IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LOETITIA JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
5.	)	C.A. No.: 99A-12-017-FSS
	)	
UNIVERSITY OF DELAWARE	)	
	)	
Defendant.	)	

Submitted: December 1, 2000
Decided: February 27, 2001

OPINION and ORDER

Upon Appeal From the Industrial Accident Board--**REVERSED & REMANDED**, in part and **AFFIRMED**, in part.

R. Scott Kappes, Esquire, Schmittinger & Rodriguez, P.A., 1300 North Market Street, Suite 205, Wilmington, Delaware 19801. Attorney for Appellant.

Danielle K. Yearick, Esquire, 300 Delaware Avenue, #1100, P.O. Box 2092, Wilmington, Delaware 19899. Attorney for Appellee.

SILVERMAN, J.

This is a consolidated appeal by appellant-employee, Loetitia Johnson. She appeals two of the Industrial Accident Board's four decisions in her case. First, Johnson challenges a hearing officer's December 6, 1999 decision

granting appellee-employer, University of Delaware's petition to terminate her total disability benefits and denying her partial disability benefits. Johnson also appeals the Board's May 25, 2000 decision awarding her a 7% permanent impairment.

The case presents two issues. The first issue is whether Johnson irrevocably forfeited her right to workers' compensation by quitting after the University provided her with employment suitable to her capacity. The second issue is the degree of permanent impairment to her spine.

I.

The forfeiture issue involves 19 *Del. C.* § 2353(c), which provides:

> **If an injured employee refuses employment procured for the employee and suitable to the employee's capacity, the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Board such refusal was justifiable.[1]**

Johnson, a custodian, was injured on September 17, 1996, when a door handle hit her in the back. After that, she was "paid various periods of

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[1] **19 *Del. C.* § 2353(c).**

total and partial disability." On September 29, 1998, Drs. Rudin and Hunt performed a lumbar disectomy and inner body fusion on her. Johnson's medical records show that her physician released her for part-time work on March 8, 1999, and for full-time work on April 21, 1999. She returned to work on April 26, 1999. But on May 4, 1999, she left work complaining, according to Johnson, that her back was giving her problems. The next day, May 5, Johnson called in sick. Johnson now explains that somehow she exceeded her work restrictions and re-injured or strained her back.

After not hearing from Johnson again, the University gave her until noon on May 17, 1999 to contact it. Johnson called on the 17th, an hour before the University's deadline. That same day, she also had her regular doctor fax a new job restriction for three weeks, beginning May 12. On May 24, Johnson provided another note from another doctor. For reasons unknown, the University asked for more specifics, which Johnson did not submit. Finally, the University terminated Johnson on June 8, 1999. Johnson filed a grievance over her dismissal. Otherwise, the record does not establish Johnson's desire and willingness to return to the position that the University offered, accommodating her disability.

Johnson's original position was not that she had reconsidered her refusal of suitable employment, nor was it her position, as it is now, that "Ms. Johnson's termination trumps her alleged refusal of suitable employment." During the administrative proceedings, Johnson unsuccessfully attempted to prove that the University's accommodation was inadequate. Thus, her refusal was justified.

The Court's authority on appeal is limited by 29 *Del. C.* § § 10142 and 10161(a)(8). It does not reexamine evidence, much less make its own factual findings. The Board's decision stands, but only so long as there are no legal errors and substantial evidence supports its factual findings.[2] Substantial evidence, to a reasonable mind, is adequate to support a conclusion.[3] Further,

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[2] ***General Motors Corp. v. Jarrell*, Del. Super., 493 A.2d 978 (1985).**

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

the Court assumes that its jurisdiction to hear the appeal regarding the partial disability issue falls under 19 *Del. C.* § 2301B(a)(4).[4]

[4] ***See Track & Trail, Inc. v. Conran*, Del. Super., C.A. No. 98A-12-004, Carpenter, J. (Jan. 21, 2000) (ORDER).**

As provided above, for a request to terminate benefits under 19 *Del. C.* §2353(c), an employer must prove "by a preponderance of the evidence the nonentitlement to compensation."[5] This is ". . . satisfied by a good faith offer to reemploy the claimant at a position . . . within the physical and intellectual capabilities of the injured worker."[6]

Everyone seemingly agrees now, more or less, that after she was injured, the University offered Johnson a suitable job, which she left on May 5, 1999. Johnson now implies that after she called in sick and the University fired her, she had a change of heart. Johnson argues that when the University terminated her, it unilaterally ended Johnson's legally sanctioned ability to end her refusal's continuance. Johnson now claims that her "alleged refusal of suitable employment was limited in duration." Further, she claims that "her refusal of that work cannot be deemed to extend beyond the expiration of that job offer on June 8, 1999."

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[5] ***Counts v. Acco Babcock, Inc.*, Del. Supr., No. 135, 1988, Walsh, J. (July 15, 1988), Order at *2 (affirming Superior Court's judgement affirming Industrial Accident Board's decision).**

[6] **Id.**

Johnson relies on *Sharpe v. W.L. Gore Associates*,[7] which involved an employer's failing to offer the claimant a suitable job.[8] Sharpe was forced to retire or be terminated.[9] This case is not *Sharpe*. Johnson did not face Sharpe's dilemma. As mentioned, Johnson returned to work in April, but in May she left due to unspecific, unconfirmed "back pain." On the record presented, there is ample evidence from which the Board could and did conclude that appellant abandoned the otherwise suitable job offered to her by the University.

