SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

Dennis J. Menton, Esquire
Tybout, Redfearn & Pell
300 Delaware Avenue, Ste. 1100
P.O. Box 2092
Wilmington, DE 19899

John J. Schmittinger, Esquire
Walt F. Schmittinger, Esquire
Schmittinger and Rodriguez, P.A.
414 South State Street
P.O. Box 497
Dover, DE 19903

RE: ***Nanticoke Memorial Hospital v. Judith Roach***
C.A. No. 03A-10-001-RFS

Date Submitted: March 21, 2004
Date Decided: September 8, 2004

Dear Counsel:

This is my decision regarding Nanticoke Memorial Hospital's ("Nanticoke's") appeal of the Industrial Accident Board's ("the Board's") decision refusing to terminate Claimant, Judith Roach's disability benefits. For the reasons set forth herein, the Board's decision is affirmed.

STATEMENT OF THE CASE

A. History

Claimant, Judith Roach, a nurse at Nanticoke injured her back in a compensable industrial accident on June 9, 1998. This was not the first time she had injured her back at work. Roach was first injured in 1992 as she was lifting a patient from a stretcher. After this incident, she underwent an automated diskectomy. When the pain returned, she had another diskectomy and a laminectomy in March of 1993. In 1995, Roach underwent a piriformis procedure to cut the piriformis muscle and release a nerve. In 1996 she was injured three more times - on May 21 and again on May 26 when she hurt her back while lifting patients and on June 25 when she fractured

her right arm and re-injured her back. Roach was injured a fifth time in the 1998 incident while transferring a patient. She continued to work in the Post Anesthesia Unit ("PACU unit") of the hospital until late September 2002 when the pain finally forced her to leave work. In October of that year, she had a spinal cord stimulator implanted in order to override pain signals going to the brain. In addition, she has been taking several medications, including Oxycotin, Paxil, Lipitor and Nexium. Since October 11, 2003, Roach has been receiving total disability benefits.

In January of 2003, Nanticoke offered her two positions, sedentary in nature - a temporary pharmacy audit unit position and a medicare cart unit position. The positions were created specifically for Roach and involved the review of charts. Both were offered conditionally upon her treating physician's written approval. Dr. Harry M. Freedman ("Dr. Freedman"), Roach's primary orthopedic surgeon disapproved the jobs on March 3, 2003. On March 11, 2003, Nanticoke filed a Petition for Review with the Board, seeking to terminate Roach's disability benefits.

B. The Hearing

A hearing before the Board was held on July 3 and July 22, 2003. Two of Roach's doctors, Dr. Kenneth Smith ("Dr. Smith") and Dr. Freedman, testified by deposition on her behalf. Dr. Freedman, the physician who had disapproved the jobs was one of several orthopedic surgeons treating the patient. He had first treated her in 1992 after her first accident and he was the one who performed the diskectomies and the laminectomy. He continued to see her on and off after those procedures, although other surgeons performed the piriformis procedure and the stimulator implant. He had seen her most recently on December 26, 2002. Dr. Freedman testified that in his opinion, Roach was unable to work in any capacity and that the positions at Nanticoke involved too much walking, stooping and sitting. He also testified that Roach could not perform

the jobs listed in a market survey prepared for Nanticoke by its vocational director, Robert Stackhouse ("Stackhouse"). (Stackhouse also testified at the hearing on behalf of Nanticoke about the labor market survey.) Roach had had vocal chord surgery and most of the positions in the survey were sales and telephone sales positions, jobs not conducive to having a raspy voice.

Dr. Smith, a board certified doctor in internal medicine, began treating Roach in 1994. He prescribed medication to her and he issued doctor's notes beginning in September of 2002, excusing her from work. In Dr. Smith's opinion, Roach should be restricted to no work at all because she is permanently disabled. He testified that she cannot ambulate without pain and that her judgment is impaired by narcotics. He believes her condition has been deteriorating and stated that the doses of the narcotics had been increased.

Roach, who was 62 at the time of the hearing, also testified that she now spends most of her time in a chair or in bed. On occasion she operates a riding mower, but can only do so for 15 to 20 minutes. She was taking Oxycotin twice a day and Tylox for breakthrough pain. She claimed that she had periods of dizziness, that she was often sleepy and that she could not concentrate for long periods of time. Roach did not take medication while she was on duty in the PACU unit. In addition, if she needed to drive she did not take the medication.

