IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GENERAL MOTORS CORPORATION,	)	
	)	
Employer-Below/Appellant,	)	
	)	
v.	)	C.A. No. N12A-07-006 WCC
	)	
REBECCA TOME,	)	
	)	
Claimant-Below/Appellee.	)	

Submitted: March 17, 2013
Decided: July 25, 2013

Appeal from the Industrial Accident Board – AFFIRMED

OPINION

Linda L. Wilson, Esquire. Marshall, Dennehey, Warner, Coleman & Goggin, 1220 N. Market Street, 5th Floor, P.O. Box 8888, Wilmington, DE 19899-8888. Attorney for Appellant.

Robert P. LoBue, Esquire. Law Office of Robert P. LoBue, 803 Shipley Street, Wilmington, DE 19801. Attorney for Appellee.

CARPENTER, J.

General Motors Corporation ("GM") seeks a reversal of the Industrial Accident Board's ("IAB") June 6, 2012 decision, which awarded Rebecca Tome ("Tome") partial disability benefits as well as attorney's and witness fees. On appeal, GM alleges the IAB erred as a matter of fact and law. Specifically, GM claims: 1) the IAB's finding was not supported by substantial evidence and, therefore, Tome should not have been awarded partial disability benefits; and 2) even if Tome was entitled to partial disability benefits, the IAB erred in determining her average weekly wage.

For the reasons discussed below, the decision of the IAB is hereby **AFFIRMED**.

FACTUAL BACKGROUND

Tome suffered a non work-related injury in 1996 that required her to seek treatment with Dr. Rudin and ultimately undergo lower back surgery in October 1997. Specifically, Dr. Rudin performed an anterior lumbar interbody fusion and nerve root decompression in 1997, which allowed Tome to return to work on the assembly line in a restricted capacity. Tome, however, experienced worsening back pain over time and, as a result, was moved to a different position within GM. In this new position, Tome was responsible for driving defective cars off the assembly line and, while she was performing her job in 1999, she was t-boned by

another employee. Although Tome initially returned to work, she saw Dr. Rudin periodically. Eventually, Tome required surgery to relieve her lower back discomfort. On January 30, 2003, Dr. Rudin performed an exterior fusion of the L4-L5 and L5-S1, including pedicle screw fixations. Following the 2003 surgery, Tome received total disability benefits for an eleven-month period beginning January 30, 2003.

Tome had a functional capacity exam ("FCE") nine (9) months after the 2003 surgery and was cleared to return to light duty work, provided she was not standing for long periods of time, bending, or lifting. In November 2003, Tome returned to work at GM re-routing shifter cables. Tome performed this job for four (4) to six (6) months before transferring to a new position as a job coordinator. In this new role, Tome filled in for other workers when they were out but did not perform any tasks that involved bending.

Even though Dr. Rudin remained concerned about Tome lifting anything greater than ten (10) pounds or performing repetitive bending, Tome would have been unable to return to work as a union worker with such restrictions. As a result, Dr. Rudin provided Tome with subsequent notes, indicating that Tome could return to work full duty with no restrictions. Fortunately, because Tome had worked at GM since June 15, 1978, she had seniority and could typically secure

lighter duty positions, even though the notes technically stated that she had no work restrictions.

Tome continued to work at GM, but by 2009, the economic climate began to affect GM at the local assembly plant; employees were either laid off or reduced to working every other week. While Tome was not laid off, she worked every other week until the plant closed on July 31, 2009. Believing she would not be accepted with her physical limitations, or that she would not have had similar seniority to maneuver to light duty at a different plant, Tome did not request to transfer to another GM facility and retired from GM on August 1, 2009.

After retiring from her thirty-one and one half (31.5) years of employment with GM, Tome began applying for a new job. Approximately one (1) year later on August 10, 2010, Tome secured a sedentary job at W.L. Gore ("Gore") as a temporary employee ("temp") prepping cable wires. Although Tome previously earned between $22-23 per hour and typically worked around 50-60 hours per week at GM, she earned $11 per hour and typically worked 40 hours per week at Gore. However, because Tome was only hired as a temp, she was laid off at Gore on September 30, 2011.

On November 23, 2011, Dr. Rudin removed Tome from work because she was having difficulty performing even sedentary tasks. On December 7, 2011, Dr.

Rudin saw Tome again and suggested additional surgery to alleviate her adjacent segment deterioration at L3-L4. However, because Tome was rehired by Gore on April 9, 2012, earning $12 per hour and working 40 hours per week, the surgery was not performed. During Tome's employment with Gore, she did not secure approval from Dr. Rudin nor did she provide Gore with a note regarding her restrictions. Tome has applied for other non-temp positions at Gore, but priority has been given to other employees with more seniority, and she has continued as a temporary employee.

PROCEDURAL BACKGROUND

On December 7, 2011, Tome filed a Petition to Determine Additional Compensation Due, seeking compensation for partial disability from August 8, 2010 and onward. Although GM acknowledged that Tome sustained a work-related injury for which she was compensated, GM argued that Tome was not entitled to partial disability benefits. A hearing was held before the IAB on June 8, 2012 and a decision in favor of Tome was issued on June 20, 2012. Specifically, the IAB found that Tome was entitled to receive partial disability benefits from August 8, 2010 and onward at a rate of $434.68 per week. As a result, GM timely filed this appeal.

STANDARD OF REVIEW

On appeal, the Court's review of the IAB's decision is limited to determining whether the IAB's findings and conclusions are supported by substantial evidence and free of legal error.[1] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] Additionally, questions of law are reviewed *de novo*.[3] However, the Court "does not weigh the evidence, determine questions of credibility, or make its own factual findings."[4] Further, the Court "must give deference to 'the experience and specialized competence of the Board,' and must take into account the purposes of the Workers' Compensation Act."[5] Therefore, if substantial evidence exists and there is no error of law, the Court must affirm the IAB's decision.[6]

DISCUSSION

Although both parties agreed that Tome's 1999 work accident was compensable, the issue on appeal is whether Tome has a diminished earning

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[1] *See e.g.*, *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[2] *Id.*
[3] *See Baker v. Allen Family Foods*, 1997 WL 818015, at *2 (Del. Super. Dec. 2, 1997) (citations omitted).
[4] *ILC of Dover, Inc. v. Kelley*, 1999 WL 1427805 (Del. Super. Nov. 22, 1999) (citing *Johnson*, 213 A.2d at 66 (Del. 1965)).
[5] *Del. Transit Corp. v. Hamilton*, 2001 WL 1448239 (Del. Super. Oct. 31, 2001) (citing *Histed*, 621 A.2d at 342 (Del 1965)).
[6] *See Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002).

capacity as a result of this work-related injury. Specifically, GM argues that the IAB's decision to award Tome partial disability benefits was not supported by substantial evidence and, therefore, constitutes legal error. Further, GM contends that the economy—and not Tome's inability to earn—is responsible for Tome currently earning less at Gore than she previously made at GM. Additionally, GM alleges that even if partial disability benefits are warranted, the IAB erred in calculating the amount owed to Tome. Conversely, Tome argues the IAB's decision was supported by substantial evidence and the amount of partial disability benefits awarded is a factual issue, which was properly decided by the IAB. The Court will address each of these issues in turn.

A. Partial Disability Benefits

First, GM contends Tome did not prove that, as a result of her 1999 work accident, she suffered diminished earning power. GM does not dispute that Tome suffered a compensable work-related injury or that she has restrictions as a result of that 1999 accident. GM acknowledges that Tome is currently earning less at Gore but claims this is insufficient to establish that Tome is entitled to partial disability benefits. Specifically, GM states that Tome did not introduce any evidence linking her current restrictions to a diminished earning capacity. Moreover, GM suggests that Tome's currently lower wages are due to both

economic reasons and Tome's unwillingness to apply for any position that would require her to relocate. In particular, GM states that Tome could have applied to transfer to another GM plant but chose not to do so due to personal reasons—not because of her physical restrictions.

Under Delaware's Workers' Compensation Act, the term "partial disability" is not defined.[7] "By implication, however, the term refers to that period of time during which an injured employee suffers a partial loss of wages as a result of his injury."[8] To be entitled to partial disability benefits, therefore, a claimant must prove by a preponderance of the evidence that she suffered a loss of earning capacity due to a *work injury*—not economic conditions or lack of job training.[9] Therefore, in evaluating a claimant's partial disability, several pertinent factors must be considered; these factors include, but are not limited to: medical testimony, claimant's physical capabilities, availability of appropriate work, and rate of compensation.[10]

To find Tome was entitled to partial disability benefits, she is required to prove: 1) "she has suffered a diminished earning capacity compared to her wages at the time of the accident"; and 2) "the diminished earning capacity is causally

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[7] *See Globe Union, Inc. v. Baker*, 310 A.2d 883, 887 (Del. Super. 1973) *aff'd* 317 A.2d 26 (Del. 1974).
[8] *Id.*
[9] *See Ruddy v. I.D. Griffith & Co.*, 237 A.2d 700 (Del. 1968); *see also Fed. Bake Shops, Inc. v. Maczynski*, 180 A.2d 615 (Del. Super. 1962).
[10] *See Globe Union*, 310 A.2d at 888.

related to her work injury."[11] In evaluating such a case, the IAB looks beyond medical and physical factors and considers post-injury earning capacity. The IAB explained that earning capacity "is a function of the employee's 'age, education, general background, occupational and general experience, emotional stability, the nature of the work performable under the physical impairment, [] the availability of such work" and, therefore, these factors must also be considered.[12] Here, the IAB took into consideration that: 1) "Tome's work-related physical condition has remained the same, although arguably there is some deterioration"; 2) "the light duty positions that had been 'available' to [Tome] at the same wages and hours as her pre-accident position are no longer available"; 3) Tome "has an ongoing restriction which limits the types of jobs she can perform, not just in the auto industry, but in any job"; 4) Tome is experiencing a "recent worsening of her condition, which Dr. Rudin causally related to her 1999 work injury"; and 5) "[t]here was no contrary evidence presented to show the availability of jobs with a higher wage rate" to which Tome could apply.[13]

The IAB concluded that Tome had a diminished earning capacity related to her work injury. Specifically, the IAB stated that it was "more likely than not" that Tome has "some type of permanent restriction," reasoning that her prior

[11] *Tome v. Gen. Motors Corp.*., No. 1243135, at * 13 (Del. I.A.B. June 8, 2012).
[12] *Id.* at 14 (citing *Ham v. Chrysler Corp.,* 231 A.2d 258, 261 (Del. 1967)).
[13] *Id.* at 16-17.

fusion at L4-L5 is now causing symptomatic adjacent segment degeneration at L3-L4.[14] In support of its decision, the IAB found Tome's testimony to be credible, even stating that her credibility was further "enhanced" by her motivation to continually seek full-time employment. As further support, the IAB relied upon Dr. Rudin's testimony, accepting his unrebutted statements regarding Tome's restrictions and his belief regarding Tome's permanent impairment.

Additionally, the IAB addressed whether there was a rebuttable presumption of nonimpairment since Tome did not experience a difference in salary immediately following either the 1999 work accident or the 2003 surgery. Specifically, the IAB stated that just as "an injured worker's actual receipt of lower wages does not necessitate a finding of diminished earning capacity," "the mere fact that an 'employee receives post-injury compensation equal to that earned by him before the injury [does] not, *per se*, defeat his claim for compensation.'"[15] The IAB noted that simply because an "employee returned to work at no wage loss did not mean that that employee could not claim partial disability benefits in the future if he could establish that, as a result of the work accident, he had a diminished earning capacity."[16] Here, the IAB recognized that Tome did not initially suffer a wage loss during her employment with GM because she was able

[14] *Id.* at 15.
[15] *Id.* at 14 (citing *Ruddy v. I.D. Griffith & Co.*, 237 A.2d 700, 703 (Del. 1968)).
[16] *Id.* at 15.

to use her seniority to find positions within her restrictions at GM. However, the IAB acknowledged that "[i]t is [now] unlikely that [Tome] would be able to secure a [new] position with the same hourly rate as her UAW job at GM with her physical restrictions."[17] The Court finds that this is not only a common sense conclusion, but one that can be reasonably inferred from Tome's testimony.

