IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MONICA DIXON,	)	
	)	C.A. No. K12A-01-001 JTV
Claimant-Below,	)	
Appellant,	)	
	)	
v.	)	
	)	
DELAWARE VETERANS HOME,	)	
	)	
Employer-Below,	)	
Appellee.	)	

Submitted: October 4, 2012
Decided: January 29, 2013

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware.
Attorney for Appellant.

Natalie L. Palladino, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware.
Attorney for Appellee.

Upon Consideration of Appellant's
Appeal From Decision of the
Industrial Accident Board
AFFIRMED

VAUGHN, President Judge

OPINION

This is an appeal from a decision of the Industrial Accident Board ("the Board"). The claimant, Monica Dixon ("the claimant"), suffered a work-related injury to her back while working for Delaware Veterans Home ("the employer") as a certified nursing assistant. The employer filed a Petition for Review seeking to terminate the claimant's total disability benefits when she was cleared by her doctor to return to work with restrictions. After a hearing, the Board issued an opinion terminating the claimant's temporary total disability benefits, but awarded her partial disability benefits, and medical witness and attorney fees. This is the claimant's appeal of the Board's decision to terminate her total disability benefits.

FACTS

The claimant injured her lower back when she was lifting a patient while working as a certified nursing assistant for the employer. As a result of the injury, the claimant received lumbar spine surgery from Dr. Ali Kalamchi on February 9, 2011. On June 17, 2011, Dr. Kalamchi examined the claimant and concluded that she was capable of working, but restricted her to sedentary or light duty work with only occasional lifting not to exceed 20 pounds. He also instructed her that she should primarily sit, with occasional standing and walking as needed. On July 14, 2011, the employer filed a Petition for Review seeking to terminate the claimant's total disability benefits on the grounds that the claimant was capable of returning to work.

After her surgery, the claimant underwent a work hardening program to increase her endurance and to determine how much weight she could tolerate lifting. The claimant did not begin to seek employment immediately after completing the

program, but rather, waited until on or about July 14, 2011 when she found out that the employer was seeking to terminate her total disability payments. The claimant further testified that she did not feel "really pressured" to seek employment until she received the employer's labor market survey on November 1, 2011.

Prior to receiving the survey, the claimant did search for employment, but she did not document her search efforts because her attorney had not told her to do so until she received the employer's labor market survey. In addition, the claimant took a number of steps to assist in her search for employment, including going to the Department of Labor to use their computers to search for available jobs and work on her resume; she applied for and gained admission to the division of vocational rehabilitation; and beginning on October 19, 2011, she attended a weekly program at the Dover Public Library to receive assistance in resume construction, interviewing pointers, completing applications, and other job seeking related skills.

The claimant applied to and was hired by Absolute Home Healthcare as a home health aide, but her employment offer was later revoked when she told the employer about her work restrictions and that she was receiving workers' compensation benefits. The claimant then became aware of a job at Comfort Suites through a friend. She applied for the job and was ultimately hired by Comfort Suites despite informing them about her work restrictions at her interview. The claimant, however, only worked there between August 24, 2011 through August 31, 2011 before quitting the job. The reason for leaving the job was in dispute at the hearing.

The claimant testified that she left Comfort Suites due to back pain because she was assigned to work the night shift, which involved a lot of sitting, which caused her

body to become stiff. She also testified that she had back cramps and spasms due to setting up the continental breakfast in the morning, which required her to set out breakfast food and supplies, including cereal dispensers that weighed between 15 and 20 pounds. However, Comfort Suites' front office manager, Val Anderson, testified that the claimant called and informed her that she could not come to work one day because she had a stomach virus. Ms. Anderson informed the claimant that because she was still in her probationary period she needed to provide a doctor's note to avoid being terminated. The claimant never provided Comfort Suites with a note or came to work again. Ms. Anderson also testified that the claimant never made any complaints about back pain to her, and that she never noticed any obvious physical discomfort when they worked together.

