

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

T. HENLEY GRAVES  
*RESIDENT JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947

(302) 856-5257

August 20, 2013

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RE: **Kenneth Howell v. Wilson Masonry**  
**C.A. No: S13A-02-003THG**

Dear Counsel:

Before the Court is Mr. Howell's appeal of a decision from the Industrial Accident Board. Briefing was completed on August 1, 2013.

Mr. Howell was injured in 2009 when a scaffold collapsed. The injury to his left foot and ankle continue to prevent him from returning to work as a bricklayer or mason. He has physical limitations and continuing pain. Both Mr. Howell's doctor and employer's doctor agree on his present medical circumstances.

Employer's doctor testified that although the injury kept Mr. Howell from his previous

job, he was capable of a full time, sedentary job. Mr. Howell's doctor testified that he agreed that Mr. Howell could return to work in a modified duty capacity.

Employer presented the testimony of a vocational rehabilitation specialist who opined that she considered Mr. Howell's education and work history to determine what sedentary positions might be available for him. The witness identified 13 entry level jobs that would be available for which Mr. Powell was educationally, vocationally, and physically qualified. Four (4) of these positions remained open as of the day she testified.

Mr. Howell testified that he can do little more than housework and take his children to and from school. He testified the pain caused by his injury requires medication and that he spends most of his day seeking relief by reclining in his recliner. Mr. Howell denied having the vocational skills for the entry level jobs included in the aforementioned survey of potential employment.

The Board determined that Mr. Howell was physically capable of working in a sedentary work environment. The Board determined that Mr. Howell was not a displaced worker.

The Board then considered the timing of Mr. Howell's discovery that his doctor had just recently opined he was no longer fully disabled. Therefore in determining Mr. Powell's partial disability and how same would reasonably affect his earning power, the Board only considered the four jobs that were available at the time of the hearing. The Board concluded the low end average compensation for these four positions to be \$492.50 per week. Mr. Howell's wage at the time of the accident was \$500.00 per week resulting in a Board determination that he had a net diminished earning capacity of \$7.50 per week. Applying 19 *Del. C. Section 2325* the end result for Mr. Howell was a partial disability compensation award of \$5.00 per week.

## DISCUSSION

It is this Court's role in the appellate review of the Board's decision "to determine whether the Board's decision is supported by substantial evidence and free from legal error" Miller v. Lutheran Senior Services, 2010 WL 702424 (Del. Super June 5, 2010 ; Hartnett, Inc v. Coleman, 226 A.2d 910 (Del. 1967). This Court does not sit as a trier of fact and therefore does not re-weigh the weight of the evidence or credibility decisions by the Board. Johnson v. Chrysler Corp., 213 A.2d 64 (Del. 1965). The Board's findings must be the product of a rational thought process in view of the evidence and applicable law. Quaker Hill Pace v. Saville, 523 A.2d 947 (Del. Super. 1987).

In this case the Claimant argues that the Board was wrong as to its ultimate conclusion that Claimant can return to work by way of a sedentary job. He argues such work would be new to him and would require retraining. These are issues that were in factual dispute. The Board found that Claimant could work in a diminished capacity. The Board considered jobs then available in calculating his partial disability. The Board's factual findings cannot be revisited in this appeal.

The fact that the Board's ruling results in what Claimant feels is a "paltry loss of earning capacity" does not mean it was an irrational decision or an arbitrary decision.

I find that the Board's decision was based on its ultimate determination of the finder of the facts and that the Board did not err as a matter of law, therefore the Board's decision is affirmed.

IT IS SO ORDERED.

Very truly yours,

*/s/ T. Henley Graves*

T. Henley Graves

pc: Prothonotary  
Industrial Accident Board