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

GENERAL MOTORS CORPORATION, Employer-Appellant, v. JAMES KANE, Claimant-Appellee.	)	C.A. No. 04A-08-003 WCC

Submitted: June 6, 2005
Decided: September 30, 2005

MEMORANDUM OPINION

Appeal from Industrial Accident Board. AFFIRMED.

Michael P. Freebery; Marshall, Dennehey, Warner, Coleman & Goggin; 1220 N. Market St., 5th Fl., P.O. Box 8888; Wilmington, Delaware. Attorney for Appellant.

Arthur M. Krawitz; Doroshow, Pasquale, Krawitz, Siegel & Bhaya; 1202 Kirkwood Highway; Wilmington, Delaware. Attorney for Appellee.

CARPENTER, J.

Introduction

Before this Court is General Motors Corporation's ("Appellant" or "GM") appeal from the Industrial Accident Board's ("Board") decision, in which it found that, while James Kane ("Appellee" or "Kane") was no longer totally incapacitated, he was entitled to receive ongoing total disability benefits as the Appellant had not terminated his employment. Upon review of briefs filed in this matter, this Court finds the Board's decision should be AFFIRMED.

Facts

On or about August 31, 1999, Kane injured his wrist while in the employ of GM. Kane underwent surgery relating to the injury in 2001 and was placed on total disability thereafter.[1] In June 2002, Kane's treating surgeon, Dr. Sowa, released Kane to return to light duty work with certain restrictions.[2] Thereafter, Kane enrolled in GM's ADAPT program, but was not provided a job because of a combination of Kane's medical restrictions and his seniority status.[3] On December 12, 2003, GM filed a petition to terminate benefits, alleging Kane was no longer totally disabled, but

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[1]At the time of the accident, Kane had an average weekly wage of $897.60, with a disability compensation rate of $434.68 per week. *Kane v. General Motors Corp.*, IAB Hearing No. 1153957 (July 12, 2004), at 2.

[2]*Id.*

[3]Tr. Dovas, IAB Hearing No. 1153957, at 21-5.

conceding partial disability payments should be made to Kane for his loss of earning capacity.[4] In August of 2003 a letter was sent to Kane's attorney, Arthur Krawitz, Esquire, stating GM would not have an appropriate position available for Kane in the "foreseeable future. . . ." and ". . . that Mr. Kane should seek employment in the open labor market as appropriate to his education, vocational background and physical restrictions. . . ."[5]

A hearing before the Board was held on June 15, 2004 and on July 12, 2004 the Board issued its opinion in which it denied GM's Petition, and awarded Kane partial disability benefits, a medical witness fee and an attorney's fee.[6] The Board determined Kane was in fact capable of returning to work, and therefore no longer totally disabled. However, the Board was not convinced that GM "definitively informed" Kane that no suitable work within GM would be available to him and their intent would be to discharge him as a GM employee. Appellant alleges that the Board's finding is not based on substantial evidence and therefore reversal is appropriate. This Court disagrees.

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[4] *Kane*, IAB Hearing No. 1153957 at 2.

[5] The August 2003 Letter was not introduced as evidence, though it was read into the record and appeared within the documentation for appeal. Tr. Kane, IAB Hearing No. 1153957 at 127-32; Appellant Br., Ex 2.

[6] *Kane*, IAB Hearing No. 1153957 at 2.

Standard of Review

In reviewing an appeal from the Board, the Court must determine whether the Board's decision is supported by substantial evidence and free from legal error.[7] Substantial evidence may be characterized as evidence that a reasonable mind accepts as adequate support for the conclusion.[8] In this capacity, the Court does not weigh evidence, determine questions of credibility, or make findings of fact.[9] If the record supports the Board's findings, the Court should accept those findings even though, acting independently, the Court might reach a different conclusion.[10] The Court merely examines whether the evidence is adequate to support the Board's factual findings.[11] When applying the substantial evidence standard, the Court must consider the record in a light most favorable to the prevailing party, "resolving all doubts in its favor."[12]

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[7] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. Ct. 1985).

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

[9] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

[10] *H & H Poultry Co., Inc. v. Whaley*, 408 A.2d 289, 291 (Del. 1979).

[11] 29 *Del. C.* §10142(d) (2003).

[12] *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super.).

