IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DIANA HACKER,	)	
	)	
Claimant Below-Appellant,	)	
	)	
v.	)	C.A. No. 02A-06-005 HDR
	)	
NEWELL/KIRSCH,	)	
	)	
Employer Below-Appellee.	)	

Submitted: February 4, 2003
Decided: May 20, 2003

Walt F. Schmittinger, Esq. of Schmittinger and Rodriguez, P.A., Dover, Delaware, for Claimant Below-Appellant.

Cassandra Faline Kaminski, Esq. of Young, Conaway, Stargatt & Taylor, LLP, Wilmington, Delaware, for Employer Below-Appellee.

O P I N I O N

Upon Claimant's Appeal
from a Decision of the
Industrial Accident Board
AFFIRMED

RIDGELY, President Judge

Hacker v. Newell/Kirsch
02A-06-005 HDR
May 20, 2003

This is the appeal of claimant Diana Hacker from the June 24, 2002 order of the Industrial Accident Board ("Board"), which found that she was a part-time employee of Newell/Kirsch and awarded her compensation at her hourly wage of $13.50 for 20 hours of work per week. Hacker appeals only the number of hours per week compensated. I find that the decision is supported by substantial evidence and free of legal error. Accordingly, it is affirmed.

I. FACTS

The relevant facts are undisputed. Prior to her accident, Hacker had been employed for approximately two months as a merchandiser for Newell/Kirsch, a supplier of drapery hardware to retail stores. Hacker was hired to work 20-29 hours per week; her duties included taking inventory and stocking the drapery products in the K-Mart and Ames stores in Delaware and Salisbury, Maryland on a frequency set by Newell/Kirsch. She was assigned to service each of thirteen stores from four to twelve times per year. On December 6, 2000, Hacker fell from a ladder while working in a K-Mart store and was unable to work until January 28, 2001.

II. STANDARD OF REVIEW

This court's role in reviewing a decision of the Board is to determine whether the decision is supported by substantial evidence and is free from legal error.[1] Substantial evidence has been defined to mean, "such relevant evidence as a

[1] 29 *Del. C.* § 10142(d); *General Motors v. Freeman,* 164 A.2d 686, 688 (Del. 1960).

reasonable mind might accept as adequate to support a conclusion."[2] This Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[3] When factual determinations are at issue, the Court "shall take due account of the experience and specialized competence of the agency."[4]

III. ASSERTIONS OF THE PARTIES

Hacker argues that she should be compensated at a full-time rate of 40 hours per week based primarily on *Furrowh v. Abacus Corp*.[5] In that case, Furrowh, a part-time security guard, was compensated for a work injury at a full-time rate. The Court noted that Furrowh had applied for full-time employment but had accepted a part-time position because the full-time positions were filled. The Board found that Furrowh was available for full-time employment, had worked 32-40 hours per week at her prior position, and her average workweek was well above the average workweek calculated using all Abacus guards, which consisted of 20% full-time and 80% part-time guards.[6]

Newell/Kirsch argues that the evidence shows that Hacker was an inherently part-time employee, with no indication that her employment would, under any

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[2] *Olney v. Cooch,* 425 A.2d 610 (Del. 1981), *quoting Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966).

[3] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965).

[4] 29 *Del. C.* § 10142(d).

[5] 559 A.2d 1258 (Del. 1989).

[6] *Id.*

circumstances, evolve into full-time employment. Newell/Kirsch relies on the Supreme Court's more recent decision in *Rubick v. Security Instruments,*[7] which stands for the principle that the "exceptional circumstances" provision of 19 *Del. C.* § 2302(b)[8] only applies to output employees and cannot be applied to hourly employees.[9]

IV. ANALYSIS

Rubick makes clear the method the Board should use when determining the compensation for employees with hourly or daily rates of pay: the Board must award the actual rate of pay in effect at the time of the injury multiplied by the number of hours in the average workweek of the employer. *Furrowh* requires that, for full-time employees and part-time employees available for and capable of full-time employment, the "employer's average workweek" is calculated using only the average hours per week worked by the full-time employees, excluding the part-time

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[7] 766 A.2d 15 (Del. 2000).

[8] (b) 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 wage shall be taken to be the employee's average weekly earnings for so much of the preceding 6 months as the employee has worked for the same employer. If, because of exceptional causes, such method of computation does not ascertain fairly the earnings of an employee, then the weekly wage shall be based on the average earnings for 6 months of an average employee of the same or most similar employment.
19 *Del. C.* § 2302(b).

[9] *Rubick*, 766 A.2d at 19.

employees. Neither case directly addresses the situation at bar: that of the employee whose employment or the employee's relation to it is inherently part-time and likely to remain so.

The *Furrowh* court emphasized that the purpose of the workers compensation statute is to compensate the employee for lost earning capacity,[10] but recognized that a claimant who has made only part-time wages and whose employment is inherently part-time and likely to remain so should have his wage basis figured on part-time wages.[11]

In *Furrowh,* the employee was available for and capable of working full-time and the employer's average workweek was actually less than Furrowh's average workweek. The Court, in construing the language of the statute, determined that, when a part-time employee is capable of and available for full-time employment, part-time employees must be excluded when determining the average workweek of the employer. This construction is necessary to meet one of the objectives of the Worker's Compensation Act, "to arrive at as fair an estimate as possible of the claimant's future earning capacity."[12] A worker's present earnings, at his or her present job, are the measure by which his or her "wages" are determined for the

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[10] *Furrowh* at 1260*, citing Howell v. Supermarkets Gen. Corp.,* 340 A.2d 833, 836 (Del. 1975).

