IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DAVID JOYNES,	:	
	:	C.A. No. 00A-06-001(WLW)
Plaintiff,	:	
	:	
v.	:	
	:	
PENINSULA OIL COMPANY,	:	
	:	
Defendant.	:	

Submitted: December 21, 2000
Decided: March 14, 2001

Upon Appeal from a Decision of the Industrial Accident Board. Affirmed.

Walt Fritz Schmittinger, Schmittinger and Rodriguez, P.A., Dover, Delaware, attorneys for the Plaintiff.

David G. Culley, Tybout, Redfearn & Pell, Wilmington, Delaware, attorneys for the Defendant.

WITHAM, J.

David Joynes v. Peninsula Oil Company
C.A. No. 00A-06-001
March 14, 2001

ORDER

Before the Court is an appeal of an Industrial Accident Board decision. The record below shows that:

1. David Joynes ("Joynes" or "Claimant") worked as a truck driver and delivery person for the Peninsula Oil Company ("Peninsula" or "Employer"). On December 4, 1996, Joynes was delivering fuel when he tripped as he rushed to stop a fuel leak. Joynes suffered a back injury for which he was out of work for a few months, returning to work at Peninsula temporarily in January and then completely in April 1997. At the time of the injury, Joynes was working seventy hours per week and earning approximately $10 per hour. In February of 1998, Peninsula sold the tanker division of its company. Eagle Transports, the new owners, did not retain Joynes because of a 17 year old conviction for driving while impaired.

2. Over the next few months, Joynes worked for brief periods of time at Service Energy, Tyson Foods and United Propane. These jobs were temporary as they all involved the use of equipment or participation in activities that caused problems with Joynes' back condition. In September of 1998, Joynes began working for Samuel Coraluzzo Co., Inc., in a position similar to the one he held at Peninsula. Joynes worked for Coraluzzo for approximately fifteen months, until January 2, 2000. Joynes testified that he left that job for a number of reasons. One reason was that he was unhappy with the routes he was being assigned. However, Joynes claims that the primary reason he left was because of difficulties with his back resulting from pulling the fuel hoses. On January 17, 2000, Dr. Freedman examined Joynes and told him not

to work as a truck driver and recommended vocational rehabilitation. The rest obtained from not working eased the pain of Joynes' back condition which allowed him to begin a job with Pepsi in late February of 2000. The job with Pepsi required lifting that Joynes could not perform and after two days he left Pepsi and began working for Mountaire Farms. The work for Mountaire Farms entails driving a truck loaded with cages of chickens and does not involve any loading, lifting or unloading. Joynes gets paid approximately $419.75 per week at Mountaire Farms. At the hearing, Joynes testified that he looked for a better paying job than Mountaire in February of 2000, and he continues to look for a job within his capabilities that pays more.

3. Dr. Freedman, an orthopedic surgeon, testified on behalf of Joynes concerning his back condition. In his deposition, Dr. Freedman stated that he believes that the activities involved with driving a tanker truck are outside of Joynes' abilities in light of his back's condition. In medical terminology, Dr. Freedman believes that Joynes' previously asymptomatic spondylolisthesis was made symptomatic by his work injury and continues to be symptomatic. Dr. Fink, a Board certified neurologist testifying on behalf of Peninsula, believes that Joynes suffers from a lumbar strain or mechanical instability. Based on the record, Dr. Fink believes Joynes' back pain will never completely resolve and Joynes may suffer from periods of acute flare-ups such as the one that occurred in January of 2000.

4. The Petition to Determine Additional Compensation was heard by the Industrial Accident Board ("IAB" or "Board") on May 30, 2000 and the decision was

released on June 8, 2000. The Board determined that Joynes was not totally disabled from January 2, 2000 through February 28, 2000, as a result of the injury he suffered while working for Peninsula in 1996. The IAB also found that Joynes was not partially disabled. As part of these determinations, the IAB found that Joynes was not a *prima facie* displaced worker and that he had not performed a reasonable job search that was unsuccessful due to his work-related injury. Claimant also sought an increase in the compensation rate for the average weekly wage as it had been based on $693.00 per week instead of $710.30 per week. The Board rejected this issue for two reasons: first, it did not affect Joynes' compensation, and second, Peninsula did not have sufficient notice that Joynes would be attempting to modify the earlier agreements. The Board did award Claimant his unpaid medical expenses.

