that, overall, he worked more for other companies than for Walton in 2004 and 2005, but one week he worked four days in a row for Walton.[29] Claimant did not file tax returns for 2004 or 2005.[30]

C. The Board's Decision

On March 30, 2007, Walton filed a Petition to Terminate Benefits, contending that Claimant was physically able to return to work. Claimant

[25] *Id.* at 109, 126.

[26] *Id.* at 117.

[27] *Id.*. at 114.

[28] *Id.* at 119.

[29] *Id.* at 143.

[30] *Id.* at 130.

filed a Petition to Determine Compensation Due and a Petition to Determine Additional Compensation Due seeking both total disability (for the period of March 14, 2005 to June 16, 2005) and partial disability benefits (ongoing from June 16, 2005) and medical expenses. The Board concluded that Walton had carried its burden to show that Claimant was no longer totally incapacitated.[31] With regard to partial disability, the Board accepted the opinion of Dr. Rodgers that Claimant continued to have restrictions to the right lower extremity related to the work accident.[32] The Board also found credible the testimony of Claimant that he had continued to experience pain and swelling in his injured leg, which adversely affected his ability to climb ladders and work on diesel rigs.[33]

Based on the testimony of Mr. Foley and the check log submitted as an exhibit, the Board concluded that Claimant was not a full-time employee, but rather had worked for Walton on the day of the injury as an "on call" mechanical repairman.[34] The Board found that Claimant's position was "inherently part-time."[35] Based on the plain language of 19 *Del. C.* §

[31] *Beck v. Walton Corp.*, No. 1281714, at 10 (Del. I.A.B. Apr. 4, 2007).

[32] *Id.* at 11.

[33] *Id.*

[34] *Id.* at 12.

2302(a) and Claimant's undisputed testimony that he earned $20 per hour on the date of injury, the Board utilized the $20 wage rate in constructing the average weekly wage rate.[36] In summary, the Board granted Walton's Petition to Terminate Benefits as to total disability benefits, and awarded Claimant ongoing partial disability benefits at the rate of $89.43 per week pursuant to 19 *Del. C.* § 2325, along with attorney's fees and medical witness fees associated with the successful defense of the termination petition.[37]

III. THE PARTIES' CONTENTIONS ON APPEAL

Claimant alleges two legal errors in the Board's decision and concedes that there is "substantial credible evidence to support the issue of Beck's ongoing earning disability."[38] Thus, the bases for this appeal are essentially legal, not factual. Claimant first argues that the Board's decision failed to give effect to the legislative intent of 19 *Del. C.* § 2302, in that the Board incorrectly applied the law to conclude that Claimant was a part-time

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[35] *Id.* at 15.
[36] *Id.* at 20-21.

[37] *Id.* at 23.

[38] Claimant-Below/Appellant's Opening Br. on Appeal, D.I. 8 at 10.

employee.[39] Second, Claimant maintains that, as a matter of law, he should have been compensated based on full-time earnings of $28 per hour times the average work week of his employer, rather than at a rate of $20 per hour because Claimant agreed to a $20 per hour rate because Walton provided use of a truck, which was worth $8 per hour.

In response, Walton unsurprisingly agrees that the Board's decision is supported by substantial evidence, but maintains that the two legal issues were correctly decided. First, Walton maintains that, under Delaware law and the facts of this case, Claimant was "inherently" a part-time employee. Second, Walton argues that Claimant improperly defines part-time employment. Third, Walton contends that the Board correctly calculated that Claimant is entitled to a $20 per hour compensation rate because that was the rate Claimant was paid on the date of his injury.

IV. STANDARD OF REVIEW

[39] Related to this first contention on appeal is Claimant's contention that the Board's decision contains

> some factual discrepancies between the underlying testimony and the IAB decision. For example, the IAB decision states, "Also, I find Mr. Foley's testimony pertinent that Walton no longer required a full-time mechanic, and that the company preferred to hire diesel mechanics for necessary equipment repairs on an 'on call' basis when the need arose." However, the actual testimony was that Walton had a full-time mechanic (Roy Meadows) who was out sick and who Beck was replacing at the time of this Accident. Beck was working in place of this full-time Walton mechanic who some time after the Beck accident returned to Walton as a full-time employee, but who later left the employment due to sickness. According to the Walton representative, after the full-time mechanic for Walton left the second time (which was after the Beck accident) Walton decided to only use outside mechanics. Contrary to the IAB decision, the position of the mechanic at Walton who Beck was replacing was a full-time position at Walton.

Claimant-Below/Appellant's Opening Br. on Appeal, at 3.

The duty of this Court in an appeal from the Board is to determine whether the decision below is supported by substantial evidence and is free from legal error.[40] Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[41] 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."[42] It is within the province of the Board to determine the credibility of witnesses and the factual inferences that are made from those determinations.[43] A reviewing court may accord due weight, but not defer, to an agency's interpretation of a statute administered by it.[44] Questions of law are reviewed *de novo.*[45] A decision of the Board will be reversed when it is contrary to law.

