IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LINWOOD MCCOY,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 08A-11-005-JEB
	)	
BJ'S WHOLESALE CLUB,	)	
	)	
Appellee.	)	

Submitted: April 22, 2009
Decided: May 11, 2009

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

OPINION

Appearances:

Michael C. Heyden, Esquire, Wilmington, Delaware.
Attorney for Linwood McCoy.

Christian G. McGarry, Esquire, and Nathan V. Gin, Esquire, Wilmington, Delaware. Attorneys for BJ's Wholesale Club.

JOHN E. BABIARZ, JR., JUDGE

In this appeal of a decision granting an employer's Petition to Terminate

Benefits, the claimant argues that a surveillance videotape is insufficient to support the petition and that the jobs listed on the employer's labor market survey are beyond his capabilities. For the reasons explained below, the Court affirms the decision of the Hearing Officer of the Industrial Accident Board ("IAB").[1]

Posture. In September 2003, Linwood McCoy ("Claimant") suffered a compensable work injury while working at BJ's Wholesale Club ("Employer"). He injured his low back, neck and right shoulder, but eventually returned to work as a greeter later in 2003. He became totally disabled in 2006 and began receiving total disability benefits at that time. In November 2007, Employer filed a Petition to Terminate Benefits, alleging that Claimant was no longer totally disabled. The matter was heard by a Workers' Compensation Hearing Officer in April 2008, and a decision was issued in October 2008 granting Employer's Petition to Terminate. Claimant appealed the Hearing Officer's decision to this Court.

Facts. At the hearing, Employer presented the deposition testimony of Jerry L. Case, M.D., a board-certified orthopedic surgeon. Dr. Case examined Claimant three times, reviewed the medical records and watched a surveillance videotape made by Employer's investigator. Prior to viewing the tape, Dr. Case held the opinion that

[1]The parties stipulated that the case could be decided by a Workers' Compensation Hearing Officer in accordance with DEL. CODE ANN. tit. 19, § 2301B(a)(6).

Claimant remained totally disabled as of October 2007, when he last examined Claimant. Dr. Case subsequently watched the tape, which showed Claimant bending, carrying fishing supplies, standing several hours while fishing, casting a fishing rod, picking up a cooler containing ice and fish, and walking with a normal gait without use of a cane.

After seeing the videotape, Dr. Case formed a different opinion about Claimant's physical capabilities, as well as his credibility. Emphasizing the subjective nature of Claimant's complaints, Dr. Case stated his opinion that Claimant magnified his symptoms and that ongoing medical treatment other than pain management is no longer necessary. Dr. Case believed that if Claimant had been telling the truth at his office visits, he would not have been able to perform the activities seen on the videotape. Dr. Case acknowledged that Claimant still experiences episodic pain from his work injury. Dr. Case concluded that Claimant could return to full-time sedentary or light-duty work with the restrictions of no repeated bending or twisting and no lifting more than 15 to 20 pounds.

Thomas Walsh, a private investigator, also testified for Employer. Walsh took the videotape on August 6, 2007, which shows Claimant fishing. He also had Claimant under surveillance five other days which yielded nothing of interest. Walsh testified that on August 6, 2007, Claimant drove from his residence in New Castle,

Delaware, to Cape Henlopen State Park, Delaware. The investigation began at 7 a.m. and ended at 10:30 p.m., during which time Claimant fished and engaged in related activities for 9 ½ hours.

Barbara Stevenson, a vocational specialist, also testified on behalf of Employer. She prepared a labor market survey identifying 14 jobs that suited the restrictions identified by Dr. Case, as well as Claimant's physical and educational abilities.

Selina Xing, M.D., testified via deposition on Claimant's behalf. Dr. Xing is board-certified in physical medicine and rehabilitation and pain management. She treated Claimant from August 2006 through January 2008, during which time she focused on pain management. Dr. Xing's opinion is that the medications she prescribes for Claimant would interfere with his ability to work, despite the result of a functional capacity evaluation (which she ordered) that released him to sedentary work for four to five hours per day. If Claimant were to work, he would have to take more medication and should not drive commercial vehicles, such as three of the jobs listed on Employer's labor market survey. Although Dr. Xing did not watch the surveillance videotape, she stated that disabled people can have good and bad days. She was unaware of Claimant's previous back problems. She acknowledged that many of Claimant's complaints are subjective and that some of the positive findings

from her physical examination are based on Claimant's subjective reactions. Based on her examinations, she believed Claimant to be totally disabled from work.

Claimant testified on his own behalf. He never finished high school and has limited reading ability. He worked at a paper company for 30 years and as a fork lift operator for Employer. After the work accident, he worked for Employer as a greeter before becoming totally disabled. He stated that he uses a cane about five times per week and that he cannot lift more than ten to fifteen pounds. Sitting causes him pain, and he can drive only thirty minutes to one hour at a time. He asserted that he cannot perform any of the jobs identified in the labor market survey. He explained that on the day the surveillance video was taken he was having a "good day." By the end of the day he was in great pain, from which he took a week to recover. He acknowledged that when he saw Dr. Xing three days after the fishing trip, he told her he felt fine.

The administrative decision. The Hearing Officer accepted the expert opinion of Dr. Case over that of Dr. Xing, and, in addition, found that Claimant was not a credible witness in regard to his symptoms. The Hearing Officer found that Dr. Case's opinion that Claimant could perform sedentary to light-duty work was consistent with the activities Claimant engaged in on the surveillance tape. For these reasons, the Hearing Officer granted Employer's Petition to Terminate benefits.

Standard of review. The Court's role is to review the administrative decision to determine whether it is supported by substantial evidence and whether it is free from legal error.[2] Substantial evidence is evidence that a reasonable person might accept as supporting a conclusion.[3] Questions of law are reviewed *de novo*.[4] Absent error of law, the standard is abuse of discretion,[5] which arises only when the decision exceeds the bounds of reason in view of the circumstances.[6]

Discussion. On a petition to terminate, the employer bears the burden of showing that the employee is no longer totally incapacitated for the purpose of working.[7] If that burden is met, the burden shifts to the employee to show either that the employee is unemployable as a result of the work injury or that the employee is a *prima facie* displaced worker.[8]

Claimant argues first that Employer did not meet its burden because the Hearing Officer placed too much emphasis on the testimony of the investigator who

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[2]*Johnson v. Chrysler Corp.*, 213 A.2d 64 (Del. 1965); *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960).

[3]*Breeding v. Contractors-One, Inc.*, 549 A.2d 1102 (Del. 1988).

[4]*Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989).

[5]*Digiacomo v. Bd. of Public Education*, 507 A.2d 542 (Del. 1986).

[6]*Willis v. Plastic Mat'ls*, 2003 WL 164292, at *3 (Del. Super.).

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

[8]*Id.*

took the surveillance tape. Claimant asserts that the investigator exaggerated the events caught on the tape and that the Hearing Officer did not take into account the five days worth of tape that did not capture anything of note. Employer responds that the video itself documented Claimant on a fishing outing for a total of 13 hours during which time he appeared to experience little or no discomfort despite engaging in strenuous activities. The Court finds that the Hearing Officer's decision shows that she relied on the tape itself and not on the investigator's reportage.

Claimant also argues that *Hartzl v. W.C.A.B.*[9] supports his position that surveillance films are inadequate to sustain the burden of showing that a claimant's disability has been reduced. In *Hartzl*, the doctor who initially found that a claimant had a continuing disability changed his mind after viewing a surveillance videotape,[10] which is precisely what happened in this case. The Court notes first that the Hearing Officer was free to accept the opinion of one medical expert over that of another.[11]

Dr. Case believed that Claimant was totally disabled until he watched the video which showed Claimant driving, walking, bending, casting, fishing and carrying an ice chest. This Court does not need to view the video to find that the Hearing Officer

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[9]515 A.2d 1009 (Pa. Cmwlth. 1986).

[10]*Id*. at 1012.

[11]*Standard Distributing Co. v. Nally*, 630 A.2d 640 (Del. 1993).

acted within her discretion in accepting the video as evidence that Claimant is no longer totally disabled.[12] The Hearing Officer is the finder of fact, and the Court concludes that the record evidence supports the administrative findings.[13]

Claimant also argues that he cannot perform any of the 14 jobs identified by Ms. Stevenson, the vocational specialist. The Hearing Officer found that Claimant could perform 11 of the 14 jobs but eliminated a shuttle bus driver job because it required almost constant driving, which would increase Claimant's pain. She also eliminated two jobs that required a high school diploma because Claimant does not have one. The other positions fell within Dr. Case's guidelines of sedentary to light-duty work and were based on Claimant's age, education, vocational training, work experience, physical capabilities and geographical area. The Hearing Officer properly exercised her discretion in weeding out the jobs that did not suit Claimant's condition or circumstances. Although Claimant asserted that he was unable to perform any of the jobs, Dr. Case found that Claimant magnified his symptoms, as

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[12] *Tecot Elec. v. Curtis-Howett*, 2009 WL 792367 (Del. Supr.); *Freebairn v. Voshell Builders*, 2006 WL 290142 (Del. Super.); *Regis v. DaimlerChrysler Corp.*, 2005 WL 535008 (Del.); *Eldridge v. Walter S. Bandurski, Inc.*, 1995 WL 108968 (Del. Super.).

[13] Although the Hearing Officer did not explicitly find that the burden of proof shifted back to Claimant and that he was unable to meet it, the Court infers this finding from the Hearing Officer's decision, which is clear and otherwise exacting *See Cruz v. Ryder Public Transportation*, 2003 WL 1563719 (Del. Super.) (in an appropriate case, the Court is permitted to infer from the Board's conclusions what the Board's unexpressed but underlying factual findings must have been); *Miranda v. E.I. Du Pont De Nemours & Co.*, 2000 WL 303317(Del. Super.) (under certain circumstances, the Court can infer the Board's underlying findings).

demonstrated by the difference between Claimant's testimony and the activities captured on the surveillance tape. Based on the record evidence, the Hearing Officer did not abuse her discretion in finding that Claimant could perform eleven of the fourteen of the recommended jobs.

It is worth noting that Employer has conceded that Claimant is entitled to partial disability benefits and that he is now receiving them.

For all these reasons, the decision of the IAB Hearing Officer granting Employer's Petition to Terminate Total Disability Benefits is ***Affirmed.***

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,Jr./rmc/bjw
Original to Prothonotary