5. The limited appellate review of the factual findings of an administrative agency is well settled in Delaware. The function of the reviewing Court is to determine whether the agency's conclusions are supported by substantial evidence and are free from errors of law.[1] If no questions of law are presented the Court's role is to determine whether the agency's decision is supported by substantial evidence.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The appellate court does not weigh the

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[1] ***General Motors v. Freeman*, Del. Supr., 164 A.2d 686, 689 (1960); *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66-67 (1965).**

[2] ***Freeman* at 689; *Johnson* at 66-67.**

[3] ***Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battista***

evidence, determine questions of credibility or make its own factual findings.[4] It merely determines if the evidence is legally adequate to support the agency's factual findings.[5] Moreover, the Court must take "due account of the experience and specialized competence" of the IAB and the purposes of the Workers' Compensation Act.[6] The Court must also determine whether the Board's decision is free from legal

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***v. Chrysler Corp.*, Del. Super., 517 A.2d 295, 297 (1986), *app. dism.*, Del. Supr., 515 A.2d 397 (1986).**

[4] ***Johnson* at 66.**

[5] **29 *Del. C.* § 10142(d).**

[6] ***State v. Cephas*, Del. Supr., 637 A.2d 20,23 (1994).**

error. The Court's review of alleged errors of law is *de novo*.[7]

6. The primary issue before the Court in Claimant's appeal is whether or not the Board had sufficient evidence to support their findings that Joynes was not temporarily totally disabled from January 2 through February 28, 2000. The Court will also review the Board's determination that Joynes is not temporarily partially disabled from the 1996 incident which occurred while Joynes was employed by Peninsula. Claimant also asks the Court to examine the Board's refusal to modify his average weekly income.

I. Temporary Total Disability Benefits.

[7] ***Brooks v. Johnson*, Del. Supr., 560 A.2d 1001, 1002 (1989).**

7. First, the Court will consider the Board's finding that Joynes was not totally disabled from January 2 through February 28, 2000. Total disability under the Workmen's Compensation Act has been well-defined through the common law. The term "total disability" refers to both complete physical disability as well as economic disability. Broadly speaking, "the degree of compensable disability depends on impairment of earning capacity."[8] According to *M. A. Hartnett v. Coleman*, the "essence of total disability is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps."[9] In more specific terms, total disability "means such disability that the employee is unable to perform any services 'other than those which are so limited in quality, dependability, or quantity that a reasonably stable market does not exist for them.'"[10] When measuring the degree of compensable disability, the issue turns "upon the degree of

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[8] ***M. A. Hartnett, Inc. v. Coleman*, Del. Supr., 226 A.2d 910, 913 (1967).**

[9] ***Id.***

[10] ***Id.***

impairment of earning capacity" which requires the "proper balancing of the medical and wage-loss factors."[11] In *Ham v. Chrysler Corp.*, the Court stated that in determining economic disability the "inability to secure work, if causally connected to the injury, is as important a factor as the inability to work."[12] Unquestionably, total disability encompasses both physical disability and economic disability. Joynes argues that he was totally physically disabled or at least economically disabled from January 2 through the end of February 2000.

[11] ***Id.***

[12] ***Id.***

8. Joynes' argument that he is totally physically disabled is based on *Gilliard-Belfast v. Wendy's,*[13] a recent decision by the Delaware Supreme Court. In *Gilliard*, the Court held "that a person who can only resume some form of employment by disobeying the orders of his or her treating physician is totally disabled, at least temporarily, regardless of his or her capabilities."[14] *Gilliard* dealt with an employee who was told by her physician not to work while she waited for her knee surgery. The doctor thought that the surgery would occur within a few weeks but the surgery did not take place for eight months. The IAB found that it was unreasonable for the employee to be out of work for eight months waiting for surgery; therefore, the claimant was not totally disabled during those eight months. The Supreme Court found that the doctor's "no work" order was controlling and that an employee should not be expected to disobey his doctor's orders by returning to work while still under medical restrictions.

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[13]***Gilliard-Belfast v. Wendy's, Inc.*, Del. Supr., 754 A.2d 251 (2000).**

[14]***Id.* at 254.**

9. The immediate case before the Court can be distinguished from *Gilliard-Belfast*. The timing of the doctor's visit is the first difference. Joynes stopped working for Coraluzzo on January 2, before scheduling his appointment with Dr. Freedman for January 17. Approximately two weeks after stopping work, Dr. Freedman told Joynes that he should not work as a tank truck driver and recommended vocational rehabilitation. Dr. Fink for Peninsula agreed with Dr. Freedman's decision in January that Joynes should not work. Joynes' case is also distinguishable because Dr. Freedman stated in his deposition that Joynes could not work as a tank truck driver, but did not give Joynes a *carte blanche* no work order.[15]

The record does not indicate exactly what medical restrictions Claimant was under in January and February of 2000, other than not working as a tank truck driver.

