

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

MIGUEL BUSTOS, )  
)  
Claimant-Below, Appellant, )  
) C.A. No. 04A-12-007 MMJ  
v. )  
)  
CASTLE CONSTRUCTION OF )  
DELAWARE, INC., )  
)  
Employer-Below, Appellee. )

Submitted: May 11, 2005  
Decided: August 31, 2005

*Upon Appeal from a Decision of the Industrial Accident Board*  
**AFFIRMED**

**MEMORANDUM OPINION**

Perry F. Goldlust, Esquire, and Joanne A. Shallcross, Esquire, Aber, Goldlust, Baker & Over, Wilmington, Delaware, Attorneys for Claimant-Below, Appellant

Christine P. O'Connor, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, Attorneys for Employer-Below, Appellee

JOHNSTON, J.

Miguel Bustos (“Claimant”) filed a timely appeal to the Industrial Accident Board’s (“Board”) decision denying in part Claimant’s Motion for Reargument. Claimant urges that the Board’s decision denying Claimant periods of partial and total disability is not supported by substantial evidence and constitutes legal error, requiring reversal. Castle Construction of Delaware, Inc. (“Employer”) asserts that there is substantial evidence to support the Board’s findings that: Claimant is not entitled to partial disability because Claimant failed to display a required loss of earning capacity; and Claimant’s request for total disability was not supported by medical evidence.

### **FACTS AND PROCEDURAL CONTEXT**

Claimant was injured in an industrial accident on July 9, 2003 while working for Employer as a laborer. Claimant fell from a ladder and suffered injuries to his back, left shoulder, and left wrist. The cause, extent, and nature of the injuries are undisputed by both parties. The parties disagreement concerns the periods of Claimant’s disability.<sup>1</sup>

By order dated March 11, 2004, the Board determined Claimant’s weekly wage as a matter of law. The weekly wage is used to establish the rate at which Claimant will be compensated for his injuries. The Board found Claimant’s wage

---

<sup>1</sup>*Bustos v. Castle Construction of Delaware, Inc.*, I.A.B. No. 1236935 at 7 (May 3, 2004).

at the time of the accident was \$26.50 an hour, and that Claimant's average work week consisted of forty hours. At the time of the accident, Claimant was receiving an increased wage as a result of working on a project that was subject to the State's prevailing wage laws. Although Claimant's regular pay was significantly less, the Board found that by law an hourly employee must be compensated on the basis of the hourly rate at the time of the accident. However, this inflated hourly wage rate generated a weekly wage that is in excess of that allowed by law. As a result, the Board determined that Claimant's compensation rate for any benefits that might be acquired for the July 9, 2003 injury should be the maximum allowable by law – \$506.81 per week.<sup>2</sup>

On April 19, 2004, a hearing was held on Claimant's Petition to Determine Compensation Due. A Hearing Officer sat in lieu of the Board pursuant to 19 *Del. C.* § 2304. Claimant sought compensation from Employer for various periods of partial and total disability beginning July 10, 2003 and continuing to March 1, 2004. On May 3, 2004, the Hearing Officer granted in part Claimant's Petition.

The Hearing officer accepted the testimony of Dr. Bandera, the treating physician, on the periods up to, and including, December 12, 2003. The Hearing Officer found Dr. Bandera's opinion the most persuasive. As a result, Claimant

---

<sup>2</sup>*Bustos v. Castle Construction of Delaware, Inc.*, I.A.B. No. 1236935 (Mar. 11, 2004).

was awarded total disability compensation from August 1, 2003 through September 11, 2003 and from November 11, 2003 through December 12, 2003. However, the Hearing officer concluded that Claimant was not entitled to partial disability payments from September 11, 2003 to November 11, 2003.

The Hearing Officer did not accept Dr. Bandera's testimony that Claimant was totally disabled from December 12, 2003 through March 1, 2004. During this period Claimant had left the country, and Dr. Bandera was unable to examine Claimant. Dr. Bandera was unable to provide any medical evidence that supported a finding of disability. Therefore, Claimant was denied compensation during that period.

On May 11, 2004, Claimant filed a Motion for Reargument. By order dated June 25, 2004, the Board granted in part Claimant's Motion. The Board granted Claimant's request to amend the May 3, 2004 decision to accurately reflect the average weekly wage previously determined by the Board.<sup>3</sup>

On December 9, 2004, the Board ruled on the remaining issues presented in Claimant's Motion for Reargument. The Board found that Claimant is entitled to temporary total disability for the periods of: July 10, 2003 through July 20, 2003; August 1, 2003 through September 11, 2003; and November 11, 2003 through

---

<sup>3</sup>*Bustos v. Castle Construction of Delaware, Inc.*, I.A.B. No. 1236935 (June 25, 2004).