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[40] *General Motors Corp. v. Jarrel*, 493 A.2d 978, 980 (Del. Super. 1985).

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

[42] *Nat'l Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980).

[43] *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 158 (Del. 2006).

[44] *Indus. Rentals, Inc. v. New Castle County Bd. of Adjustment*, 2000 WL 710087, *3 (Del. Super.), *rev'd on other grounds* 776 A.2d 528 (Del. 2001) (NO. 233,2000).

[45] *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

V. DISCUSSION

A. The Board Correctly Concluded that Claimant Was Not a Full-Time Employee at the Time of His Injury

Claimant contends that the Board erred by concluding that he was a part-time employee, and thus improperly calculated his loss of earning capacity. In support thereof, Claimant stresses that, on the day of his injury, he worked full-time "in the labor market," that he was substituting for a full-time employee, and that he was working with other full-time employees performing the same or similar work as Claimant.[46]

The Delaware Wage Statute in effect at the time Claimant was injured provides in pertinent part the framework for determining compensable wages:

> (a) The term "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident . . . .
> (b) If the rate of wages is fixed by the day or hour, the employee's weekly wages shall be taken to be that rate times the number of days or hours in an average work week of the employee's employer at the time of the injury.[47]

The parties agree that Claimant was an hourly worker for Walton.

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[46] Claimant-Below/Appellant's Opening Br. on Appeal, at 2.

[47] 10 *Del. C.* § 2302.

Pursuant to the Delaware Wage Statute, the weekly wage rate for an hourly employee was determined by multiplying his hourly rate by the number of hours of a full-time employee of the employer.[48] However, this Court has held that where a claimant's employment was, at the time of the injury, "inherently part-time" and likely to remain so, a claimant should have his wages calculated based on part-time earnings.[49]

In *Hacker v. Newell/Kirsch* this Court affirmed a decision of the Board that had found a claimant to be a part-time employee, reasoning that "[a] worker who, whether by his or her own choice or by necessity, has demonstrated a clear and consistent willingness to participate in the labor market on a part-time basis only, has limited his of her capacity to that of part-time wages."[50] The Board concluded that the claimant, who was additionally raising school-age children, was willing to participate in the labor market only on a part-time basis.[51]

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[48] *Furrowh v. Abacus Corp.*, 559 A.2d 1258, 1260 (Del. 1989).

[49] *Id.* at 1260-61 ((citing 2 LARSON'S WORKMEN'S COMPENSATION LAW § 60.00 (1987) (noting "[s]ince the entire objective [of workmen's compensation] is to arrive at as fair an estimate as possible of claimant's future earning capacity, a claimant who has made only part-time earnings should have his wage basis figured on part-time wages only if the employment itself or his relation to it is inherently a part-time one and likely to remain so; otherwise his earnings should be converted to a full-time basis.")).

[50] *Hacker*, 2003 WL 21203308 at *2.

[51] *Id.*

In *Shaw v. United Parcel Service*, this Court affirmed the Board's decision that had held that the claimant was a part-time employee. This Court explained that "an employee's loss of earning capacity may appropriately be measured by part-time hours 'if the employment itself or the employee's relation to it is inherently a part-time one and likely to remain so.'"[52] In *Shaw*, the claimant was a pre-loader (a person who loads and unloads packages from United Parcel Service cars and trucks), and all pre-loaders had worked on a part-time basis. Although the claimant was available for and would have preferred full-time work, no full-time pre-loader positions were available at the time of the injury.

In *Baggett v. First State Staffing, Inc.*, this Court reversed the Board's determination that a claimant was a part-time employee and held that, as a matter of law, the claimant was a full-time employee. In *Baggett*, the claimant was a licensed practical nurse who was employed by a temporary staffing agency. The claimant testified that she was available and desirous of working full-time for the employer, though her actual hours worked were not specified. The *Baggett* Court noted, "[s]ince the employer did allow employees to work 40 hours per week and since some did, at least on occasion, my ruling is that the employer's average work week for

[52] *Shaw*, 2003 WL 203070, at *2.

calculating the claimant's wages is 40 hours."[53] *Baggett*, however, is factually distinguishable from *Hacker* in that the *Baggett* claimant expressed a desire to work for the employer on a full-time basis. *Baggett* is also factually distinguishable from *Shaw* in that there was testimony in *Baggett* that some of the nurses worked 40 hours per week for the employer. Similarly, in the instant case, Claimant did not testify that he wanted to work on a full-time basis for Walton; nor did he testify that in the year and a half preceding his injury he had ever worked 40 hours per week for Walton in his capacity as a repairman or that any other on call repairman worked 40 hour per week for Walton.