On September 9, 2011, nine days after last working for Comfort Suites, the claimant visited Dr. Keehn, an orthopedic surgeon. The claimant informed Dr. Keehn that she quit the Comfort Suites job because she experienced discomfort in her back, due mostly to setting up the continental breakfast. After examining the claimant and reviewing her medical records, Dr. Keehn came to the conclusion that the claimant suffered a strain of her lumbar spine as a result of the Comfort Suites job, but that there were no objective signs of ongoing injury. He further indicated that he believed that the claimant could work full time in a sedentary position, lifting no more than 10 pounds with no restrictions on her ability to walk, stand, or sit.[1]

[1] Dr. Keehn did not dispute Dr. Kalamchi's recommendation, made a little over a month after Dr. Keehn's prognosis, that the claimant was capable of working in a light duty capacity and could lift up to 20 pounds. *Dixon v. State of Delaware*, I.A.B. Hearing No. 1358419, at 8.

The claimant testified at the Board hearing that she called the office of her treating physician, Dr. Kalamchi, after allegedly injuring her back at Comfort Suites, and that she spoke with Dr. Kalamchi's physician's assistant to inform him about her back pain. That call was not documented in her medical records, however. The claimant's next visit with Dr. Kalamchi was on October 21, 2011. There, the claimant informed the doctor of her attempted return to work at Comfort Suites, and that she was in pain due to the lifting and bending on the job. Despite her increased subjective complaints of pain, and increased objective signs of pain, including a decreased range of motion, Dr. Kalamchi maintained that she was capable of working with light duty work restrictions, lifting up to 20 pounds.

The employer's labor market survey was prepared on November 1, 2011 by Robert Stackhouse, a vocational rehabilitation specialist. Mr. Stackhouse testified that he believed that the claimant is employable in the local labor market, considering her vocational and educational backgrounds as well as her physical limitations.[2] The survey was composed of a list of 12 jobs that were available on November 1 that fit within the claimant's work restrictions. On November 22, 2011, Mr. Stackhouse followed up with the employers identified in the survey and determined that only 3 of the positions remained open at that time. On November 23, Mr. Stackhouse provided the claimant with 3 more available job opportunities that fit within her work restrictions. These three additional employers were not considered by the Board,

[2] The claimant is a 47 year old high school graduate who can read, write, perform basic mathematics, and has a certified nursing assistant license and a valid driver's license. *Id*. at 2.

however, because they were provided to the claimant only two weeks before the Board hearing and just prior to the Thanksgiving holiday, and did not allow her enough time to fully and fairly explore them.[3]

The claimant testified at the Board hearing that she applied to 6 of the 12 jobs listed on the employer's labor market survey, that she contacted another 2 of the 12 employers by phone, who informed her that they were no longer hiring, and that she did not contact or apply to 4 of the 12 employers. In addition, the claimant documented that she applied to at least 9 employers outside of the labor market survey between November 1 and November 16,[4] and an unidentified number of employers that were not documented before receiving the survey. The Board did not consider an additional 12 employers that were allegedly applied to and documented by the claimant between November 23 and December 5, however, because they were provided to the employer the day before the Board hearing, and did not provide the employer with sufficient time to obtain information about those jobs to cross examine the claimant.[5]

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[3] *See id.* at 9 n.3 (sustaining the objection by the claimant). The Board, however, may have considered these 3 additional jobs in its analysis of whether the claimant conducted a reasonable job search, because it stated "[t]hereafter Claimant applied to six of the 15 jobs listed on the survey." *Id.* at 19. The claimant testified that she did contact all three employers, and that each employer informed her that they were not hiring.

[4] *See* Claimant's Exhibit 2.

[5] *Dixon v. State of Delaware*, I.A.B. Hearing No. 1358419, at 11 n.7. The Board also noted that the job logs provided by the claimant "were very incomplete," and "made it difficult for Mr. Stackhouse to determine what positions Claimant had applied for." *Id.* at 12.

On December 7, 2011, the Board held a hearing on the employer's Petition for Review, and subsequently issued an opinion on December 29, 2011 which terminated the claimant's total disability benefits. In that opinion, the Board found that the claimant was not a displaced worker, because her job search effort was inadequate. The Board came to this conclusion "based largely upon issues underlying Claimant's credibility."[6] Specifically, the Board took issue with the fact that the claimant was "so nonchalant in her job search, deferring most of her efforts until just a few weeks before [the Board] hearing."[7] The Board acknowledged that although the claimant did obtain a job with Comfort Suites, there was doubt as to whether her motive for leaving the job was due to back pain, or if it was due to a stomach virus.[8] Lastly, the Board noted in a footnote that the claimant did not offer evidence that she informed prospective employers of her partial disability, and that the claimant did not establish that she was even rejected by prospective employers, and therefore, could not have been denied employment because of her partial disability.[9] This appeal followed.

