IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, Employer-Appellant, v. CATHY EWING, Employee-Appellee.	)))))))))	C.A. No. N16A-03-007 CEB

ORDER

This 7th day of November, 2016, upon consideration of the State of Delaware's ("Employer") appeal from the decision of the Industrial Accident Board ("Board"), it appears that:

1. On December 20, 2012, Cathy Ewing was employed as a special education teacher for the Colonial School District. Ms. Ewing was injured when she was supervising recess and blocked an out-of-control student from another student and was pulled to the ground. As a result, she injured her cervical spine and her left shoulder in a compensable work accident while working for Employer.

2. Ms. Ewing worked as a special education teacher for seventeen years. She last worked in January of 2013 for Colonial School District. She has not been employed since then.

3. Medical evidence is not an issue on appeal. It is undisputed by the parties that Ms. Ewing was capable of working in a light duty capacity as of January 2014. The Employer also does not contest the Board's conclusion that Ms. Ewing became totally disabled as of February 24, 2015. Employer contends that Ms. Ewing did not demonstrate an intention to remain in the workforce from January 7, 2014 through February 24, 2015. If the claimant voluntarily left the workforce before her total disability recurred in February, 2015, her voluntary departure would cut off Employer's disability liability from that point forward, effectively mooting the total disability finding that occurred in February, 2015. So the question of whether Ms. Ewing voluntarily left the work force has pronounced effect for both parties.

4. In August, 2013, Ms. Ewing underwent neck surgery, receiving a two level fusion of her cervical spine. In January, 2014, her surgeon released Ms. Ewing to return to light-duty work after seeing significant improvement. But within a month, her symptoms worsened and she began experiencing radiculopathy down both arms, as well as trouble swallowing and breathing due to the two-level fusion in her cervical spine. An EMG performed by Dr. Patil confirmed pinched nerves. Efforts at rehabilitation were unsuccessful and she abandoned that effort in April, 2014.

5. Nonetheless, Ms. Ewing's condition improved enough to prepare a resume, request recommendation letters and try to go back to work as a special education teacher. Ms. Ewing testified at the Board hearing to her documented job search materials, which included updated resumes and cover letters; four letters of recommendation from prior teachers, speech therapists, and her assistant principal; a job application to Tristate Christian School dated May 20, 2014; and professional certification as a special education teacher which Ewing paid for out of her own pocket. Ms. Ewing testified at the Board hearing that she completed the teaching certifications in the hope that it would improve her employability. Ms. Ewing also maintained a log recording the various times she contacted Colonial School District's personnel office, when she updated her resumes, when she applied for different jobs, both in teaching and other light duty jobs within the restrictions of her doctor's orders. She testified that she continued to call Colonial School District in the fall of 2014 despite not documenting it in her log.

6. In August 2014, Ms. Ewing's neck condition worsened, and she was referred by Dr. Zaslavsky to see Dr. Raisis and Dr. Sowa in order to determine where her symptoms were originating from. By the end of 2014, the doctors were able to conclude that Ms. Ewing's neck was the cause. On February 24, 2015, they discussed the need for another neck surgery and Dr. Zaslavsky kept Ms. Ewing out of work until her next surgery, which was scheduled for June 8, 2015. It is

undisputed that she was completely disabled as of the order by Dr. Zaslavsky in February, 2015 that she not work pending her surgery.

7. Although not directly relevant to this proceeding, it is apparent that Ms. Ewing began receiving total disability benefits at some point shortly after the incident, in 2013. The Employer, relying upon evidence of her improving condition, filed a "termination petition" to remove those benefits, a dispute that was settled in June, 2014 with an agreement that she would receive partial disability benefits effective in June, 2014.

8. On July 14, 2015, Ms. Ewing filed a Petition to Determine Additional Compensation Due with the Board, seeking compensation for a recurrence of total disability as of February 24, 2015, when the surgeon ordered her not to work pending a second surgery. The IAB hearing took place on January 11, 2016. Employer contended that Ms. Ewing was not totally disabled until June 8, 2015 – the date of the surgery – and that she was not entitled to total disability benefits because she voluntarily withdrew from the workforce sometime in 2014, prior to the alleged recurrence date.

