

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SHIRLEY TAYLOR)	
)	CIVIL ACTION NUMBER
Plaintiff)	
)	09A-08-006-JOH
v.)	
)	
DIAMOND STATE PORT CORP.)	
)	
Defendants)	
)	

Submitted: January 20, 2010

Decided: April 29, 2010

MEMORANDUM OPINION

Upon Appeal from the Industrial Accident Board - AFFIRMED

Appearances:

Yvone Takvorian Saville, Esquire, of Weiss & Saville, P.A., Wilmington, Delaware, Attorney for Appellant, Shirley Taylor

Francis X. Nardo, Esquire, of Tybout Redfearn & Pell, Wilmington, Delaware, Attorney for Appellee, Diamond State Port Corp.

HERLIHY, Judge

This appeal from the Industrial Accident Board requires this Court for the first time to interpret a recent statute providing the basis for calculating an injured employee's wages for benefit purposes. The statute at issue basically provides the injured employee's wages are calculated on an average weekly basis for 26 weeks immediately preceding the injury by adding up all the wages earned in the previous 26 weeks and dividing by 26. Shirley Taylor did not work during each of the preceding 26 weeks due to the nature of her job or unrelated unavailability.

While she was still "employed" by her employer, Diamond State Port Corporation during the 26 weeks, she only worked in 16 of the 26 weeks. The issue presented to the Court and to the Board was whether her total wages for those 16 weeks should be divided by 16 - the number of weeks she worked - or by 26. The Board decided the denominator should be 26 to avoid a windfall to her. Utilizing well-known rules of statutory construction, the Court also holds the correct interpretation of the statute is to use the number 26 as the denominator.

The Board's decision is **AFFIRMED**.

Factual Background

On August 2, 2007, Shirley Taylor suffered a compensable injury while working for her employer, Diamond State Port Corporation ("Diamond"). Taylor worked as a laborer for Diamond unloading cargo as it would arrive at the port. As a result of her injury, Taylor suffered damage to her head, neck, back and right ankle. She received total

disability benefits for the time lost from work, partial disability benefits, permanency for the head and back injuries as well as medical expenses. However, the parties could not reach an agreement concerning Taylor's average weekly wage.

Taylor's pay history is undisputed. Over the course of the 26 weeks prior to her injury, Taylor earned \$12,610.00 in wages from Diamond. She earned \$18.00 per hour, and was employed at Diamond for 12 years prior to her injury. However, her work schedule was sporadic. This was based on two factors, first that there was not always work for her at Diamond, and second, that she suffered from non-employment-related health conditions that prevented her from coming to work on occasion. Both parties agree that during the relevant 26 week period, Taylor actually worked 16 weeks. In the weeks she received wages, she earned between \$561 and \$1113. She received no income from Diamond on the weeks she did not work any hours.

Both parties requested a hearing before the Board to determine her appropriate average weekly wage rate. On May 21, 2009, that hearing took place. Taylor argued that 19 *Del. C.* § 2302(b) and (b)(1) determined the rate she was to be awarded, while Diamond argued that § 2302(b)(1) was inapplicable and the wage should be calculated solely according to § 2302(b).¹ Section 2302 requires the employer to pay the employee

¹ Section 2302(b) states:

(b) The average weekly wage shall be determined by computing the total wages paid to the employee during the 26 weeks immediately

(continued...)

for a compensable accident the total amount she earned in the last 26 weeks divided by a certain number of weeks. The fundamental difference was whether to place a 26 or 16 in the denominator of the calculation. Taylor argued that the Board should divide her income by 16 to represent the actual number of weeks she worked over the last 26 months.

¹(...continued)

preceding the date of injury and dividing by 26 provided that:

(1) if the employee worked less than 26 weeks, but at least 13 weeks, in the employment in which the employee was injured, the average weekly wage shall be based upon the total wage earned by the employee in the employment in which the employee was injured, divided by the total number of weeks actually worked in that employment;

(2) If an employee sustains a compensable injury before completing that employee's first 13 weeks, the average weekly wage shall be calculated as follows:

a. If the contract was based on hours worked, by determining the number of hours for each week contracted for by the employee multiplied by the employee's hourly rate;

b. If the contract was based on a weekly wage, by determining the weekly salary contracted for by the employee; or

c. If the contract by based on monthly salary, by multiplying the monthly salary by 12 and dividing that figure by 52; and

d. If the hourly rate of earnings of the employee cannot be ascertained, or if the pay has not been designated for the worked required, the average weekly wage, for the purpose of calculating compensation, shall be taken to be the average weekly wage for similar services performed by other employees in like employment for the last 26 weeks.