December 12, 2003.<sup>4</sup> The Board affirmed that claimant is not entitled to partial disability from September 11, 2003 through November 11, 2003. Finally, the Board confirmed that Claimant should be denied total disability from December 12, 2003 through March 1, 2004.

On or about December 16, 2004, Claimant filed a Notice of Appeal to this Court from the Board's decision.

### **STANDARD OF REVIEW**

In reviewing the decisions of an administrative board, this Court must determine whether the findings and conclusions of the board are free from legal error and supported by substantial evidence in the record.<sup>5</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>6</sup>

On appeal, the "Superior Court does not sit as a trier of fact with authority to weigh evidence, determine questions of credibility, and make its own factual

---

<sup>4</sup>*Bustos v. Castle Construction of Delaware, Inc.*, I.A.B. No. 1236935 (Dec. 9, 2004).

<sup>5</sup>See *Unemployment Insurance Appeal Board v. Martin*, 431 A.2d 1256 (Del. 1981); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Ponchvatilla v. United States Postal Service*, Del. Super., C.A. No. 96A-06-019, Cooch, J. (June 9, 1997), Mem. Op. at 2.

<sup>6</sup>*Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

findings and conclusions.”<sup>7</sup> The Superior Court may not overturn a factual finding of the Industrial Accident Board unless there is no satisfactory proof supporting the Board’s finding.<sup>8</sup> It is also well established that “[t]he credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine.”<sup>9</sup>

## ANALYSIS

### *Board’s Order Dated March 11, 2004 (“March Order”)*

In its March Order, the Board found as follows:

- An hourly employee must be compensated on the basis of employee’s hourly rate at the time of the accident.
- At the time of injury, Claimant’s rate of pay was \$26.50 per hour. The parties agreed that Claimant’s average work week consisted of forty hours.
- Compensation for forty hours of work at \$26.50 per hour results in a weekly wage in excess of that allowed by law. Claimant’s

---

<sup>7</sup>*Johnson v. Chrysler Corp.*, 213 A.2d 65, 66 (Del. 1965).

<sup>8</sup>*Id.* at 67.

<sup>9</sup>*Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. 1972).

compensation rate for any benefits awarded as a result of the July 9, 2003 injury shall be the legally allowed weekly maximum of \$506.81.

***Board's Order Dated May 3, 2004 Upon Claimant's Petition to Determine Compensation Due ("May Order")***

Following the April 19, 2004 hearing, the Board found as follows:

- The nature and extent of the injuries in this matter are not at issue; the sole issue concerns whether Claimant is entitled to certain periods of disability.
- Regarding the periods of disability up to and including December 12, 2003, the Hearing Officer accepts Dr. Bandera's (treating physician) testimony over the Defendant's medical expert, Dr. Mauriello. Claimant was considered totally disabled from August 1, 2003 through September 11, 2003, and from November 11, 2003 through December 12, 2003.
- Dr. Bandera and Dr. Mauriello offered consistent opinions as to the nature and extent of Claimant's injuries. The only conflicting opinions concerned whether Claimant could return to work.
- The Hearing Officer declines to accept Dr. Bandera's testimony regarding the periods of disability from December 12, 2003 through

March 1, 2004. Dr. Bandera lacked medical evidence to support a finding of total disability during this time period. The Hearing Officer questions the appropriateness of awarding benefits given the concurrence with Claimant's exit from the country.

- Claimant is not entitled to any disability benefits for the time period between September 11, 2003 and November 11, 2003. Claimant's assertion of partial disability fails due to a lack of an actual loss in earning capacity. The evidence demonstrates that Claimant returned to work during this period and was receiving his usual compensation.

***Board's Order Dated December 9, 2004 Upon Claimant's Motion for Reargument ("December Order")***

Upon consideration of Claimant's Motion for Regargument the Board found:

- Claimant is entitled to temporary total disability for the periods of July 10, 2003 through July 20, 2003, August 1, 2003 through September 11, 2003 and November 11, 2003 through December 12, 2003.
- As specified in the original decision, Claimant failed to provide evidence of a reduced earning capacity and, therefore, is not entitled



to partial disability from September 11, 2003 through November 11, 2003.

- The Hearing Officer's decision that Claimant is not entitled to total disability from December 12, 2003 through March 1, 2004 is affirmed. The Board finds Claimant's evidence insufficient.

## **DISCUSSION**

### ***Claimant's Contentions***

Claimant argues that the Board's decision not to award certain periods of disability requires reversal. Claimant makes two separate arguments. First, the Board's decision not to award total disability from July 10, 2003 to July 20, 2003 and partial disability from July 20, 2003 to August 1, 2003 and September 11, 2003 to November 11, 2003 is not supported by substantial evidence and constitutes legal error. Second, the Board's decision not to award total disability benefits from December 12, 2003 to March 1, 2004 is not supported by substantial evidence and constitutes legal error.

