SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES,
JUDGE

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RE: ***John Sabo v. Pestex, Inc.***
C.A. No. 03A-11-001-RFS

Date Submitted: November 18, 2004
Date Decided: December 7, 2004

Dear Counsel:

In this Industrial Accident Board ("the Board") appeal, the Court issued an opinion on October 28, 2004. As discussed there, the Board's finding that the employee was not a displaced worker was not supported by substantial evidence. This determination affected the allocation of the burden of proof on a critical issue. If an employee was not displaced, then he would have to show a reasonable job search which was not successful because of the injury. On the other hand, if a worker is displaced, then the employer must show the availability of compatible employment opportunities.

Giving deference to the Board's prerogative to find facts, a remand was ordered. The idea was that the Board should measure the evidence with the different burden of proof standard. Mr. Schmittinger, on behalf of the employee, has moved for reargument, essentially on the

ground that labor market information is now stale. Mr. Richter, representing the employer, believes remand is nonetheless appropriate, and the Board can adequately deal with the issue.

In general, remands may be ordered where an incorrect legal rule or standard was applied. *See* 82 Am. Jur. 2d *Worker's Compensation* § 719 (1992). This path has been taken in Delaware cases. *See Howell v. Supermarkets Gen. Corp.* 340 A.2d 833 (Del. 1975); *Gen. Foods Corp. v. Twilley* 341 A.2d 711 (Del. 1975). In *Howell* and *Twilley*, the Supreme Court reversed and remanded cases for the Board to apply the correct burden of proof. There was confusion on the subject which was discussed by the *Twilley* Court: "As we emphasized in *Howell*, 'the burden of proof rule of the *Ham* case, which places the burden on the employer to show the availability of employment, is intended to apply only in 'displaced' worker cases.'" *Id.* at 712, *citing*, *Franklin Fabricators v. Irwin* 306 A.2d 734 (Del. 1973)." This problem was treated as if the appropriate standard was established after the initial Board decisions.

Certainly, the Delaware Superior Court has remanded cases to the Board. For example, where the Board failed to express the reasonableness of a claimant's job search in its decision, the issue was remanded back to the Board. *See Guy v. State* 1996 WL 111116 (Del. Super. Ct.). In *Guy*, both sides presented evidence on the point, and the remand permitted the Board to explain its conclusions from the record. *Id.* As the Supreme Court recognized, the scope of the remand was narrow: "The Superior Court's order of remand did not require supplemental factual findings but merely directed the Board to complete its determination of Guy's claim by explicitly stating all of its conclusions on the record. Once the Board completed its supplemental function, the matter must of necessity, return to the Superior Court for the Court to complete its appellate review." *Guy v. State* 676 A.2d 903 (Table), 1996 WL 283591, at *1 (Del.). In that case, the

Superior Court, after remand, found substantial evidence to support the Board's decision that the search was unreasonable. The Supreme Court affirmed the decision. *See Guy v. State* 1996 WL 453313 (Del. Super. Ct.), *aff'd*, *Guy v. State* 687 A.2d 195 (Del. 1996).

On this subject, the Superior Court ordered a remand to provide for additional evidence where the Board announced a point for the first time without prior discussion. *See Penchen, Inc. v. Heluck* 391 A.2d 220 (Del. Super. 1978). There, the Board's decision found the employee to be a displaced worker although the doctrine was not raised beforehand. The Court concluded: "that employer should have the opportunity to produce evidence on the subject which the Board raised after hearing. Accordingly, the case is remanded to the Board for the limited purpose of hearing evidence on the subject of the availability of regular employment within the capability of employee." *Id.* at 224. The *Penchen* case has been discussed, cited or mentioned in fourteen Superior Court cases from 1978 - 1995.