STANDARD OF REVIEW

The court's scope of review for an appeal of the Board's decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of

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[6] *Id.* at 18.

[7] *Id.* at 19.

[8] *Id.* at 19-20.

[9] *Id.* at 11 n.6.

law.[10] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[11] "When the issue raised on appeal from the IAB is exclusively a question of the proper application of the law, review by this Court is *de novo*."[12]

DISCUSSION

The displaced worker doctrine recognizes that a worker who is not totally disabled may nonetheless be entitled to total disability benefits under Delaware's Workers' Compensation law.[13] Under that doctrine, the employer has the initial burden to show that the claimant is no longer totally incapacitated for the purpose of working.[14] If the employer satisfies its burden, the burden shifts to the claimant to demonstrate that she is a "displaced worker."[15] The employee may establish that she is a displaced worker in one of two ways: (1) by making a *prima facie* showing that her physical impairment, coupled with her mental capacity, education, training, or age, renders her displaced; or (2) by demonstrating that she has made reasonable efforts to secure suitable employment, but because of the injury has been

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[10] *Roland v. Playtex Prods., Inc.*, 2003 WL 21001022, at *1 (Del. Super. Feb 3, 2005).

[11] *Id.* (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[12] *Pugh v. Wal-Mart Stores, Inc.*, 2007 WL 1518970, at *2 (Del. Super. May 2, 2007), *aff'd*, 945 A.2d 588 (Del. 2008).

[13] *Watson v. Wal-Mart Assocs.*, 30 A.3d 775, 779 (Del. 2011).

[14] *Governor Bacon Health Ctr. v. Noll*, 315 A.2d 601, 603 (Del. Super. 1974).

[15] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).

unsuccessful.[16] There is an inference that the employer refused to hire the claimant because of her partial disability if the claimant advises prospective employers that she has a physical limitation, and she does not get the job.[17] Finally, assuming that the claimant can demonstrate that she is a displaced worker, the burden shifts back to the employer to establish the availability of regular employment within the claimant's capabilities.[18]

On appeal, the claimant contends that the Board erred when it found that she did not make reasonable efforts to gain employment, and that the Board placed a higher burden of proof on her when it determined that the claimant was not entitled to the inference, and therefore had to prove, that she was denied employment due to her disability. The claimant does not seem to argue on appeal that the Board erred in finding that she was not a *prima facie* displaced worker. The entire focus of the appeal is whether she established that she is an actually displaced worker. I infer from the record that the claimant does not contend on appeal that she is a *prima facie* displaced worker, and therefore I will not address that point further.

The employer contends that the Board correctly found that the claimant failed to perform a reasonable job search, and that the Board did not place a higher burden of proof on her, because she did not show that she informed employers that she was

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[16] *Saunders v. DaimlerChrysler Corp.*, 894 A.2d 407, 2006 WL 390098, at *2 (Del. Feb. 17, 2006).

[17] *Watson*, 30 A.2d at 779 n.4 (citing *Keeler v. Metal Masters Foodservice Equip. Co.*, 712 A.2d 1004, 1005 (Del. 1998)).

[18] *Franklin Fabricators v. Irwin*, 306 A.2d 734, 736 (Del. 1973).

partially disabled, and therefore, was not entitled to the inference that she was denied employment because of her disability.

As mentioned, a claimant who is not a *prima facie* displaced worker must show that she has made a reasonable job search effort, and that she was unable to obtain employment due to her disability. I have concluded that the Court need not make a specific finding on the reasonableness of the job search, because I conclude that the claimant did not establish that the reason she was unable to obtain employment was due to her disability.