[11] *Id., citing* 2 Larson WORKMEN'S COMPENSATION LAW § 60.00. (Now at 5 LARSON'S WORKERS' COMPENSATION LAW § 93.00.)

[12] *Id.* at 1260, *citing* 2 Larson WORKMEN'S COMPENSATION LAW § 60.00.

purpose of 19 *Del. C.* § 2302(b).[13] This definition, which essentially freezes the worker in time, is equivalent to the worker's earning capacity; future raises are not contemplated by the statute. That present wages represent future earning capacity is substantiated by the Courts' routine approval of Board awards of a full-time worker's full-time earnings as fair compensation for lost earning capacity.[14] A worker who, whether by his or her own choice or by necessity, has demonstrated a "clear and consistent willingness to participate in the labor market on a part-time basis only"[15] has limited his or her capacity to that of part-time wages.[16]

While the claimant in *Furrowh* was capable of and available for full-time employment, the facts in the case at bar show that Diana Hacker was not. Hacker was seeking part-time employment when she responded to an advertisement for a

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[13] *See Rubick, supra; see also* 19 *Del. C.* § 2303(a), which states in pertinent part: "[t]he term "wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident."

[14] *See, e.g., Rubick, supra; Howell v. Supermarkets Gen. Corp.,* 340 A.2d 833 (Del. 1975); *Springer v. Sigma Indus., Inc.,* 2001 Del. Super. LEXIS 279 (Del. Super. Ct. 2001); *but see Wallace v. J.S. Alberici Construction Co.,* 1999 Del. Super. LEXIS 457 (Del. Super. Ct. 1999) (affirming a 40 hour workweek for employee who routinely worked overtime).

[15] *Glasgow Thriftway v. Donovan,* 1991 Del. Super. LEXIS 465 (Del. Super. Ct. 1991).

[16] *See, e.g., Spicer v. State,* 1991 Del. Super. LEXIS 326 (Del. Super. Ct. 1991); *Pinson v. Thriftway,* 1994 Del. Super. LEXIS 29 (Del. Super. Ct. 1994); although these cases use the "exceptional circumstances" exception in 19 *Del. C.* § 2302(b), these employees were engaged in employment that was inherently part-time and likely to remain so at the time of their work accident. *See also Shaw v. United Parcel Service,* 2003 Del. Super. LEXIS 30 (Del. Super. Ct. 2003) (all preloaders were part-time, 20 hour per week employees; compensation based on 20 hour workweek affirmed).

position as a "Part Time Merchandiser" that promised flexible hours averaging 20-29 hours per week.[17] The Board found that Hacker was aware that the maximum she could work was 20-29 hours per week. In addition, Hacker testified that she always arranged her work to enable her to be home before 3:00 p.m., at which time her four school-aged children arrive home from school. Hacker's employment history further indicates her willingness to participate in the labor market only on a part-time basis. Prior to working for Newell/Kirsch, Hacker was a part-time telemarketer for MBNA, and her present employment is as a part-time cafeteria worker for Caesar Rodney School District, where she works the hours from 9 a.m. to 2 p.m. Her only other employment was as a night shift cashier for Acme. This employment was also scheduled around her parental duties, although it is unclear whether that position was full or part-time. The evidence supports the conclusion that, because of her parental responsibilities and as illustrated by her employment history, Hacker was not available for full-time employment. Her employment was inherently part-time and likely to remain so. The Board's finding that Hacker was a part-time employee is supported by substantial evidence and will not be disturbed.

V. CONCLUSION

The Board found that Hacker was a part-time employee and awarded compensation at her wage of $13.50 per hour for twenty hours per week. No average weekly wage is calculated, but the hearing transcript and exhibits show

[17] Tr. at p. 12, Plaintiff's Exhibit 1.

Hacker worked as little as 7.5 hours during one week,[18] and the most hours she ever worked was 19.25 in one week.[19] Her average workweek must then fall between 7.5 and 19.25 hours per week. Although testimony reflected that other part-time merchandisers were employed by Newell/Kirsch, an average workweek of employees in Hacker's classification was not introduced as evidence at the hearing.

In awarding Hacker compensation for 20 hours per week, an amount that is clearly above Hacker's average weekly wage, the Board recognized the Supreme Court's mandate to compensate an injured worker for his or her loss of earning capacity. Testimony before the Board indicated that Hacker's maximum earning capacity was in the range of 20-29 hours per week; there was no evidence of the average workweek of similar part-time merchandisers presented. This Court does not weigh evidence or make its own factual findings in reviewing appeals from the Board.[20] There is substantial evidence by which the Board could determine that a) Hacker was inherently a part-time employee, and b) her earning capacity, considering her availability and past and future employment history, was her wage of $13.50 per hour multiplied by 20 hours per week. This award serves the purpose of the Workers Compensation Act in that it ascertains fairly the wages of a part-time employee to compensate that employee for the lost earning capacity at the time of

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[18] Tr. at p. 49. She also testified that one week she worked only 2 hours, but was sick during that week.

[19] Board decision at p. 9.

[20] *Johnson,* 213 A.2d at 66.

the work accident. Accordingly, the Board's decision is ***AFFIRMED.***

IT IS SO ORDERED.

/s/ Henry duPont Ridgely
President Judge

cmh
oc: Prothonotary
xc: Order distribution