Moreover, the Supreme Court ordered a remand for the Board to reconsider a claimant's displaced worker status in *Clements v. Diamond State Port Corp.,* 831 A.2d 870, 879, 881 (Del. 2003). The claimant's treating physician had put him on a "no work" total disability order. The Board determined that claimant was not actually displaced because no effort was made to find suitable employment. *Id.* at 873. As this finding violated established law, which permits employees to rely upon their physician's advice, the Board's decision on this issue was understandably reversed. As a matter of law, claimant had the status of a displaced worker and was not obligated to look for work until the Board determined that he was no longer totally disabled. *Id.* at 879. Like *Guy*, the remand had a narrow focus and consequence; i.e., Clements was excused from looking for work; the Board could not find that this failure meant that he was

not actually displaced; yet there was sufficient evidence to support the Board's conclusion to terminate the total disability benefits effective with the filing of the employer's petition to terminate; and the Board could still determine that Clements remained totally disabled on a prima facie basis. *Id.* at 880.

Here, the claimant argues that the Board's decision should be reversed rather than remanded. In support of the argument, Supreme Court rulings are cited from cases in 1998. In *Adams v. Shore Disposal, Inc.* 720 A.2d 272 (Del. 1998), the Superior Court remanded the issue of the reasonableness of a job search to the Board. After a second hearing, the Board again found the search was not reasonable. The Superior Court found the finding was supported by substantial evidence. It also found no error by the Board's failure to issue subpoenas directed to businesses contacted by the employer's vocational expert.

The *Adams* case was reversed. The subpoenas should have been issued as a matter of due process to help weigh the evidence on the availability of work and wages which could have been earned. Further, on the subject of reversal or remand, the Court had this guidance:

> This Court has concluded that the Board's decision must be reversed. It would be inequitable to remand this matter for further proceedings on the basis of employment opportunities that are not current. A proper application of the displaced worker doctrine can only be made by considering the contemporaneous availability of employment. Therefore, without prejudice to the employer's right to file another Petition for Termination, the judgment of the Superior Court is reversed. *Id.* at 273-74 (citation omitted).

This same point was made in *ILC of Dover, Industries, Inc. v. Kelley* 716 A.2d 974 (Table), 1998 WL 465133 (Del.), *aff'g* 1997 WL 817847 (Del. Super. Ct.). In *Kelley*, the Board refused to issue subpoenas which were designed to develop evidence about the availability of work for the claimant. On similar grounds, a Board decision on a petition to terminate was

reversed without prejudice to employee's right to refile in *Adams v. Shore Disposal, Inc.*, 1998 WL 960714 (Del. Super. Ct.)[1]

While subpoenas were wrongfully withheld by the Board in these cases, this problem did not determine the remedy. Rather the concern involved the need to have current, rather than old, information about the job market. This position was expressed by the Court in 1995 where a claimant could not properly rely on outdated market surveys used by the employee's lawyer in other cases. *See Torres v. Allen Family Foods*, 672 A.2d 26, 31 (Del. 1995) (finding that labor market surveys which are not current only indicate the availability of a job at sometime in the past). Without question, the purpose of a labor market survey is to present a representative sample of jobs in the current labor market and to show whether or not suitable employment is available to a claimant.

After reviewing the law and positions of the parties, I find the Motion for Reargument should be granted. It is not equitable to have additional proceedings which do not have the benefit of information about current market conditions and available jobs. Although there have been remands in cases before 1998, the point made here was not made in any of them nor in the *Clements* decision in 2003. Given the posture of the *Clements* case, an objection to a remand would not reasonably be expected on this basis. Further, unlike what was contemplated in this Court's remand, the supplemental proceedings in the *Guy* litigation did not involve additional findings.

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[1] The claimant is a different person from the one named in the previously cited *Adams* opinion.

Considering the foregoing, the opinion dated October 28, 2004 is modified at page 13 to reflect that there will be no remand to the Industrial Accident Board for the employer to show claimant's ability to work. The comments made at pages 13-14 are provided for future guidance should a subsequent petition to terminate be filed. In light of the decision on this motion, the Board's decision on the petition to terminate is reversed without prejudice to employer's right to refile another one.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary