IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
Employer-Appellant,	)	
v.	)	C.A. No. N16A-09-004 JAP
DARREN ARCHANGELO,	)	
Employee-Appellee.	)	

MEMORANDUM OPINION

The issue presented in this Workers' Compensation appeal is whether, as a matter of law, a partially disabled worker who does not seek employment has voluntarily removed himself from the labor market and is therefore not eligible for total disability benefits if the worker's total disability re-occurs. The determination whether a worker has voluntarily removed himself from the labor market entails an evaluation of the totality of the circumstances. The court holds that although the absence of a job search by a partially disabled worker is an appropriate factor to consider in this evaluation, it is not, as the employer claims, dispositive as a matter of law.

BACKGROUND

Darren Archangelo was a middle school physical education teacher and wrestling coach when, in 2012, he was injured at work while trying to break up a fight between two students. He was totally disabled for Worker's Compensation purposes until March 6, 2014 when he improved to the point where he was capable of doing light work. Because of his improvement his total disability benefits of $645.01 per week were reduced to $369.30. In 2015, Archangelo learned he would need another back surgery as a result of his injuries, and the Industrial Accident Board (IAB) subsequently found that his total disability had recurred. The Employer appeals from this determination.

ANALYSIS

A. The standard of review.

The court gives considerable deference to the Board when considering appeals from its decisions. "On appeal from the Board . . . [this court] does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own

factual findings."[1] Instead it reviews the Board's decision to determine whether substantial evidence exists to support the Board's findings of fact and conclusions of law. "Substantial evidence" is evidence which a reasonable mind may find adequate to support a conclusion.[2] However, when questions of law are involved the court exercises *de novo* review.[3]

B. The Board's decision that Appellee did not voluntarily remove himself from the workforce is supported by substantial evidence.

Archangelo bore the burden of proving to the Board that (1) there was a recurrence of his permanent disability, and (2) he had not retired from the work force.[4] To establish a recurrence, a worker must show that after his permanent disability ceased there was a work-related change in his condition which caused that permanent disability to recur.[5] Both parties agree that Archangelo has proven a recurrence of his work-related permanent disability. The issue is whether he had voluntarily withdrawn from the work force during

---

[1] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).
[2] *Arrants v. Home Depot*, 65 A.3d 601, 604-05 (Del. 2013).
[3] *Walden v. Georgia-Pacific Corp.*, 738 A.2d 239, 1999 WL 801437, at *2 (Del. 1999) (TABLE).
[4] *Redman v. State*, C.A. No. 14A-05-006 JAP (Del. Super. Feb. 4, 2015) (slip op.).
[5] *Archangelo v. State*, No. 1389452, at 4 (Del. I.A.B. Jan. 26, 2016).

the period between when his permanent disability ceased and when it reoccurred.

The best way to put this dispute into context is to briefly examine relevant portions of Delaware Workers' Compensation Law.

- Where, as here, a worker is totally disabled, the worker will receive two-thirds of his or her "wages" as that term is defined elsewhere in the statute. That section further provides that "[n]othing in this section shall require the payment of compensation after disability ceases."[6]
- This does not mean that a totally disabled worker loses all benefits if he or she improves but remains partially disabled. If a permanently disabled worker improves to that point, the worker continues to receive benefits, but those benefits are reduced to two-thirds of the "difference between the wages received by the injured employee before the injury and the earning power of the employee thereafter." The partial disability benefits are not reduced by the worker's actual income while

[6] DEL. CODE ANN. tit. 19, §2324 (West).

disabled; instead they are reduced by the worker's "earning power."[7] Stated another way, when a totally disabled worker improves to the point that the worker is capable of doing some sort of light work, the worker's benefits are reduced to two-thirds of the difference between what the worker was previously earning and the amount the worker is *capable* of earning after his or her improvement. This reduction is made irrespective of whether the worker actually undertakes light duty work or does nothing—the worker's benefits will be reduced to the same amount either way. In short, a worker who does not undertake light duty employment gains no advantage insofar as his or her benefits are concerned and suffers the loss of the wages he or she would have earned by doing light duty work.

- On occasion, a partially disabled workers' condition may worsen. When this occurs the worker may petition for reinstatement of his total disability benefits.

[7] DEL. CODE ANN. tit. 19, §2325 (West).

> If the IAB finds that the worker has again become totally disabled as a result of his job-related injury, the Board may order that the worker again receive total disability benefits.

A wrinkle arises when an injured worker retires in the traditional sense for reasons unrelated to his or her job injury. (The court uses the term "traditional retirement" in contradistinction to retirement forced by the job-related injury.) Workers' compensation benefits are viewed as wage replacement benefits.[8] In instances in which a disabled worker retires in the traditional sense, there are no longer any wages to replace because the worker would not have been earning any wages after his or her retirement, and thus no reason for wage replacement benefits.

In *Estate of Jackson v. Genesis Health Ventures*[9] a nurse was totally disabled as a result of a knee injury suffered at work. Two years and one arthroscopic surgery after the injury recurred, the nurse was able to return to work. The nurse took early retirement only three years after returning to work because of a back problem

[8] *Melvin v. Playtex Apparel, Inc.*, 2013 WL 4086803, at * 4 (Del. Super. June 4, 2013), *aff'd* 2015 WL 854333 (Del. 2015) ("The purpose of total disability compensation is to compensate for the loss of earning capacity, or in other words, to replace wages.").
[9] 23 A.3d 1287 (Del. 2011).

distinct from her job-related knee injury. A decade after her early retirement the nurse's knee became worse and she underwent knee replacement surgery. The nurse sought reinstatement of her total disability benefits claiming she was again totally disabled as a result of her knee injury. The problem with her case was that she had been retired for several years for reasons unrelated to her job-related knee injury. The Delaware Supreme Court opined:

> We have recognized that "voluntary retirement is only one factor to consider in determining whether an employee is entitled to disability benefits under Delaware law." If, for example, an employee's retirement decision was motivated by a work-related injury that affected that employee's ability to find a comparable job, that injury has diminished the employee's earning power and thereby entitles the employee to workers' compensation benefits. An employee may collect disability benefits even after voluntarily retiring from a specific job, so long as that employee does not intend to remove herself from the job market altogether. But where, as here, an employee does not look for any work or contemplate working after retiring, however, and is content with her retirement lifestyle, that employee is not eligible for workers' compensation benefits.[10]

The key to the analysis here can be found in the last sentence in this paragraph: "[W]here, as here, an employee does not look for any work or contemplate working after retiring, however, and is content with her retirement lifestyle, that employee is not eligible for

[10] *Id.* at 1290–91 (footnotes omitted).

workers' compensation benefits." It is not enough that the worker "does not look for work," the employer must also show that the employee "is content with her retirement lifestyle." This is dispositive of the argument that Mr. Archangelo's failure to look for work while partially disabled establishes as a matter of law that he is ineligible for benefits.

The State refers the court to a handful of cases, most of which do not support the proposition that the failure to look for work establishes *as a matter of law* that the worker has voluntarily retired.

- In some of the cited cases the Board found that the worker had voluntarily retired and relied upon the worker's failure to look for work to support its conclusion.[11] On appeal this court examined the record to determine if there was "substantial evidence" supporting the Board's factual determination that the worker had retired. In none of them, however, did this

[11] *Martin v. State*, 2015 WL 1548877, at *2 (Del. Super. Mar. 27, 2015) ("the Board believed the evidence showed Appellant had totally removed herself from the labor market altogether based on the lack of evidence of a reasonable job search."); *Popken v. State*, 2013 WL 1871754, at *3 (Del. Super. Apr. 23, 2013) ("The Board determined that Claimant had incurred no lost wages . . . because Claimant voluntarily removed herself from the workforce.").

court state that the lack of a job search alone established retirement as a matter of law.

- In another opinion case by the State this court wrote "if such a claimant fails to . . . seek alternative employment within the limitations of the disability benefits *may* be denied."[12] The court's use of the permissive phrase "may be denied" is inconsistent with the State's matter-of-law argument.
- In other cited cases the IAB and this court found the claimant did not voluntarily retire.[13]
- In another cited case this court, in dictum, contradicted the State's argument. In *General Motors Corp. v. Willis*,[14] this court expressly referred to the situation where "an employee does not look for work . . . *and* where the Claimant is content with his or her retirement lifestyle." It is not enough under this formulation that the worker failed to look for work; the

[12] *State v. Disharoon,* 2013 WL 3339395, at *2 (Del. Super. June 17, 2013) (emphasis added).
[13] *State v. Ewing*, 2016 WL 6805351 (Del. Super. Nov. 7, 2016).
[14] 2000 WL 1611067, at *2 (Del. Super. Ct. Sept. 5, 2000) (emphasis added).

worker must also be content with his or her retirement lifestyle.

One opinion from this court contains language which on the surface appears to support the State. In *Wilson v. Chrysler, LLC* this court wrote that "[i]n voluntary retirement cases, when an injured worker voluntarily retires for inability to continue work with his current employer, but also demonstrates intent and ability to continue working elsewhere, he must show that he sought employment elsewhere to be eligible for benefits."[15] The *Wilson* court cited *General Motors Corp. v. Willis* as the sole support for this proposition. But as discussed above, the *Willis* court did not say that the absence of a job search was dispositive. Rather it also required a showing that "the Claimant is content with his or her retirement lifestyle."

In the instant matter the Board balanced several factors to determine that Appellee had not voluntarily withdrawn from the workforce. On the one hand the Board considered Mr. Archangelo's decision not to seek work as "significant evidence" he intended to

[15] *Wilson v. Chrysler LLC*, 2011 WL 2083935, at *3 (Del. Super. Ct. Apr. 26, 2011).

withdraw from the workplace. On the other side of the scale the Board found:

- Mr. Archangelo's absence from work was of shorter duration than those in other cases in which the Board found the employee had not retired.
- Mr. Archangelo was a professional educator who attended college to pursue a career as an educator and athletic coach. He was spending his time undergoing the rehabilitation he believed was necessary to enable him to return to his career. If he had taken some sort of light duty job while partially disabled, he would have had less time for rehabilitation. In essence he might have had to forego his career as a teacher. Rather than forego any opportunity to rehabilitate and rejoin his chosen profession, Mr. Archangelo opted not to undertake light duty work.
- Mr. Archangelo is only 45 years old, a comparatively young age for retirement.
- For the period when Mr. Archangelo allegedly chose to remove himself from the workforce, Mr. Archangelo did

> not receive any other forms of additional income such as Social Security benefits or a pension. In fact, his only income at that point was his weekly partial disability benefit of $369.30—a mere 30 percent of his average pre-injury weekly wage.

The court therefore finds that there is substantial evidence supporting the Board's factual findings.

CONCLUSION

The overwhelming evidence in this case supports the fact that Mr. Archangelo did not voluntarily remove himself from the workforce. The Board's decision is thereby **AFFIRMED** and it therefore follows that Mr. Archangelo is entitled to compensation for a recurrence of total disability following his compensable surgery in November 2015.

Dated: August 9, 2017

_____
John A. Parkins, Jr.
Superior Court Judge

oc: Prothonotary
cc: Andrea C. Panico, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware
Brian E. Lutness, Esquire, Silverman McDonald & Friedman, Wilmington, Delaware