

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

LISA DARLING,	:	
	:	C.A. No. 03A-05-002 WLW
Claimant Below-	:	
Appellant,	:	
	:	
v.	:	
	:	
SARA LEE CORPORATION,	:	
	:	
Employer Below-	:	
Appellee.	:	

Submitted: March 5, 2004  
Decided: June 21, 2004

**ORDER**

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

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware;  
attorneys for the Appellant.

Christine P. O'Connor, Esquire of Marshall Dennehey Warner Coleman & Goggin,  
Wilmington, Delaware; attorneys for the Appellee.

WITHAM, J.

### **Introduction**

Before this Court is Employee Lisa Darling's appeal of a decision of the Industrial Accident Board ("IAB" or "the Board") finding that her earning capacity was \$6.63 per hour. Employer Sara Lee Corp. (formerly Playtex, hereinafter referred to as "Playtex") has answered the appeal contending that the Board's decision is supported by substantial evidence.

### **Background**

In this workers' compensation case, Ms. Darling suffered a compensable back injury on April 25, 2002, while working for Playtex for which she received total disability payments beginning June 13, 2002. Playtex filed a Petition for Review on December 23, 2002, seeking to terminate Ms. Darling's total disability benefits. Following a hearing on May 1, 2003, the Board terminated Ms. Darling's total disability benefits as of the date the employer's petition was filed. However, the Board concluded that Ms. Darling was entitled to temporary partial disability benefits at a rate of \$339.41 per week. In addition, the Board awarded Ms. Darling medical expert fees and an attorney's fee of \$5,250.00.

Ms. Darling filed this limited appeal for the Court to determine whether the Board properly calculated her partial disability rate based on the evidence presented at the hearing. Specifically, Ms. Darling asserts that the Board erred in determining that her earning capacity was \$6.63 per hour, rather than \$6.15 per hour. Playtex contends that the Board's decision is legally sound and supported by substantial evidence.

The evidence presented to the Board included testimony from William Hausch, a vocational field care manager with Kemper National Services, regarding the results of a labor market survey he prepared in this case. Mr. Hausch conducted the market survey with the understanding that Ms. Darling could perform light duty work, unaware of the most recent restriction from Dr. Moufawad indicating that Ms. Darling could work in a sedentary capacity up to six hours per day. Mr. Hausch testified that of the jobs he included in the survey, there was one sedentary job that Ms. Darling would be able to perform. Specifically, he believed Ms. Darling would be qualified for a greeter position at Wal-Mart which paid \$6.25 per hour. In addition, Mr. Hausch mentioned that there was a suitable cashier position that he learned about after preparing the report which would be sedentary in nature and would pay \$7.00 per hour.

Ms. Darling testified that in Spring 2003 she began looking for suitable employment, given her physical limitations. She applied to Wal-Mart, Video Scene and the SPCA, disclosing her limitations, but was unable to locate employment. Ms. Darling testified that in April 2003 she did obtain a part-time position as a pharmacy cashier at Rite-Aid earning \$7.00 per hour. However, because the job required her to bend throughout the day, she had a flare up of her back condition and quit the job after two weeks. On April 25, 2003, Dr. Moufawad, who treats Ms. Darling for pain management, issued a note restricting her to sedentary work only for 6 hours per day. Since that time, Ms. Darling has been taking increased pain medication waiting for the spasms in her back to subside and has not looked for further employment.

### Discussion

The scope of review for an appeal of an IAB decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence is present on the record to support the IAB's findings of fact and conclusions of law.<sup>1</sup> The role of the Superior Court is to determine whether there was substantial competent evidence to support the findings of the Board.<sup>2</sup> Substantial evidence has been defined to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>3</sup> The Court is not the trier of fact and does not have the authority to weigh the evidence or make its own factual findings.<sup>4</sup> This Court determines if the evidence is legally adequate to support the Board's factual findings and must give "due account of experience and specialized competence of the agency and of the purposes of the basic law under which the agency acted."<sup>5</sup> When the issue raised on appeal is exclusively a question of the proper application of the law, the review by this Court is *de novo*.

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<sup>1</sup> *Histed v. E. I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993). See also *Willis v. Plastic Materials, Co.*, 2003 Del. Super. LEXIS 9 and *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. Lexis 264.

<sup>2</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>3</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

<sup>4</sup> *Johnson*, 213 A.2d at 66.

<sup>5</sup> 29 Del. C. § 10142(d); see also *Histed*, 621 A.2d at 342.

The Board accepted Mr. Hausch's testimony that there were sedentary jobs available within Ms. Darling's restrictions. Specifically the Board found it reasonable for Ms. Darling to be able to find a sedentary job, like the greeter position at Wal-Mart which pays \$6.25 per hour. In determining Ms. Darling's earning capacity, the Board took the average of the pay rate for the greeter position and the pay Ms. Darling received as a cashier at Rite-Aid. Thus, the Board concluded that Ms. Darling's post-injury earning capacity was \$6.63 per hour for 30 hours per week.

Title 19, section 2325 of the Delaware Code provides that a partially disabled employee shall receive compensation which is "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." The Delaware Supreme Court concluded that earning capacity, as the Board uses the term, and earning power, as used in the statute, are synonymous.<sup>6</sup> Earning capacity means earning ability, rather than actual earnings.<sup>7</sup> Earning capacity is determined by a number of different factors, including age, education, general background, occupational and general experience, the nature of the work performable with the physical impairment, and the availability of such work.<sup>8</sup> A claimant's actual post-injury wages create a presumption which may be

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<sup>6</sup> *Ruddy v. I. D. Griffith & Co.*, 237 A.2d 700, 703 (Del. 1968).

<sup>7</sup> *Id.* at 703. See also *Darnell v. BOC Group, Inc.*, 2001 Del. Super. LEXIS 283, \*10, *aff'd*, 792 A.2d 188 (Del. 2002) (citing *Chrysler Corp. v. Williams*, 282 A.2d 629, 631 (Del. Super. Ct. 1971)).

<sup>8</sup> *Darnell*, 2001 Del. Super. LEXIS 283 at \*10.

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rebutted by other evidence showing that the actual wages do not fairly reflect the claimant's earning capacity.<sup>9</sup> It is undisputed in this case that Ms. Darling has suffered a loss of earning capacity and thus suffers a partial disability. However, the issue is the amount of her earning capacity.

The Board did not commit legal error when it determined Ms. Darling's earning capacity by taking into consideration the uncontroverted testimony of Mr. Hausch and the wage Ms. Darling earned at Rite-Aid. Earning capacity is determined by a number of different factors, which were considered by Mr. Hausch in compiling the labor market survey and by the Board in determining Ms. Darling's earning capacity of \$6.63 per hour.

The Board accepted Mr. Hausch's testimony that a sedentary job at Wal-Mart was available paying \$6.25 per hour and concluded that the wage Ms. Darling received while working at Rite-Aid was "further evidence of her earning capacity."<sup>10</sup> In addition, the Board heard testimony from Mr. Hausch that another sedentary job existed for which Ms. Darling would be qualified paying \$7.00 per hour.

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<sup>9</sup> *Id.*

<sup>10</sup> *Darling v. Sara Lee Corp.*, Hearing No. 1211222, IAB Decision on Petition for Review to Terminate Benefits, May 13, 2003, p.9.

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**Conclusion**

Therefore, the Court finds that the decision of the Board was supported by substantial evidence. Accordingly, the decision of the Board finding Ms. Darling's earning capacity to be \$6.63 should be affirmed.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
J.

WLW/dmh  
oc: Prothonotary  
xc: Order Distribution