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[15]The Board's decision and the record reflect the discrepancy about exactly what Dr. Freedman told Joynes at his January 17 appointment. Joynes and his counsel appear to misinterpret what Dr. Freedman said as being a *carte blanche* no work order and not merely a restriction from one specific type of work. However, the deposition of Dr. Freedman does not say that Joynes could not work at all but instead says that Joynes could not work as a tank truck driver and should participate in vocational rehabilitation. Because Claimant does not distinguish or clarify the doctor's deposition testimony as to whether Joynes could not work generally or could not work as a tank truck driver specifically (which is what the deposition states), it appears that the Board relied on the actual language of the deposition.

Therefore, even applying *Gilliard-Belfast*, the Board had substantial evidence that Joynes was not totally physically disabled.

10. Claimant also argues that he is totally disabled based upon his economic disability. To prove economic disability Claimant must prove that he is a "displaced worker."[16] In *Franklin Fabricators v. Irwin*,[17] the Delaware Supreme Court described the procedure which an employer must undertake to show that the employee is not a displaced worker and thereby terminate total disability benefits. The burden of proof shifts in the immediate case because the employee/claimant is attempting to establish total disability. *Franklin Fabricators* noted that two methods exist to show displacement.[18] First, the claimant may be a *prima facie* displaced worker which is one who "although not utterly helpless physically, because of the degree of obvious

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[16]***Id.*; *Zdziech v. Delaware Authority for Specialized Transportation*, Del. Super., C.A. No. 87A-AU-10, Gebelein, J. (Oct. 13, 1988), Mem. Op. at 3.**

[17]***Franklin Fabricators v. Irwin*, Del. Supr., 306 A.2d 734 (1973).**

[18]***Id.* at 736-737, *see also*, *Torres v. Allen Family Foods*, Del. Supr., 672 A.2d 26, 30 (1996).**

physical impairment, combined with various factors such as mental capacity, education, training, and age, is placed in a situation in which he could not ordinarily sell his services in any well-known branch of the labor market."[19] Second, the claimant can show displacement by showing that he has "made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury."[20] Therefore, if the Claimant is not a *prima facie* displaced worker, he may be a displaced worker by reason of inability to secure a job because of his injuries.

[19]***Zdziech* at 3; *Ham* at 261; *Hartnett* at 913.**

[20]***Franklin Fabricators* at 737.**

11. The Board had substantial evidence to find that Claimant is not a *prima facie* displaced worker under the definitions provided by *Ham* and *Hartnett*. Joynes argues that the Board used a labor-market approach when determining whether the Claimant is employable within his capabilities in the job market. The Court agrees that the test for determining disability in *Hartnett*, *Ham* and their progeny does evidence a "Claimant-Oriented" approach as opposed to a "Labor-Market" approach; however, the Board had substantial evidence to make their determination that Joynes was not a *prima facie* displaced worker.[21] After the injury in 1996, Joynes returned to work for Peninsula where he worked until he was laid off. After a few short jobs he worked in a similar capacity for Coraluzzo for fifteen months. Joynes left his job with Coraluzzo on January 2, 2000 and thereafter scheduled a doctor's appointment with Dr. Freedman for January 17. According to Dr. Freedman and Dr. Fink, Joynes cannot drive the tanker trucks he had been driving, and Dr. Freedman, his treating doctor, suggested that Joynes should generally avoid driving trucks, prolonged sitting, pushing, pulling and bending. Dr. Freedman also suggested that Joynes find a new job with vocational rehabilitation. No other medical restrictions were placed on Joynes at that time or any time thereafter; therefore, Joynes is not a *prima facie* "displaced worker" in the sense that he is impaired to the extent that a job would have to be specifically crafted considering his injuries, age, training and experience. In

[21]The Court disagrees with the Claimant that the Board mis-cites the relevant legal standard and used a "labor-market" approach.

fact, Claimant was able to obtain two jobs after his January 17, 2000 appointment with Dr. Freedman, apparently without vocational rehabilitation.