In support of his first argument, Claimant points out the Board's finding in the December Order that Claimant is entitled to temporary total disability from July 10, 2003 through July 20, 2003.<sup>10</sup> Concerning this period, Claimant asserts

---

<sup>10</sup>*Bustos v. Castle Construction of Delaware, Inc.*, I.A.B. No. 1236935 (Dec. 9, 2004).

that the December Order clarifies any ambiguities apparent in the earlier determination of compensation due.

Claimant argues that the Board incorrectly decided that Claimant was not entitled to partial disability payments during the time periods of July 20, 2003 to July 31, 2003 and September 12, 2003 to November 11, 2003. The Board reached this decision because it found that Claimant never experienced an actual loss in earning capacity. A finding of partial disability requires an actual loss of earning capacity.<sup>11</sup> The Board found that during these time periods Claimant had returned to work at his regular salary of \$8.00 per hour.<sup>12</sup>

However, Claimant asserts that the appropriate wage to determine earning capacity is the wage at the time of the accident.<sup>13</sup> At the time of the accident Claimant's rate of pay was an inflated \$26.50 per hour. As a result, Claimant contends that his earning capacity was \$1,060 per week.<sup>14</sup> Claimant indicates that this rate is significantly higher than \$8.50 per hour, or \$340 per week salary he was receiving post-accident. Claimant asserts that this depreciation of average

---

<sup>11</sup>*Globe Union, Inc. v. Baker*, 310 A.2d 883, 887-88 (Del. Super. 1973).

<sup>12</sup>*Bustos v. Castle Construction of Delaware, Inc.*, I.A.B. No. 1236935 (May 3, 2004).

<sup>13</sup>*Rubick v. Security Investment Corp.*, 766 A.2d 15, 17 (Del. 2000).

<sup>14</sup>This amount is derived from a \$26.50 hourly wage times the 40 hour work week, therefore, \$1,060 per week.

weekly wages is an obvious loss in earning capacity. To find that there was no loss in earning capacity, the Hearing Officer had to ignore the prior ruling that the Claimant's average weekly wage was derived from a rate of \$26.50 per hour, and *not* the original contracted rate of \$8.00 per hour. Claimant asserts that this loss of earning capacity allows for a finding of partial disability.

Second, Claimant contends that the Board mistakenly denied total disability benefits from December 12, 2003 to March 1, 2004.<sup>15</sup> In support of this argument, Claimant insists that once the Board accepted Dr. Bandera's opinion as prevailing, it should have decided in full accordance with Dr. Bandera's testimony. The Board decided that Claimant was totally disabled from November 11, 2003 through December 12, 2003. Claimant argues that no evidence supports the conclusion that following December 12, 2003, Claimant had physically recovered as was no longer totally disabled. Claimant presented contrary evidence that Claimant continued to suffer total disability following December 12, 2003. Further, the fact that Claimant left the country in no way affected Claimant's ability to work, or Dr. Bandera's opinion that Claimant was unable to work. Claimant points out that Employer presented no evidence that shows it could have

---

<sup>15</sup>*Bustos v. Castle Construction of Delaware, Inc.*, I.A.B. No. 1236935 (May 3, 2004).

continued to employ Claimant, or that Claimant would be able to find regular work in his qualified field.

### *Employer's Contentions*

Employer asserts that the Board's decision denying Claimant certain periods of partial and total disability is supported by substantial evidence and should be affirmed by this Court. Employer contends that the Hearing Officer's decision to deny partial disability benefits during the period of July 21, 2003 to July 31, 2003 and September 12, 2003 to November 11, 2003 was logical and compatible with the intentions of the Workers' Compensation Act. Employer acknowledges that the average weekly wage was correctly calculated by the rate of pay at the time of the accident, \$26.50 per hour. However, Employer argues that compensation based on such a significantly increased rate of pay would be inequitable and illogical.

Employer agrees with the Hearing Officer's reasoning that Claimant did not experience a true loss of earning capacity. Employer also agrees with the Hearing Officer's decision to deny Claimant total disability benefits beginning on December 12, 2003 and continuing until March 1, 2004. Employer reiterates and supports the Hearing Officer's reasoning that disability benefits should be denied because Claimant's treating physician issued a prospective total disability order

without medical evidence to support the opinion and apparently to accommodate a patient's departure from the country for non-medical purposes.

