

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

<b>GWYNN WOODWARD,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>CA No. 02A-03-005-JEB</b>
	)	
<b>DELAWARE SUPERMARKETS. INC.,</b>	)	
<b>(SHOPRITE),</b>	)	
	)	
<b>Appellee.</b>	)	

Submitted: July 18, 2002  
Decided: September 3, 2002

*On appeal from a Decision of the Industrial Accident Board.  
Decision Affirmed.*

**OPINION**

*Appearances:*

Joseph W. Weik, Esquire  
Attorney for Gwynn Woodward, Appellant.

Charles Slanina, Esquire and Susan A. List, Esquire  
Attorneys for Delaware Supermarkets, Inc., Appellee.

**JOHN E. BABIARZ, JR., JUDGE.**

This is the Court's decision on Claimant Gwynn Woodward's appeal of a decision of the Industrial Accident Board (Board) denying her petition for workers' compensation benefits. For the reasons explained below, the Board's decision is *Affirmed*.

## FACTS

On July 14, 2001, Claimant fell and injured her left knee during the scope of her employment at Delaware Supermarkets (Shop Rite). After reporting the injury to her supervisor, Claimant went to the Emergency Room at the Christiana Hospital, and her leg was placed in a brace. After a few days, she returned to her job at Shop Rite for one day, but was able to work for only a few hours because of pain and swelling in her leg. Claimant had a second job working as a waitress at the Newport Family Restaurant where she returned to work approximately one week after the accident.

Claimant's family doctor sent her to Dr. Paul Kupcha, an orthopaedic surgeon. After examining her on August 7, 2001, Dr. Kupcha's diagnosis was preexisting osteoarthritis with acute swelling resulting from the work injury. He prescribed various injections and ordered diagnostic testing, including an MRI and x-rays of the left leg. Claimant requested a disability note, but Dr. Kupcha did not give her one

until August 29, which said “No work at Shop Rite until next appointment.”<sup>1</sup> Although Claimant was still working her regular hours at the restaurant, she did not tell Dr. Kupcha that she had a second job.

Claimant was able to continue waitressing because management made accommodations for her leg injury. At Shop Rite, Claimant turned in the disability slip from Dr. Kupcha, and she did not ask if light duty work was available. She was not able to remain on her feet and do the heavy lifting required of a deli clerk at Shop Rite.

Dr. Kupcha released Claimant to work without restriction on October 23, 2001. In November, she reported to work at Shop Rite but was fired within 2 ½ hours. She was informed by letter that if she had any questions that she could contact her union, but she did not challenge the termination because she did not know how to contact the union.

On October 31, 2001, Claimant filed a Petition to Determine Compensation Due, seeking partial disability benefits for the alleged knee injury. In January 2002, Claimant was examined by Dr. Samuel Matz, an orthopedic surgeon, who served as Shop Rite’s independent medical examiner. After conducting a hearing, the Board denied the petition. Claimant filed a timely appeal to this Court. Briefing is

---

<sup>1</sup>Transcript of Board Hearing at 30.

complete, and the issues are ripe for decision.

### **STANDARD OF REVIEW**

In reviewing a decision of the Board, the Court's role is to determine whether the Board's findings are supported by substantial evidence and are free from legal error.<sup>2</sup> Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion.<sup>3</sup> The Court does not weigh the evidence, determine questions of credibility or make factual findings.<sup>4</sup> It merely determines if the evidence is legally adequate to support the Board's findings.<sup>5</sup>

### **DISCUSSION**

Claimant seeks partial disability benefits from July 15, 2001, the day after the accident, through October 23, 2001, when Dr. Kupcha released her to work without restrictions. The Board denied Claimant's petition, finding that she could have worked light duty at Shop Rite. Claimant argues that the Board erred in (1) denying her benefits for the wages she lost at Shop Rite, (2) finding that she had the burden of showing that Shop Rite had no suitable work for her, and (3) relying on the opinion

---

<sup>2</sup>*Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del.1988).

<sup>3</sup>*Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del.1988).

<sup>4</sup>*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.1960).

<sup>5</sup>Title 29 *Del.C.* § 10142(d).

of Dr. Matz, Shop Rite's independent medical examiner. Shop Rite argues that the Board's denial of benefits is free from error and is based on substantial evidence. Shop Rite also argues that the Board acted within its discretion in accepting Dr. Matz's opinion.

The Board's decision that Claimant could have worked light duty at Shop Rite was based on the simple fact that Claimant was working as a waitress at the Newport Family Restaurant during the relevant time period. Dr. Matz offered his opinion that if Claimant could continue waitressing, she could also have worked at Shop Rite in some capacity, if not as a deli clerk. Dr. Matz pointed out that the MRI of Claimant's left knee was normal for a woman her age. On the other hand, Dr. Kupcha, who gave Claimant a total disability slip, was unaware that she was working as a waitress. Dr. Kupcha acknowledged that his disability note was based on incomplete information and subjective complaints of pain. When medical experts disagree, the Board may accept the testimony of one expert over the testimony of another expert.<sup>6</sup> The record shows that the Board acted within its discretion in accepting Dr. Matz's opinion.

The record also supports the Board's finding that Claimant deprived Shop Rite of the opportunity to accommodate her restrictions by failing to tell either Dr. Kupcha

---

<sup>6</sup>*Stanley McDowell v. State of Delaware*, C.A. No. 88AOJN-3, Steele, J. (Del. Super. March 12, 1991)

or Shop Rite that she still worked at the restaurant. Claimant's argument that the Board erred in stating that she bore the burden of showing that Shop Rite had no work for her is unavailing because Claimant herself told Shop Rite that she was totally disabled.<sup>7</sup> Having done so, she cannot now hold Shop Rite responsible for not contacting her for light duty work. The Court concludes that the Board's decision is based on substantial evidence and is free from legal error.

### CONCLUSION

For the foregoing reasons, the Board's decision denying Claimant Gwynn Woodward's petition for worker's compensation benefits is *Affirmed*.

***It Is So ORDERED.***

---

Judge John E. Babiarz, Jr.

---

<sup>7</sup>See *Chrysler Corp. v. Duff*, 314 A.2d 915, 918 (Del.1973) (in a workers' compensation case, both employer and the employee share a mutual duty to obtain employment for the employee, the precise extent of which cannot be clearly and definitely expressed as a general rule).

JEB,jr/BJW/RMP  
Original to Prothonotary