Dr. Lanny Edelsohn ("Dr. Edelsohn"), a board certified neurologist, testified on behalf of Nanticoke. He saw Roach four times - September 4, 2000, February 26, 2002, January 14, 2003 and May 20, 2003. Dr. Edelsohn believed she was capable of returning to work full time but only in a sedentary position with the ability to change positions. He also felt she was capable of working while taking the narcotics.

C. Finding of the Board

The Board, in its August 4, 2003 decision concluded that Roach was totally disabled. It chose to accept Dr. Edelsohn's opinion over the opinions of Drs. Freedman and Smith, in concluding that Roach was physically capable of working in a sedentary capacity. In addition, the Board noted that she appeared articulate and bright at the hearing and that she was able to operate a car and a riding lawnmower. Since she could at least alter her medication to drive responsibly, she could also alter it in order to work.

However, the Board determined that Roach remained totally disabled pursuant to the reasoning in *Hoey v. Chrysler Motors Corp.*, 655 A.2d 307 (Table), 1994 WL 723023, at *1 (Del.). The Board found that Roach had never been terminated by Nanticoke and therefore had no duty to look for work. Although Nanticoke had tried to find suitable employment for Roach, it had made the offer contingent upon her treating physician's approval, which was not granted. Nanticoke was also in the process of preparing a retirement proposal package for her. The Board denied Nanticoke's Petition for Review, concluding "[i]t is not reasonable to expect Claimant to look for other employment when Nanticoke has not terminated her and was in the process of finding a position for her to accommodate her restrictions." R. at 11, in Decision on Pets. for Review to Terminate Benefits and to Determine Additional Compensation.

On August 15, 2003, Nanticoke filed a Motion for Reargument, contending that the reasoning of the *Hoey* decision did not apply because the facts of that case were distinct and inapplicable to this case. It argued that once the Board accepted Dr. Edelsohn's opinion, the offered jobs were viable evidence of Roach's employability, despite her own physician's refusal to approve the offers. The Board found that its previous decision was supported by substantial evidence. It pointed out that the jobs were conditional, and since the condition was never met,

they were never truly available to her. Since they were not available, they were not viable and thus could not have evidenced her employability.

DISCUSSION

A. Standard of Review

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence and to review questions of law de novo. *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del.1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del.1960); *In re Beattie*, 180 A.2d 741, 744 (Del. Super. Ct.1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del.1994); *Battista v. Chrysler Corp.*, 517 A .2d 295, 297 (Del.), *app. dism.*, 515 A.2d 397 (Del.1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, 312 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d).

B. Total Disability of the claimant

Nanticoke filed a Petition for Review for Termination of Benefits on the basis that the Claimant was physically able to return to work and thus was not totally disabled and had a duty to seek new employment. Pursuant to 19 *Del. C.* § 2347, the Board, may, "upon petition of any party in interest, on the ground that the incapacity of the injured employee has subsequently terminated" or diminished, make an award ending or diminishing the compensation previously agreed upon. At issue in this case is whether Roach remains totally disabled such that she has no duty to find employment and may continue to receive disability payments. If she is not physically

totally disabled, then the question becomes whether she can be considered a displaced worker and then did she fail to meet her burden of proving she has searched for employment, which efforts have been unsuccessful because of the injury.

In *Hartnett v. Coleman*, the Supreme Court stated that "the degree of compensable disability depends upon the degree of impairment of earning capacity." An employee "may be totally disabled economically, and within the meaning of the Workmen's Compensation Law, although only partially disabled physically." *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967). Such an economically disabled employee, called a displaced worker, is a worker "who, while not completely incapacitated for work, is so handicapped by a compensable injury that he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if he is to be steadily employed." *Id*. The general rule is:

> If the evidence of degree of obvious physical impairment, coupled with other factors such as the injured employee's mental capacity, education, training, or age, places the employee *prima facie* in the 'odd-lot'[1] category . . . the burden is on the employer, seeking to terminate total disability compensation, to show the availability to the employee of regular employment within the employee's capabilities. . . . If, on the other hand, the evidence of degree of physical impairment, coupled with other specified factors, does not obviously place the employee prima facie in the 'odd-lot' category, the primary burden is upon the employee to show that he has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury . . . .

Franklin Fabricators v. Irwin, 306 A.2d 734, 736 (Del. 1973).

Accordingly, a worker is *prima facie* displaced if she does not have the education, training, experience or skills to qualify her for work other than as a general laborer who is able to do only light or sedentary work. *Lister v. Fluor-Daniel Const. Co.*, 1992 WL 91122, at *3 (Del. Super. Ct.), *citing*, *Ham*, 231 A.2d at 261. Unless an employee is unskilled and restricted to light work, she must show that she has made reasonable efforts to secure employment which were

unsuccessful because of the injury, in order to be considered totally disabled under the displaced worker doctrine. *See Lynch v. Baker*, 1997 WL 817844, at *4-5 (Del. Super. Ct.). In *Chrysler Corp. v. Duff*, 314 A.2d 915, 918 (Del. 1973), the Court found:

> [G]iven the great variety of factual situations, it is unwise to focus solely on one factor as necessarily decisive on the burden of proof. Both the employer and the employee share a mutual duty to obtain employment for the employee, the precise extent of which cannot be clearly and definitely expressed as a general rule.

(citation omitted). In *Hoey v. Chrysler Motors Corp.*, 655 A.2d 307 (Table), 1994 WL 723023, at *1 (Del.), the Supreme Court reiterated that, despite the *Duff* standard, the primary burden remained upon the employee to show that he has made reasonable efforts to secure employment. However, the *Hoey* Court also noted that "[a] displaced employee . . . who does not know or have reason to know that she is a displaced employee cannot be expected to seek new employment." *Id*. at *2.

In *Hoey*, the claimant, Hoey, who was injured in a compensable industrial accident, had been released by her physician for light duty work but she continued to be listed as an employee of Chrysler and to be eligible for substantial employee benefits. *Id.* at *1. Chrysler scheduled physical examinations for her every six weeks to evaluate her condition. It did not inform her that no light duty work would be available or that her employment would be terminated, and Hoey did not seek other employment. *Id*. The Court found that under the particular facts and circumstances of the case, Chrysler had a duty to advise Hoey that if it did not intend to provide light duty work, that it intended to discharge her. *Id*. at 2.

The *Hoey* decision addressed the facts of that case. *See Jablonski v. Chrysler*, 1996 WL 528425, at *2 (Del. Super. Ct.). However, given the facts and circumstances of this case, the Board was correct to apply the reasoning of *Hoey* to Roach's situation. Hoey had been released

for light duty work and the pertinent question there was whether she was unemployable because of her injury and thus totally disabled economically. Normally, she would have the primary burden of proving that economic disability in order to continue to receive disability benefits; but, given the circumstances, the court found she had a reasonable expectation of returning to work at Chrysler. Thus, she had no duty to look for other employment.

The facts of this case are slightly different, but the reasoning of *Hoey* is still applicable. Nanticoke offered Roach two sedentary positions, but made her acceptance of them conditional upon her treating physician's approval. Nanticoke gave her no indication that they intended to terminate her employment if she did not accept the positions, nor did it inform her that no other light duty positions would be available. "Under the *Hoey* scenario, a worker who reasonably expects to be given a light duty job soon, is not to be expected to look for work elsewhere during the interim." *Playtex Prods., Inc. v. Leonard*, 2002 WL 31814637, at *8 (Del. Super. Ct.), *aff'd*, 823 A.2d 491 (Table), 2003 WL 21107145 (Del.). Dr. Freedman disapproved of the two offered jobs on March 3, 2003, and Nanticoke filed its petition to terminate Roach's disability benefits only eight days later, on March 11, 2003. To Roach, the hospital seemed to be working with her to develop a solution to accommodate her disability. Just as Hoey did, Roach had a reasonable expectation of eventually returning to work at Nanticoke. *Cf. Greene v. Kraft General Foods*, 1998 WL 960758 (Del. Super. Ct.) (finding Board properly awarded only partial disability benefits and rejected Claimant's claim that she was displaced under *Hoey*, when Claimant had been told no light duty work would be available for her and she had failed to conduct a reasonable job search). As was the situation with Chrysler, Nanticoke had a duty to advise Roach that it intended to discharge her if it no longer intended to work with her and her doctors to provide adequate light duty or sedentary work. *See also Playtex Prods., Inc.* (finding Claimant had no

duty to look for employment when Playtex had not offered her light duty work because of its belief that her injury was not work related; Playtex had a duty to inform her no light duty position would be offered to her). The Board was correct in concluding Roach was permanently disabled and thus had no duty to look for other employment.