12. The remaining issue with respect to total disability by economic disability is whether Joynes performed a reasonable job search that was unsuccessful because of his injury. At the hearing, Joynes testified that his job search consisted of reading the papers daily and inquiring from people he met about available jobs. Joynes also testified that he only applied at Pepsi and Mountaire after the exacerbation of his injury in January of 2000. The Board found that reading newspapers, asking around and two applications was not a reasonable search of the potential job market. The Board also emphasized the fact that Claimant's doctor recommended that Claimant not drive trucks and the only two jobs he applied for were truck driving positions. The Court agrees that the Claimant must show a "diligent, good faith effort to locate suitable employment in the vicinity."[22] In addition to a good faith unsuccessful job search, the claimant must show that the lack of success was caused by the injury.[23] Joynes was hired at both places that he applied which the Board interpreted as evidence that Claimant is still employable in recognized branches of the job market. Joynes' employment history does not provide substantial evidence that his job search or earning capacity was affected by the December, 1996 injury. After the injury, Joynes returned to work for Peninsula until February 1, 1998, at which time

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[22]***Bernier v. Forbes Steel Ensign Wire Corp.*, Del. Super. C.A. No. 95A-FE-17, Taylor, J. (March 5, 1996), *aff'd*., Del. Supr., 515 A.2d 188 (1986).**

[23]***Franklin Fabricators* at 737.**

he was laid off by Eagle Transports, the company that purchased Peninsula. After three short jobs, Joynes remained with Coraluzzo, an employer similar to Peninsula, for fifteen months. Claimant then left Coraluzzo on January 2 before speaking with his doctor. In light of Joynes' work history and employment search, the Board had substantial evidence to find that he did not perform a reasonable job search. Therefore, the Board's denial of temporary total disability benefits is affirmed as substantial evidence exists showing Joynes to be neither totally physically disabled nor economically disabled.

II. Temporary Partial Disability Benefits.

13. The second issue that Claimant appeals is the Board's finding that he is not partially disabled. Partial disability under the Workmen's Compensation Act is determined by the claimant's diminished earning capacity. The Workers' Compensation Act states "for injuries resulting in partial disability for work, . . . the compensation to be paid shall be 66 2/3 percent of the difference between the wages received by the injured employee before the injury and the earning power of the employee thereafter."[24] Delaware courts interpret the term "earning capacity" as being synonymous with the term "earning power" in § 2325 and both mean "earning ability."[25] Therefore, partial disability is calculated as two-thirds of the difference

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[24] **19 *Del. C.* § 2325.**

[25] ***Ruddy v. I.D. Griffith & Co.*, Del. Supr., 237 A.2d 700, 703 (1968).**

between a claimant's pre-injury wages and his post-injury earning ability. The claimant must prove the reduction in his earning ability and that the alleged partial disability is a result of the injury he suffered in his previous work.

14. In the case *sub judice*, Claimant argues that the fact that his current job pays less than his previous job is conclusive evidence of his diminished earning power and therefore his partial disability. In *Ruddy v. I.D. Griffith & Co.,* the Court rejected this idea stating that, "[i]t is important to note that the term "earning power," as used in the Act, does not mean actual earnings or 'wages received,' ... [t]hus it is clear that actual earnings and 'earning power' are not synonymous under the Delaware Statute."[26] Joynes was earning just over $700 per week at the time of his injury in December of 1996. At this time, he is earning a little more than $400 per week, and his wages are based upon the number of runs or trips he makes for Mountaire Farms. The Board calculated Joynes' earnings as if he worked the same number of hours for Mountaire Farms as he did with Peninsula and found little difference in salary. The problem for Joynes is that the same number of trips (amount of hours) are not available with Mountaire Farms. An employer is not required to compensate an injured employee for the fact that the new job he has taken does not offer the same number of hours. As the Board stated, Joynes' salary at Peninsula was based on 30 hours of overtime per week, which is unavailable at Mountaire Farms. The current earning capacity of Joynes has not suffered due to the injury but because of the number of hours available to work. In addition, the Board found that it could not be

[26] ***Id.***

certain that Joynes' reduced earnings are related to the injury he sustained in 1996. The Board noted two particular difficulties in this respect: first, there was no clear statement as to Joynes' employment limitations based on his medical condition, and second, the inadequate job search Joynes engaged in to find a better paying job. Based on a review of the record, the Board had substantial evidence to support its finding that Joynes is not partially disabled.

III. Average Weekly Wage.

15. Claimant asks this Court to review the Board's refusal to address the issue of modifying the Claimant's average weekly wage. Peninsula argued that they had no notice that this issue would be raised at the hearing and it would thus be improper for the Board to consider the modification. The Board stated they did not address the issue "because Claimant's disability compensation rate is the maximum allowable rate, [however] the average weekly wage only affects Claimant's partial disability benefits, which the Board denied." Based on the lack of notice to Peninsula and because the average weekly wage does not affect the award in this matter, the Court will not disturb the Board's refusal to address this issue.

Therefore, Claimant's appeal is DENIED and the Board's decision is AFFIRMED. IT IS SO ORDERED.

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Judge

David Joynes v. Peninsula Oil Company
C.A. No. 00A-06-001
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dmh
oc: Prothonotary
xc: Order Distribution
File