Employer further asserts that despite Claimant's contention, Claimant has the burden of proof to demonstrate that he was disabled from December 12, 2003 to March 1, 2004. It is unnecessary for Employer to provide evidence to prove that Claimant was not disabled, or employable.

### **FINDINGS OF THE COURT ON APPEAL**

After reviewing all of the Board's findings, it appears to the Court that in its December Order, the Board correctly determined Claimant's entitlement to disability benefits.

As to the period of July 10, 2003 to July 20, 2003, Claimant is entitled to temporary total disability benefits as awarded in the Board's December Order. Employer does not dispute Claimant's disability during this time.

As to the periods of July 21, 2003 to July 31, 2003 and September 12, 2003 to November 11, 2003, Claimant is not entitled to partial disability benefits. Claimant failed to demonstrate the required impairment of earning capacity. The term "earning capacity" means "earning ability," taking into consideration factors such as Claimant's age, education, general background, occupational and general experience, the nature of the work to be performed with the physical impairment,

and the availability of such work.<sup>16</sup> The actual wages a claimant earns and “earning capacity” are not synonymous.<sup>17</sup> Although a discrepancy between actual wages and earning capacity may raise the presumption of an impairment of earning capacity, that discrepancy is not dispositive.<sup>18</sup>

Claimant’s pre-injury wages were determined at a rate of \$26.50 per hour. Claimant’s post-injury wages were set at \$8.50 per hour. While this difference demonstrates a loss of “actual wages,” it does not inevitably constitute a loss of earning capacity.<sup>19</sup> When considering a possible impairment of earning capacity, a showing that Claimant’s pre-injury wages were only temporarily increased may mitigate the relevance of an actual decrease in post-injury wages. Claimant offered no corroborating evidence to support a finding of a loss in earning capacity. In order to obtain partial disability benefits, a claimant has the burden of proving a decreased earning capacity as a result of injuries sustained in a work-related accident.<sup>20</sup>

---

<sup>16</sup>*Chrysler Corp. v. Williams*, 282 A.2d 629, 631 (Del. Super. 1971).

<sup>17</sup>*Ruddy v. I.D. Griffith & Co.*, 237 A.2d 700, 703 (Del. 1968).

<sup>18</sup>*Id.*

<sup>19</sup>*Darnell v. BOC Group, Inc.*, 2001 Del. Super. LEXIS 283.

<sup>20</sup>*Id.*

The Board considered the multiple factors that determined Claimant's earning capacity, including Claimant's education, experience, availability of work, and the standard pay of similar laborers. This Court must take due account of the experience and specialized competence of the IAB.<sup>21</sup> Because there is evidence in the record from which the Board's conclusion could have been fairly and reasonably drawn, the Court will not disturb the Board's findings.<sup>22</sup>

This Court also affirms the Board's decision denying Claimant total disability benefits covering the period December 12, 2003 through March 1, 2004. On appeal, the Superior Court may only overturn factual findings where the agency's decision is not supported by evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>23</sup> The Board considered that Dr. Bandera presented no medical evidence that supported his opinion that Claimant was totally disabled during the period in question. Additionally, the Board reasonably found that Dr. Bandera inappropriately issued the disability note to specifically accommodate Claimant's absence from the country.

---

<sup>21</sup>*Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981).

<sup>22</sup>*See In re Delaware Sports Sev.*, 196 A.2d 216 (Del. Super. 1963).

<sup>23</sup>*Oceanport*, 636 A.2d at 899.

Further, Claimant incorrectly contends that Employer has a burden to present evidence that proves Claimant is no longer disabled during the period of December 12, 2003 through March 1, 2004. Claimant also contends that Employer must provide evidence regarding the availability of future employment opportunities. The burden of proof lies solely on a claimant who alleges disability. It is only when an employer seeks a change in disability status that the burden shifts.<sup>24</sup> In this case, Employer is not seeking a change in status because the Board never recognized Claimant as being disabled from December 12, 2003 through March 1, 2004. Therefore, the burden of proof did not shift to Employer.

### **CONCLUSION**

The Board's decision to deny Claimant certain periods of disability was based on substantial evidence and is free of legal error. The Board correctly reasoned that Claimant's failure to show an actual loss of earning capacity precluded Claimant from recovering partial disability compensation. Second, based upon a lack of persuasive medical evidence, and an unsupported disability referral, the Board correctly determined that Claimant is not entitled to total disability benefits from December 12, 2003 to March 1, 2004.

---

<sup>24</sup>*Abex Corp. v. Brinkley*, 252 A.2d 552, 554-55 (Del. Super. 1969).



**THEREFORE**, the decision of the Industrial Accident Board is hereby  
**AFFIRMED.**

**IT IS SO ORDERED.**

---

The Honorable Mary M. Johnston