19 *Del. C.* § 2302(b).

Diamond argued that under § 2302(b) the Board should divide her wages by 26. The pragmatic difference between the two calculations was \$485 under Diamond’s calculation versus \$788.12 under Taylor’s.

The Board issued its decision on July 29, 2009. It first noted that this issue was a matter of first impression in Delaware. It further held that the term “worked” as cited in § 2302 was ambiguous and attempted to give effect to legislative intent.² It agreed with Diamond and held that § 2302(b) was the proper method of calculation and § 2302(b)(1) did not apply because she had been employed by Diamond for longer than 26 weeks. It held that Taylor would reap a windfall if it divided by the *actual* number of weeks because Taylor received nothing on occasion. In accordance with that holding, the Board determined that Taylor’s rate was \$485 per week.³ Taylor filed this timely appeal.

Parties’ Contentions

Taylor argues that the primary rule of statutory construction when a court or the Board is faced with an ambiguous statute is to give effect to the intent of the General Assembly. She argues that one of the objectives of the Worker’s Compensation Act⁴ is to “arrive at as fair an estimate as possible of the claimant’s future earning capacity.”⁵ She

² Board Decision at 5.

³ *Id.* at 6.

⁴ 19 *Del. C.* §§ 2301-2397.

⁵ Taylor’s Br. at 10 (citing *Furrowh v. Abacus Corp.*, 559 A.2d 1258, 1260 (Del. 1989)).

argues that in order to give effect to the legislature and to reach a fair compensation amount, § 2302(b)(1) must be used in order to divide the total amount earned in the last 26 weeks by the number of weeks actually worked. She represents that § 2302(b)(1) is applicable to any employee who did not work for the last 26 consecutive weeks prior to his or her accident. Also, she highlights that the amount determined by the Board was below the minimum amount she earned in any given week which, she contends, demonstrates the inadequacy of the Board's interpretation.

In opposition, Diamond agrees with Taylor that the meaning of "worked less than 26 weeks" is ambiguous and the Court must give effect to the General Assembly's intent. Diamond argues that Taylor's interpretation gives her a windfall. It stresses that the Court cannot ignore the weeks in which she received no income because she did not work, and that needs to be considered when calculating a fair estimate of her future earning capacity. It argues that its interpretation, and the Board's decision, is grounded in public policy and should be affirmed.

Discussion

The Board's interpretation and construction of a statute is a purely legal determination and is reviewed *de novo*.⁶ The Court agrees with the Board's assessment that the term, "worked less than 26 weeks" is ambiguous. "Under Delaware law, a statute is ambiguous if: it is reasonably susceptible to different conclusions or interpretations; or

⁶ *New Castle County Dept. of Land Use v. Univ. of Del.*, 824 A.2d 1201, 1206 (Del. 2004).

second, a literal interpretation of the words of the statute would lead to an absurd or unreasonable result that could not have been intended by the legislature.”⁷ Two reasonable conclusions can be drawn from the statute. The first is that § 2302(b)(1) applies only to employees who have been employed less than 26 weeks with their current employer. The second interpretation is that § 2301(b)(1) covers any employee, regardless of their duration with their employer, as long as he or she worked not less than 13 weeks and not more than 26 weeks of the 26 weeks prior to his or her injury. The statute is ambiguous. The Court must attempt to resolve this ambiguity by giving effect to the legislature’s intent.⁸ Furthermore, the statute must be read in a way that will promote its purpose.⁹

The Supreme Court has interpreted the General Assembly’s intent in enacting the Worker’s Compensation Act as, “to provide a scheme for assured compensation without regard to fault and to relieve employers and employees of the expenses and uncertainties of civil litigation.”¹⁰ Worker’s Compensation “reflects a public policy to compensate employees for injuries arising out of and in the course of employment.”¹¹ It is meant to

⁷ *Harris v. State*, --- A.2d ----, 2010 WL 1347100, at * 8 (Del.)(citing *Leatherbury v. Greenspun*, 939 A.2d, 1284, 1288 (Del. 2007)).