Discussion

In order to terminate total disability benefits, GM bears the initial burden of demonstrating that Kane is no longer totally disabled.[13] Kane does not dispute that he is capable of returning to work in a limited capacity, thus GM met its burden.[14] The only issue which remains is whether Kane was advised by GM that he was obligated to seek other employment because he was being terminated from GM. This is a factual determination, and this Court must give deference to the Board with respect to its findings of fact.

After receiving medical clearance to return to work, Kane was enrolled in a voluntary program, ADAPT, run by GM to assist in the placement of restricted workers. Under the ADAPT program, an employee is placed within GM in accordance with his seniority and restrictions, making it unknown exactly when placement will occur.[15] As early as August 19, 2002, Kane was first advised by GM of the inability to place Kane in a position accommodating to his medical restrictions.[16] In August 2003, Kane's attorney received a letter from GM's counsel

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[13] *Waters v. Statewide Maint.*, 2005 WL 1177568, at *3 (Del. Super.).

[14] Tr. Kane, IAB Hearing No. 1153957 at 119.

[15] GM also has a program for individuals who were laid off, Job Bank, however Kane was not eligible for this program. Tr. Dovas, IAB Hearing No. 1153957 at 57.

[16] *Id* at 25.

indicating GM still could not place Kane and he should look for employment in the open labor market.

Throughout GM's inability to place him, Kane still received employee benefits from GM.[17] To continue his benefits, Kane was required to be examined by GM's physicians annually, which he did as requested.[18] In fact, Kane met with the GM medical staff on several occasions, and even had an appointment scheduled after the IAB hearing.[19] The testimony of Paul Dovas, the GM human resource representative who was responsible for running the ADAPT Program, indicated with each visit to the GM physician, Kane was theoretically closer to placement.[20]

This case parallels *Hoey v. Chrysler Motors Corp.*,[21] and the legal principles established by the Supreme Court are applicable to this case. Ms. Hoey was employed by Chrysler Motors for 17 years prior to her injury. She was injured on the

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[17]Tr. Kane, IAB Hearing No. 1153957 at 114.

[18]Tr. Dovas, IAB Hearing No. 1153957 at 21-37; Tr. Kane, IAB Hearing No. 1153957 at 111-112.

[19]Kane had examinations with GM on June 10, 2002; August 19, 2002; November 19, 2002; November 24, 2003. Tr. Dovas, IAB Hearing No. 1153957 at 21-37. Kane further had an appointment scheduled for November 18, 2004. Tr. Mitchell, IAB Hearing No. 1153957 at 65. The notes within Kane's files at GM, dated August 19, 2002, November 20, 2002 and November 24, 2003, indicated there were no jobs available to Kane with his current restrictions. Tr. Dovas, IAB Hearing No. 1153957 at 37.

[20]Tr. Dovas, IAB Hearing No. 1153957 at 52-3.

[21]*Hoey v. Chrysler Motors Corp.*, 655 A.2d 307 (Del. 1994).

job and thereafter reported to a Chrysler's physicians for regular checkups as a condition of her disability.[22] While waiting for a light-duty position within Chrysler to become available to her, Chrysler continued to provide Ms. Hoey substantial employee benefits. In light of her status, she did not seek new employment and Chrysler never informed Ms. Hoey that a light-duty position would not be available nor that her position would be terminated. Chrysler then attempted to terminate Ms. Hoey's benefits.[23]

The Supreme Court of Delaware determined, under the displaced worker doctrine, both an employer and an employee have a mutual duty to obtain some employment for the employee.[24] Normally the burden to seek new employment is primarily the employees', however, the employer has a duty to advise an employee of pending termination if the employee would not otherwise be aware. Thus, since Chrysler was in "exclusive control" of whether Ms. Hoey would obtain a light-duty position, Chrysler is also under a duty to advise Ms. Hoey if a position will *never* be offered. Since Chrysler did not advise Ms. Hoey of its intent to discharge nor of Chrysler's inability to offer a light-duty position, Ms. Hoey was under no obligation

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[22] *Id* at 307.

[23] *Id*.