The Court has found this to be a difficult case. It is obvious to the Court that Tome is a hard-working individual who has not attempted to take unfair advantage of her Workers' Compensation situation. Tome worked at GM for over thirty-one (31) years and when the plant closed, she decided to retire due to her personal family situation. Almost immediately after leaving GM, Tome began applying for employment, including jobs that likely did not accommodate her physical limitations. Tome wanted to work and eventually landed a temporary job at Gore. There is nothing in the record to suggest that Tome was not diligent in her search for employment, and the jobs she sought were consistent with the manufacturing position she previously held at GM. Despite her efforts, jobs were scarce, and the market simply did not have GM-paying type jobs available. While not artfully done, Tome has established that even without disclosing any physical limitations to the companies where she sought employment, the pay was

[17] *Id.*

substantially less than her GM position. As such, it is fair to infer that if Tome had presented herself as a potential employee that could not lift more than ten (10) pounds, bend more than a forty-five (45) degree angle, or stand for more than a few hours, there would have been even fewer opportunities where she could have obtained employment.

In order to fully make the causal connection, there is no question that counsel for Tome should have developed the record more carefully and provided the IAB with expert testimony regarding the availability of jobs based upon Tome's restrictions, education, and work history. Obviously, this would have increased litigation costs, and given Tome's situation, perhaps it was not practical. However, even with this deficiency, the Court cannot say substantial evidence does not exist to support the IAB's conclusion.

The IAB has fairly and appropriately articulated its reasons for finding Tome was entitled to partial disability benefits, and the Court finds the IAB did not err as a matter of law in relying, in part, on either Tome's or Dr. Rudin's unrebutted testimony to conclude that there was a causal relationship between Tome's diminished earning capacity and her 1999 work accident. The IAB found both individuals to be credible and persuasive, and it is well accepted that "[i]t is not within the purview of this Court to resolve issues of credibility and assign

weight to evidence presented."[18] "As a general rule, the credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine."[19] Therefore, "[o]nly when insufficient facts in the record exist to support a factual finding will the Court overturn the Board's findings."[20] As a result, the Court finds there are sufficient facts in the record to support the IAB's decision to accept both Tome's and Dr. Rudin's testimony and, therefore, the Court will not disturb the IAB's decision on appeal.

If GM or its insurance carrier is unhappy with the results they obtained from the IAB, they have no one to blame but themselves. Although conceivably not their burden, they had significantly greater financial resources that would enable them to present evidence to counter any suggestion that Tome had a diminished earning capacity as a result of her injuries. Instead, GM presented no evidence and simply relied upon the IAB to mirror its conclusion after the arguments they presented. Retrospectively, this clearly did not achieve their desired outcome.

As a result of the above-mentioned reasons, the Court will not disturb the IAB findings in this matter.

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[18] *Christiana Care Health Sys, VNA. v. Taggart*, 2004 WL 692640, at *12 (Del. Super. Mar. 18, 2004) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965)).
[19] *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).
[20] *Christiana Care*, 2004 WL 692649, at *12 (citing *Johnson,* 213 A.2d at 67).