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[7] **Del. Super., C.A. No. 97A-10-017, Silverman, J. (May 29, 1998) (Op. and Order).**

[8] **Id. at *5.**

[9] **Id. at *2.**

The Court finds that substantial evidence supports the Board's decision on that point. The Board relied on medical evidence, noting that Johnson's doctor released her to full-time work on April 21, 1999. Her missing work for two weeks without justification supports the conclusion that she refused suitable employment. And even if her doctors' notes amounted to an excuse for not working in May, Johnson was AWOL by the time the University terminated her in June. According to § 2353(c), if the employee refuses a suitable job offer, workers' compensation rights are forfeited for the refusal's duration.[10]

Johnson's current argument that her entitlement to benefits resumed when the University terminated her presents an issue of first impression in Delaware. According to Larson, although there is little case law on the subject, the effect of a refusal of suitable employment usually is:

> **a suspension of benefits for the period of the refusal. Thus, if a claimant, after an initial refusal, changes his or her mind and decides to accept the proffered job, the suspension is lifted, even if in the meantime the job has become unavailable.[11]**

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[10] ***See* 19 *Del. C.* § 2353(c).**

[11] **A. Arthur Larson et al., *Larson's Workers' Compensation Law* § 85.03 at 85-2 - 85-3 (2000).**

Larson relies, in part, on the Michigan Supreme Court's recent decision in *Perez v. Keeler Brass Co.*,[12] which is strikingly similar to, but more extreme than this case. When Perez was injured on the job, his employer offered him a reasonable, light-duty job.[13] Perez worked for a few months and then he "quit to go to New Jersey."[14] The employer "waited two or three days, and when [Perez] did not show up for work, [the employer] formally terminated him."[15] Over three years later, Perez offered to return to work for his former employer.[16] After considering Michigan's Worker's Disability Compensation Act, which is substantially similar to Delaware's law, *Perez* concluded that the phrase "refuses [reasonable] employment," standing alone, "is ambiguous on the question whether it encompasses quitting."[17] *Perez* further concluded that "the

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[12] **Id. The Michigan Supreme Court essentially combined rulings on three similar workers' compensation cases: *Perez v. Keeler Brass Co.*, 608 N.W.2d 45 (Mich. 2000), *Russell v. Whirlpool Financial Corp.*, 608 N.W.2d 52 (Mich. 2000), and *McJunkin v. Cellasto Plastic Corp.*, 608 N.W.2d 57 (Mich. 2000).**

[13] ***Perez*, 608 N.W.2d at 47.**

[14] **Id.**

[15] **Id.**

[16] **Id.**

[17] **Id. at 49.**

only party that can end the period of refusal is the disabled employee."[18] Then, adopting language from an earlier Michigan case,[19] *Perez* declares: "the dispositive question is whether the refusal to work has ended, not whether the offer of employment is still open."[20] Accordingly, *Perez* finally holds:

> **Thus, if a disabled employee unreasonably refuses a job initially, but later informs the employer of a desire to reenter the work force, the employee has ended the period of refusal, regardless of whether a suitable job is available.[21]**

***Perez* makes sense and its logic squarely applies to Delaware's Workers Compensation Act. Moreover, *Perez* is a natural extension of the Delaware Supreme Court's recent decision in *Johnson Controls, Inc. v. Fields*,[22] which holds that "forfeiture for lost earning capacity of workers cannot be implied where an employee is terminated for cause."[23] If that is so, then it follows that an injured worker's voluntary withdrawal from the work force also**

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18 **Id. at 50.**

19 ***Derr v. Murphy Motors Freight Lines*, 550 N.W.2d 759 (Mich. 1996).**

20 ***Perez*, 608 N.W.2d at 51 (quoting *Derr*, 550 N.W.2d at 768).**

21 **Id. at 51-52.**

22 **Del. Supr., 758 A.2d 506 (2000).**

23 **Id. at 510.**

will not work a permanent forfeiture of benefits. When an injured worker voluntarily withdraws, the worker's disqualification for lost earning capacity is temporary. Its duration is controlled by the injured worker, not by the employer's discretion.

II.

Regarding the permanency issue, at the May 17, 2000 hearing Johnson's expert, Dr. Case, testified that she suffered a 27% permanent impairment. The University's expert, Dr. Gelman, testified that Johnson suffered only a 7% permanent impairment. Acting within its discretion,[24] the Board relied on Dr. Gelman's testimony. His opinion was rationally based on examinations of appellant, the "Diagnostics Related Estimates/Injury" model, and the American Medical Association's Guides for the DRE/I model's use.

A medical expert's opinion "constitutes substantial evidence to support the Board's finding."[25] It is well-settled that when the Board relies on an expert's opinion, which is backed up by substantive evidence, the Court will not disturb the Board's decision. It is up to the Board to decide between experts,

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[24] ***Lohr. v. ACME Mkts.*, Del. Super., C.A. No. 98A-05-020, Cooch, J. (Feb. 24, 1999) Order at *2 (citing *DiSabatino v. Wortman*, Del. Super., 453 A.2d 102, 106 (1982)), *aff'd,* Del. Supr., 734 A.2d 641 (1999).**

[25] **Id. (Citations omitted).**

not the Court. Accordingly, the Court affirms the Board's decision to award appellant a 7% permanent impairment.

III.

For the foregoing reasons, the December 6, 1999 decision denying partial disability benefits is REVERSED and the Board's May 25, 2000 decision awarding permanent benefits after June 8, 1999 is AFFIRMED. The case is REMANDED with instruction that the Board undertake proceedings consistent with this decision.

IT IS SO ORDERED.

Judge

oc: Prothonotary