[24] *Id*.

to seek employment elsewhere, leaving Chrysler the continued obligation to provide disability payments.[25]

The case at hand is strikingly similar. Kane was injured after working for GM for sixteen years.[26] Kane was placed on total disability since his wrist surgery on October 23, 2001.[27] Kane continued to see GM physicians as a condition of his employment with GM to determine if Kane could return to work.[28] As a result, Kane admittedly did not seek other employment and anticipated a light-duty position with GM.[29] The question now remains whether Kane, in accordance with the principle established in *Hoey*, was definitively advised of his pending termination with GM or reasonably believed he would be provided a position within the company.

The Appellant argues that the Board committed factual error by concluding Kane was not "definitively informed" he would not be given a light duty position within GM, nor that he would be terminated. Further, the Appellant argues the record does not support the conclusion that Kane would be placed in a position within GM through the ADAPT Program, thus GM did not foster a reasonable belief that Kane

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[25]*Id.*

[26]Tr. Kane, IAB Hearing No. 1153957 at 110.

[27]*Kane*, IAB Hearing No. 1153957 at 2.

[28]Tr. Dovas, IAB Hearing No. 1153957 at 51.

[29]Tr. Kane, IAB Hearing No. 1153957 at 113.

would be placed. The collective bargaining agreement states that an injured worker will be placed in another position, except that he cannot replace an employee with higher seniority.[30] Further, Mr. Riccio, a union representative, testified that an employee injured on the job cannot be terminated by GM as a result of that injury in accordance with the collective bargaining agreement.[31] As such, Kane was placed in the ADAPT Program with the assumption that he would obtain a position at GM in a few years.[32]

GM argues the August 2003 letter was sufficient notification to foster a reasonable belief by Kane that he would be terminated. While the contents of the August 2003 letter may have been enough under different circumstances, the Court cannot find that the Board's characterization of the letter and its finding that it was not a definitive termination to be unreasonable or not supported by the record. First, despite the letters or notices received, the evidence supports that a reasonable person in Kane's position, being a long term employee with significant seniority, would

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[30]Appellee Br., Ex. A.

[31]Tr. Riccio, IAB Hearing No. 1153957 at 90.

[32]According to the testimony before the Board, Kane's seniority date was May 1985. The ADAPT Program was placing persons with a seniority of 1981. Mr. Dobos testified that it "could take years" to find Kane a job based on his restrictions and seniority. Tr. Dovas, IAB Hearing No. 1153957 at 35, 42, 55-6.

likely assume the ADAPT Program was continually searching for a suitable position within the company, but at the current time one was unavailable.

Further, the August 2003 letter does not state that Kane will be discharged from GM, it merely states GM cannot place Kane in a light-duty position in the foreseeable future and he should begin looking in the open market for employment. Under these circumstances, a long term employee like Mr. Kane could reasonably conclude that he was not being terminated since a definitive statement of termination is not written within the August 2003 letter and his benefits continued. As such, it appears that Kane reasonably believed that his union's bargaining agreement would protect his employment status and he had no obligation to obtain a new job outside of GM.

Appellant further argues under *Greene v. Kraft*[33] that Kane is not entitled to benefits, but that case is distinguished from the facts at hand. In *Greene* the Court determined Greene is not entitled to benefits because Kraft did nothing to lead Greene to think Kraft would continue searching for a light-duty position.[34] Here, Kane participated in a company-run program to place displaced workers in a light-duty position. By GM doing this, Kane assumed he would remain with the company, and

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[33] *Greene v. Kraft General Foods*, 1998 Del. Super. LEXIS 651.

[34] *Id.*

if that status was changed, it is a reasonable obligation to impose upon the company to clearly and precisely advise the long-term employee of its position.

As in *Hoey*, here GM was in exclusive control of the decision whether Kane could return to work with them. The collective bargaining agreement requires placement by GM of employees injured on the job, with the ADAPT Program appearing to be the means GM would utilize to meet this requirement. Since GM did not definitively advise Kane that he would *never* be placed in a position within GM, nor was sufficient evidence offered showing Kane was given definitive notice of termination, the Court finds no legal error has been committed by the Board and their determination has support in the record.[35] While this Court may have initially ruled otherwise, it is not free to simply substitute its judgment for that of the Board when there is evidence to support their factual conclusions. GM could have easily avoided this situation by indicating a clear intent to terminate this employee. They failed to take this step and must abide by that decision.

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[35]*General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. Ct. 1985).

Conclusion

For the foregoing reasons, the decision of the Board is AFFIRMED.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.