⁸ *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998).

⁹ *Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 19 (Del. 2000).

¹⁰ *Id.* at 18.

¹¹ *Willing v. Midway Slots*, 2003 WL 21085398, at *2 (Del. Super.).

compensate employees for their lost earning capacity not their lost income.¹² The statute “is to be liberally construed with reference with its intended benevolent purpose.”¹³

The current version of § 2302 was enacted on January 17, 2007. It was part of a sweeping change to Worker’s Compensation laws in Delaware.¹⁴ Section 5 provides the relevant changes to § 2302. In the synopsis to the Act, the General Assembly explained, “Section 5 clarifies the calculation of wage rates, particularly for employees with limited work histories.” The preamble and the synopsis accompanying a legislative amendment are instructive when trying to glean the General Assembly’s intent.¹⁵

Evidently, the General Assembly intended that the amendments, which included the addition of § 2302(b)(1), to focus on employees who were not with their employees for

¹² *Fitzgerald v. State*, 1992 WL 240340, at *2 (citing *Howell v. Supermarkets Gen. Corp.*, 340 A.2d 833 (Del. 1975)).

¹³ *Gen. Motors v. Coulbourne*, 415 A.2d 1345, 1347 (Del. 1979).

¹⁴ 76 Del. Laws 1, § 5. Prior to the amendment, § 2302 stated:

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. If the rate of wages is fixed by the output of the employee, then the employee’s weekly wages shall be taken to be the employee’s average weekly earning for so much of the preceding 6 months as the employee has worked for the same employer. If because of exceptional circumstances, such method of computation does not ascertain fairly the earnings of an employee, then the weekly rate shall be based on the average earnings for 6 months of an average employee of the same or most similar employment.

¹⁵ *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932, n. 13 (Del. 2007).

a long period of time. It appears that the General Assembly was attempting to alleviate a situation in which a new employee who had not yet worked 26 weeks prior to the injury was to be penalized by having his or her total pay divided by a greater number of weeks than he or she was ever employed by the employer.

Section 2302(b)(2) provides further instruction if an employee was on the job less than 13 weeks by providing a formula that does not consider actual wages earned, but rather the wage agreed to between the employer and employee. Section 2303(b)(2) requires “[A]n employee [to] sustain[] a compensable injury before completing the employee’s *first* 13 weeks” before it takes effect.¹⁶ It is clear from the statute that any employee who was with his or her company for years, yet only worked 12 of the last 26 weeks would not be able to quantify his or her wages under § 2303(b)(2) or (1). Under Taylor’s proposed construction, she would not be able to use § 2302(b) either, her wage calculation would not be determinable by the Worker’s Compensation statutes. The Court cannot assume that the General Assembly would have intended to create a statute that further muddies the waters instead of clarifying them.

Taylor states that the Court should reject the Board’s interpretation of the statute because her earnings ranged from \$561 and \$1113 per week and Diamond’s interpretation of the statute only yielded Taylor a weekly average of \$485. She uses this to show that she was being compensated less than her earning capacity because she was earning less

¹⁶ 19 *Del. C.* § 2302(b)(2)(emphasis added).

than her minimum weekly pay. While this argument is tempting, it ignores one very important fact: there were 10 weeks of the previous 26 where Taylor received no wages. To pay her based only on the weeks she earned a paycheck, while disregarding the weeks she earned nothing, would create a windfall in Taylor's favor. Mindful of Delaware courts' liberal construction of the Worker's Compensation law, it cannot be the General Assembly's intent to create a windfall. Those weeks of zero earnings must be taken into effect because she is now to receive a consistent paycheck instead of her sporadic earnings.

A full average of her pay over a 26 week period, then divided by 26 accurately represents Taylor's earning potential. It is consistent with the General Assembly's intent of accurately setting a fair wage amount without the expense of a full trial. The Board's interpretation is in line with the Court's and is **AFFIRMED**.

IT IS SO ORDERED.

Judge