The Board concluded that Claimant's position at Walton at the time of his injury was "inherently part-time" as an "on call" diesel mechanic.[54] In reaching this finding the Board noted:

> I also accept the testimony of Mr. Foley, Walton's chief operating officer, that at the time of the work injury, Claimant worked as an "on call" mechanical repairman after leaving full-time employment there in 2004. Mr. Foley testified that Claimant earned from $20.00 to $28.00 an hour while working for them depending on the type of job to which he was sent. Mr. Foley also testified that Claimant worked sporadically for a total of seven weeks for Walton between July 2004 and the date of the work accident, based on the check log . . . submitted into evidence. However, based on the check ledger, I determine that Claimant actually worked a total of twelve calendar weeks between July 2004 and March 2005, excluding the March 28 and June 8 checks which represented other income. Mr. Foley also testified that Claimant did not work more than

[53] *Baggett v. State Staffing, Inc.*, 2003 WL 327618, at *3 (Del. Super.).
[54] *Beck*, No. 1281714, at 20.

> four to six hours on any given day, and that their full-time employees worked eight hours a day, for forty hours a week.[55]

In addition, it should also be noted that Claimant did not file a tax return for 2004 or 2005 to substantiate his claim that he worked in the labor market on a full-time basis and the check log indicated that Claimant never worked 40 hour per week in the year and a half before his injury.

The Board concluded that the facts of the instant case more closely align with *Hacker* and *Shaw* than *Baggett.* The record shows that Claimant had worked for Walton for approximately five years as a driller, earning $12.50 per hour. Claimant left Walton in 2004 and became a self-employed diesel mechanic. Claimant testified that he earned anywhere from $25 to $65 per hour as an independent diesel mechanic, working on call for twenty-six to thirty companies. Unlike the claimant in *Baggett*, Claimant here did not testify he had any intention or desire to work at Walton on a full-time basis. Mr. Foley testified that the position of on call repairman was part-time in nature and that it could not become full-time. In addition, Claimant presented no evidence as to the number of hours worked by other on call diesel mechanics who worked for Walton. The Board interpreted the Delaware Wage Statute and concluded that Claimant's position at Walton was inherently part-time. This Court must give "due weight" to the

[55] *Id.* at 13.

interpretation of a statute by the agency that administers it.[56] Therefore, the Board correctly concluded that Claimant was not a full-time employee at the time of his injury.

B. The Board Correctly Calculated that Claimant is Entitled to a $20 Per Hour Compensation Rate

According to the Delaware Wage Statute, "the term "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident . . . ."[57] Claimant's undisputed testimony at the hearing was that he earned $20 per hour on the date he was injured. Nonetheless, Claimant argues that he should be compensated at the rate of $28 per hour because he was paid the higher rate on previous occasions when he worked on call for Walton and he reduced his hourly rate on the date of the accident because he was provided the use of a Walton truck. Claimant relies on *Larson's Worker's Compensation Law* in support of the proposition that the value of the use of a Walton truck should be included in Claimant's wage calculation:

> In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but any thing of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic

[56] *Indus . Rentals, Inc*, 2000 WL 710087 at *3.

[57] 10 *Del. C.* § 2302(a).

> gain to the employee. A car allowance is includable as wage only if it exceeds actual truck, or travel expenses.[58]

However, Claimant cites no Delaware case for this proposition. In fact, the Delaware Supreme Court's decision in *Rubick v. Security Instrument Corp.* contradicts Claimant's position. In *Rubick*, the Court concluded, "based on the language and history of the statute, that an hourly employee must be compensated on the same basis of his/her hourly rate at the time of the accident, even if that rate is significantly above or below the employee's average hourly rate."[59] In this case, Claimant was compensated at the hourly rate in effect at the time of his injury. The plain language of 10 *Del. C.* § 2302(a) and the Delaware Supreme Court's ruling in *Rubick* support the Board's determination that Claimant's hourly rate at the time of his injury was $20 per hour.[60]

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[58] LARSON'S WORKMEN'S COMPENSATION LAW § 93.01[2][a] (2005).

[59] *Rubick v. Security Instrument Corp.*, 766 A.2d 15, 17 (Del. 2000).

[60] The Court notes that Claimant did not respond in his Reply Brief to the arguments on this issue in Walton's Answering Brief (namely, that Claimant's position is contradictory to the plain language of the Delaware Wage Statute and that, on the day of his injury, Claimant was "setting up road signs," rather than diesel mechanic repair work), stating instead that "Claimant will defer to the arguments in his original brief on the issue of the higher rate of $28 per hour times the average work week of his employer." Reply Br. on Appeal, D.I. 15 at p. 6.

VI. CONCLUSION

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

IT IS SO ORDERED.

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Richard R. Cooch