Before the burden shifts back to the employer to establish the availability of regular employment within the claimant's capabilities, the claimant must show that she was denied employment because of her partial disability.[19] In its opinion, the Board determined that there was insufficient evidence to suggest that the claimant was even rejected for employment, given the timing of the claimant's applications and the Board hearing, and the fact that the claimant had not been formally rejected by the employers.[20] The Board also stated that "[t]he simple fact that the jobs are no longer open to applicants does not equate to an assumption that Claimant is not under consideration for employment."[21] However, simply because an employer has not contacted the claimant to formally reject her, does not mean that the clamant has not

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[19] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).

[20] *Dixon v. State of Delaware*, I.A.B. Hearing No. 1358419, at 11 n.6.

[21] *Id.*

been turned down for the job.[22] Here, the record reflects that the claimant applied to at least 13 employers between November 1 and November 16.[23] The Board hearing was held on December 7, 2011. I find that a sufficient amount of time had passed between the submission of the claimant's applications and the Board hearing to infer that the claimant was effectively rejected by those employers.

Having found that the claimant was rejected for employment, the Court must next address whether the claimant was denied employment *because of* her partially disability. Because it is oftentimes difficult to determine why an employer does not hire a particular candidate, the Supreme Court has created an inference that the claimant was turned down for the job because of her partial disability, if the claimant advises prospective employers that she has a physical limitation, and the claimant does not get the job.[24] Therefore, in order to be entitled to that inference, the claimant must establish that he or she informed the prospective employers of his or her disability, because an employer cannot refuse to hire someone because of disability if the prospective employer did not know about it.[25]

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[22] *See Watson*, 30 A.2d at 780 ("[T]here is no evidence that employers contact prospective employees that they are not interested in hiring or that, in these circumstances, [the claimant] should have contacted any employer again.")

[23] The claimant applied to four jobs in the labor market survey, and nine jobs outside of the survey. *See* Claimant's Exhibit 2.

[24] *Id.* at 779 n.4 (citing *Keeler v. Metal Masters Foodservice Equip. Co.*, 712 A.2d 1004, 1005 (Del. 1998)).

[25] *See Torres*, 672 A.2d at 31 ("[M]ost of the employers [the claimant] contacted could not have refused to hire her because of her injury since they knew nothing about it."); *Meloni v.*

Here, the Board stated that "Claimant did not testify that she denoted any disability on her applications, [or] that she has interviewed with any of the employers to so inform them of her physical restrictions."[26] A thorough review of the record indicates that the claimant did not testify or otherwise show that she informed prospective employers of her disability.[27] Because the claimant bears the burden of proving that she has been denied employment because of her disability,[28] I find that the claimant has failed to meet her burden by not establishing that she informed prospective employers of her disability. This case is distinguishable from other cases where the claimants have testified that they informed prospective employers of their disability in their applications.[29]

Westminster Vill., 2006 WL 2382832, at *4 (Del. Super. Aug. 17, 2006) ("[The claimant] must prove she is unable to find employment **because of her injuries**. If none of the employers knew of her injuries, as Claimant testified, she could not have possibly been denied employment because of her injuries.").

[26] *Dixon v. State of Delaware*, I.A.B. Hearing No. 1358419, at 11 n.6.

[27] The record reflects that claimant informed Absolute Home Healthcare and Comfort Suites of her disability either during or after her interviews and not in her applications. There is no evidence that she interviewed with any other employer between quitting the Comfort Suites job and the time of her Board hearing.

[28] *Keeler v. Metal Masters Foodservice Equip. Co.*, 712 A.2d 1004, 1005 (Del. 1998) ("The burden of proof under the displaced worker doctrine requires an employee-claimant who is not *prima facie* displaced to produce evidence that he or she has sought suitable employment yet has been denied such employment due to restrictions attributable to the injury." (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973))).

[29] *See e.g.*, *Watson*, 30 A.2d at 778 ("[The claimant] applied online and in person, and always disclosed his disability on the applications."); *but cf. Meloni*, 2006 WL 2382832, at *4 ("'Claimant admitted in her testimony that the employers she contacted did not know about her injury or physical

Therefore, the judgment of the Board is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
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restrictions, and thus they made their hiring decisions on factors other than her physical abilities.'"); *Torres*, 672 A.2d at 31 ("[T]he claimant only mentioned her physical disability on two of her cover letters. Thus, most of the employers she contacted could not have refused to hire her because of her injury since they knew nothing about it.").