Furthermore, Roach was justified in relying upon Dr. Freedman's disapproval of the job analyses and on his and Dr. Smith's conclusions, as her treating physicians, that she was unable to work. As counsel for the Claimant pointed out in his opening before the Board, there is precedent in Delaware that a Claimant is justified in relying on her doctor's no-work order. In *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251, 254 (Del. 2000), the Supreme 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." In *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 879 (Del. 2003), the Court found the Board had erred as a matter of law when it terminated claimant's total disability benefits after finding the employee had improperly relied on his doctor's "no work" order and was therefore not a displaced worker.

> The Claimant's general right to rely upon his treating physician's total disability opinion, especially while a Board award or agreement is in effect, means that the Claimant had no obligation to either return to work on a limited basis with the Employer or to look for other employment until the Board makes that determination.

Id.

In this regard, Roach had worked in the PACU unit following her injury until September 2002, when the pain forced her to leave work. She then underwent surgery to have a posterior column stimulator implanted. For six weeks she felt better, but then the pain returned, at which point she began taking Oxycontin and Tylox again. When Dr. Edelsohn saw Roach in January of

2003, he felt she was capable of returning to work in a sedentary capacity. Her family doctor, Dr. Smith, however, had been giving Roach doctor's notes on a regular basis since September of 2002, excusing her from work. The notes, submitted with the Board Record as Claimant's Exhibit 5, are dated September 6, 2002, January 2, 2003, March 12, 2003, May 19, 2003 and June 19, 2003. At the time of his deposition he still believed she should not be working in any capacity because of the narcotics and because of the low-back condition and the pain. She testified that he had told her not to return to work.

When Dr. Freedman met with Roach on December 26, 2002, he wrote in an office note that she was not to return to work as a nurse in any capacity. He testified in his deposition that when he wrote, "in any capacity" he meant she was not to work at all. On March 3, 2003, Dr. Freedman disapproved the Job Analyses for the two positions offered for re-employment, which Roach had brought to him. Neither Dr. Smith nor Dr. Freedman had released Roach to work in any capacity.

Under *Clements*, "when the treating physician renders a no work order–even if the employer's physician disagrees with the order–the claimant is totally disabled for the purpose of Delaware Workers' Compensation statute." 831 A.2d at 879. *Accord Delhaize v. Baker*, 2002 WL 31667611, at *3 (Del. Super. Ct.) (finding the Board was correct in concluding the claimant was entitled to total disability payments for the period during which she was under a "no work" order). Thus, in addition to the reasoning in *Hoey*, applied by the Board, and pursuant to this parallel line of reasoning, set out in *Gilliard-Belfast* and in *Clements*, Roach had a right to rely on her treating physician's opinions that she was unable to work. During the period up until the Board hearing, she was totally disabled in the eyes of the law and had no duty to look for other employment.

Finally, the Court finds that the Board's decision to conclude Roach is not totally disabled because she is physically capable of working in a sedentary capacity was supported by substantial evidence. It is for the Board to determine and weigh the credibility of witnesses. The Court does not make findings of fact or determine questions of credibility. Here, there was substantial evidence to support the Board's determination that Roach was capable of working. Dr. Edelsohn testified that he believed she was capable of working in a sedentary capacity, even while on narcotics. In addition, Roach testified that she had not taken medication while on duty at the PACU unit and that neither did she medicate when she needed to drive. Before the Board, she appeared bright and lucid. The Board has weighed the credibility of each of the doctors' testimony and of Roach. Since it is evident to the Court that there were substantial facts sufficient to find Roach was physically capable of working in a sedentary capacity, the Board's decision as to that issue must be affirmed.

CONCLUSION

Considering the foregoing, the decision of the Board is affirmed.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTE

1. The phrase "odd-lot" category is synonymous with the idea of the displaced worker. In *Ham*, 231 A.2d at 261, the Supreme Court expressed a preference for the descriptive term "displaced," as opposed to saying a worker falls into the "odd-lot" category, in order to signify that the worker is "displaced" from the regular labor market.