B. Average Weekly Wage

GM next argues that the IAB erred in calculating the amount of partial disability benefits to which Tome was entitled. Specifically, GM contends that the IAB used the improper average weekly wage to calculate Tome's partial disability benefits and, therefore, she was awarded more than she was entitled to receive. In support of this argument, GM cites the conflicting compensation agreements that Tome signed during her employment with GM. As noted by the IAB, "[u]tilizing the correct [average weekly wage] makes a big difference in the calculation of partial disability."[21] This is because "[p]artial disability compensation is paid at the rate of '66 2/3 percent of the difference between the wages received by the injured employee before the injury and the earning power of the employee thereafter.'"[22] At the time of the accident, the correct method of calculating an employee's average weekly wage was to take the employee's hourly rate and multiply it by the average work week of the *employer*. However, GM claims that because Tome was unsure of her hourly rate in 1999 and could not provide evidence of GM's average work week,[23] Tome's partial disability benefits should be calculated based upon the initial compensation agreement.

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[21] *Tome v. Gen. Motors Corp.*., No. 1243135, at * 17 (Del. I.A.B. June 8, 2012).
[22] *Id.* at 13 (citing Del. C. Ann. Tit. 19, § 2325).
[23] The Court notes this is information that would be readily available to the employer.

At the IAB hearing, GM submitted an Agreement as to Compensation, which was dated November 24, 2003 and listed an average weekly wage of $884.80, while Tome submitted an Agreement as to Compensation, which was dated October 7, 2004 and listed an average weekly wage of $1382.50. Additionally, Tome testified that her hourly rate in 1999 was between $22-23 per hour and that she worked overtime, which totaled around 50-60 hours per week. Moreover, the IAB noted that "[a]ll the [compensation] agreements were signed by the same insurance adjuster of GM, Ruth Smith," which allowed the IAB to believe that "the carrier was fully aware of the change in the [average work week] and sanctioned it."[24] As a result, the IAB concluded that the second compensation agreement should be used to calculate Tome's partial disability benefits. From this agreement, the IAB calculated Tome's wage loss to be $852.55 weekly and, therefore, entitled her to receive partial disability benefits of $434.68 per week.[25]

From the Court's perspective, the simple answer to GM's argument is that the October 7, 2004 compensation agreement was signed and approved by GM. The Court finds it difficult to now accept that GM should not be bound by the last compensation agreement entered into evidence or that the IAB in some way erred when it found the agreement as the more appropriate reflection of

[24] *Id.* at 18.

[25] Since the Compensation Agreement was used as the basis to determine benefits, the Court finds the issues relating to what Tome's average work week was have become moot.

Tome's wages. Clearly before the hearing the parties were aware of the conflicting documents, and it is astonishing to the Court that neither party made a significant attempt to present evidence to help the IAB resolve the conflict.

As such, this Court is now required to determine if there is any evidence to support the IAB's conclusion. Tome's testimony reflected that she was making $22 to $23 per hour, and in 1999 when the injury occurred, she worked 50 to 60 hours a week and would be paid time and a half for overtime. If the Court accepts the $23 hour salary, multiplying that number by a normal 40 hour work week would reflect a wage of $920. Accepting the unrebutted testimony that Tome worked between 50 and 60 hours a week, 13 hours of overtime a week at time and a half would reflect a total weekly wage of $1368.50. In other words, a 53 hour work week at $23 an hour would equal $1368.50. If the wage was $22 an hour, a 55 hour work week would be $1375.00. Both calculations are close to the $1382.05 set forth by the second compensation document and are consistent with Tome's testimony. As such, while not articulated well by the IAB, there is evidence to suggest that the $1382.05 is a fair and accurate representation of Tome's salary in 1999, and the Court will not overturn the IAB compensation calculation.

CONCLUSION

It is not disputed that Tome suffered a compensable work-related injury in 1999. However, in order to receive additional compensation due, Tome was required to prove that she has a diminished earning capacity as a result of this work-related injury. Finding Tome met her burden of proof, the IAB awarded Tome partial disability benefits from August 8, 2010 and onward at a rate of $434.68 per week. The Court finds that substantial evidence on the record supports this decision and that it is free of legal error.

Based on the foregoing reasons, the decision of the Industrial Accident Board is, therefore, **AFFIRMED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.