9. On February 25, 2016, the Board issued a decision granting Ms. Ewing's Petition for Recurrence of Total Disability Benefits. The Board concluded that Ms. Ewing was totally disabled as of February 24, 2015, that she had not voluntarily removed herself from the labor market prior to the recurrence date, and therefore

she remained entitled to disability benefits. The Board found that Ms. Ewing left her teaching job because of her work related injuries without ever returning to a level of physical capacity that would allow her to return to her previous job with Colonial School District as a special education teacher. The Board recognized that while Ms. Ewing did not conduct an intensive, broad-based job search in 2014, she did present documentation of her efforts to find a new job either teaching at a different school, school district, or in a non-teaching job while she underwent further medical treatments to improve her condition. The Board also found that Ms. Ewing's training certifications, which she completed in the summer of 2014 to improve her employability as a teacher, are consistent with someone who intended to remain in the job market and hoped to find a job in the profession she had been in for 17 years.

10. The function of the Superior Court in an appeal from a decision of the Industrial Accident Board is "limited to a determination of whether the Board's decision is supported by substantial evidence, and whether that decision is free from legal error."[1] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] The Court does not

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[1] *Chrysler Motors Corp. v. Howie*, 1996 WL 111142, at *1 (Del. Super. Ct. Jan. 31, 1996).

[2] *Rash v. State of Delaware Home & Hosp. for the Chronically Ill*, 2007 WL 2823331, at *2 (Del. Super. Ct. Sept. 28, 2007).

"weigh the evidence, determine questions of credibility, or make its own factual findings."[3] Rather, the Court must consider the record in the light most favorable to the prevailing party below,[4] and overturn the Board's decision only when there is no legally sufficient proof to support the Board's factual findings.[5]

11. This Court has held that retirement, in a traditional sense, can disqualify an employee from receiving worker's compensation benefits.[6] "This is especially true where an employee does not look for work after his retirement and where the claimant is content with his or her retirement lifestyle."[7] However, simply because an individual takes a voluntary retirement does not automatically preclude receipt of partial disability benefits if an employee wishes to continue working and actively seeks, and obtains, employment after retirement.[8]

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

[4] *Rash*, 2007 WL 2823331, at *2.

[5] *Johnson*, 213 A.2d at 67.

[6] *General Motors Corp. v. Willis*, 2000 WL 1611067, at *2.

[7] *Id.*

[8] *Id.* (*See Chrysler Corp. v. Chambers*, Del. Super. Ct., 288 A.2d 450, 452 (1972), *aff'd*, Del., 299 A.2d 431 (1972).

12. The Court has also held that "when a claimant fails to submit adequate evidence that he made a good faith effort to seek alternative employment within the limitations of the disability, benefits may be denied".[9]

13. In this case, the Court finds that there was a substantial basis for the Board's finding that Ms. Ewing did not voluntarily retire or otherwise voluntarily remove herself from the work force, but left her teaching job because of her work-related injuries. The Board has articulated its reasons for finding that Ms. Ewing did not voluntarily remove herself from the work force and that she made a good faith effort to secure employment within the limits of her disability from January 7, 2014 through February 24, 2015. This Court agrees with the Board that it is not unreasonable for Ewing to continue seeking employment in the teaching profession rather than conducting a broader search for any job she may physically be capable of performing, particularly given the medical advice that she may improve enough to return to the profession. The Court is satisfied that the Board's decision is supported by substantial evidence and free from legal error.

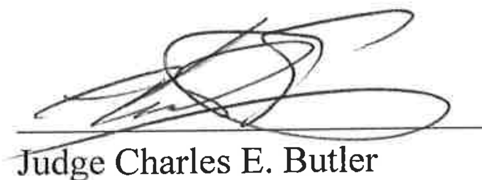
14. The Employer makes a pointed argument that the Board considered the fact that in June 2014 when the parties stipulated to temporary partial disability payments in lieu of litigating a termination petition, the Employer made no

[9] *State v. Disharoon,* 2013 WL 3339395, at *2 *(citing Wilson v. Chrysler, L.L.C.,* 2011 WL 2083935, at *3).

complaint then that Ms. Ewing had voluntarily left the work force. While it is true that the Board noted this fact, it is not true that the Board felt it worked some sort of waiver or estoppel against the Employer. That was the plaintiff's position in argument, but the Board did not adopt it as a matter of law and indeed, went through a detailed analysis of the evidence that the claimant had continued to either seek employment or, at a minimum, consider herself a part of the workforce. Had the Board relied exclusively on the Employer's earlier settlement of the 2014 dispute to estop the Employer, the Court would have more sympathy for Employer's position. But having reviewed the facts and the decision of the Board in detail, the Court is satisfied that the Board fairly considered Employer's arguments and credited the claimants evidence over that offered by the Employer. Since those findings are supported by the record, they will not be disturbed on appeal.

15. Accordingly, the decision of the Industrial Accident Board is **AFFIRMED.**

IT IS SO ORDERED.



Judge Charles E. Butler