

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

NVF,	:	
	:	
Employer Below-Appellant,	:	
	:	
v.	:	C.A. No. 05A-11-012
	:	
WENDELL WILKERSON,	:	
	:	
Employee Below-Appellee.	:	

Submitted: May 22, 2006  
Decided: July 27, 2006

*Decision Upon Employer's Appeal of the Decision of the Industrial Accident Board.*

**OPINION**

This is an appeal from the decision of the Industrial Accident Board awarding claimant, Wendell Wilkerson, partial disability benefits. The Board awarded claimant partial disability benefits from April 27, 2005, the date he was restricted to light duty work, until August 1, 2005, the date his retirement became effective. The Board further awarded partial disability benefits to claimant from August 1, 2005, onward. The denial of total disability benefits has not been cross-appealed; therefore, the Court's review and discussion will focus on the award of partial disability benefits. Central to this appeal is the effect of a voluntary retirement on the receipt of disability benefits.

**Factual Background**

Wendell Wilkerson ("claimant") was injured in a compensable accident on April 13, 2000, while working at NVF Corporation ("NVF").<sup>1</sup> The following October, he had surgery to

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<sup>1</sup>Deposition of Bruce J.Rudin, M.D. ("Rudin Deposition"), Sept. 15, 2005 at 3; Transcript of *Wilkerson v. NVF Co.*, Industrial Accident Board Hearing ("IAB Hearing")1175832, Sept. 23, 2005, at 1-3.

his lower back.<sup>2</sup> On January 8, 2001, he was released by his treating physician, Dr. Rudin,<sup>3</sup> and returned to work at NVF as a Working Group Leader, a somewhat lighter duty job.<sup>4</sup>

In September 2001, May 2003, and January 2005, claimant returned to Dr. Rudin with back related complaints, but he was able to continue working.<sup>5</sup>

On January 21, 2005, claimant was laid off from NVF for the final time.<sup>6</sup> He commenced receiving unemployment compensation benefits.<sup>7</sup>

On April 27, 2005, claimant received light duty restrictions from his treating physiatrist, Dr. Moran.<sup>8</sup> Later, Dr. Rudin confirmed the restrictions.<sup>9</sup>

On May 13, 2005, claimant filed a petition for additional compensation, seeking total and partial disability. On July 18, 2005, claimant applied for retirement benefits with NVF. His retirement became effective August 1, 2005.<sup>10</sup> Commencement of his retirement made him ineligible for work at NVF, and ended his receipt of unemployment compensation benefits.

On September 23, 2005, the Industrial Accident Board (“Board”)<sup>11</sup> heard evidence. Its decision was issued on November 4, 2005. NVF filed a timely appeal.

### **Standard of Review**

On appeal from a decision of the Industrial Accident Board, the Court is limited to determining whether substantial evidence in the record supports the Board's findings, and that

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<sup>2</sup> Rudin deposition at 3; IAB Hearing at 14-15.

<sup>3</sup> Rudin deposition at 3; IAB Hearing at 3.

<sup>4</sup> IAB Hearing at 18-19, 51-56.

<sup>5</sup> Rudin deposition at 3-6.

<sup>6</sup> IAB Hearing at 58.

<sup>7</sup> IAB Hearing at 77.

<sup>8</sup> Rudin deposition at 8-9; IAB Hearing at 18.

<sup>9</sup> Rudin deposition at 10-11.

<sup>10</sup> IAB Hearing at 21, 76.

<sup>11</sup> The parties stipulated that the case would be heard by Worker’s Compensation Hearing Officer, Joan Schneikart, pursuant to 19 Del. C. § 2301B (a)(4). Such stipulation allowed Ms. Schneikart to stand in the position of the Industrial Accident Board. For purposes of this Opinion, Ms. Schneikart will be referred to as the “Board.”

such findings are free from legal error.<sup>12</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>13</sup> If this Court finds substantial evidence and that the Board has not committed an error of law, the Board's decision must be affirmed.<sup>14</sup> This Court does not weigh evidence, determine questions of credibility, or make its own factual findings.<sup>15</sup>

### **Discussion**

In its November 4, 2005, decision the Board awarded claimant partial disability benefits effective April 27, 2005. Partial disability refers to the period of time during which an injured employee suffers a partial loss of wages as a result of a compensable injury.<sup>16</sup> Compensation for partial disability requires a showing that the claimant intends to work more than part-time.<sup>17</sup> The moving party has the burden to prove partial disability.<sup>18</sup>

The medical testimony of Dr. Rudin supports the Board's conclusion that as of April 27, 2005, the claimant's condition changed, and he became restricted to light duty employment.<sup>19</sup> On that basis, the Board concluded that as of April, 27, 2005, the claimant was not totally disabled from all employment, but was partially disabled due to limitations related to his April 13, 2000, compensable injury. While Claimant had not secured alternate employment at the time of the hearing, the Board found the testimony of the employer's vocational rehabilitation expert,

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<sup>12</sup> See *Unemployment Ins. Appeals Bd. of Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del.1975); *Longobardi v. Unemployment Ins. Appeal Bd.*, 287 A.2d 690, 692 (Del.Super.1971).

<sup>13</sup> See *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del.1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del.Super.1986).

<sup>14</sup> *Windsor v. Bell Shades and Floor Coverings*, 403 A.2d 1127, 1129 (Del.1979).

<sup>15</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del.1965).

<sup>16</sup> *Globe Union, Inc. v. Baker*, 310 A.2d 883, 887 (Del. Super. 1973); *Hall v. Bell Atlantic Delaware, Inc.*, 1998 WL 960686 (Del.Super.Ct.); 19 Del. C. § 2325.

<sup>17</sup> *American Consumer Indus., Inc., v Fehl*, 391 A.2d 224 (Del.Super.1978).

<sup>18</sup> *General Motors Corp. v. Coulbourne*, 415 A.2d 1345 (Del. 1979).

<sup>19</sup> Rudin deposition at 9-11.

Ms. Gleckner, to be an adequate foundation for establishing a reduced earning capacity and for calculating his partial disability claim.<sup>20</sup>

### **Job Availability**

The Board based its ruling of partial disability, in part, on the fact that work which initially was unavailable to claimant due to NVF's lay-off became unsuitable because of the claimant's physical limitations. The Board likened the claimant's situation to that of a displaced worker in that claimant was willing to work, but there was no job within his limitations available to him. Employer correctly argues that the Board did not make an express factual finding that the job claimant left at NVF exceeded the light duty limitations imposed in April, 2005. The Board's analysis would be clearer if that finding had been made. However, such a finding can be inferred from the displaced worker analogy, and from the testimony of the petitioner and others as to the physical requirements of the job petitioner had been performing.<sup>21</sup>

### **Interplay between Worker's and Unemployment Compensation**

Employer argues that the claimant is not entitled to partial disability benefits because he was laid off prior to the imposition of light duty restrictions.

A claimant may be eligible for both unemployment benefits and worker's compensation benefits at the same time, but the worker's compensation benefits must be reduced in the amount of the unemployment compensation benefits received.<sup>22</sup> Recovery of one benefit does not bar recovery of another. A single loss of earnings should be compensated by one complete recovery.<sup>23</sup>

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<sup>20</sup> See IAB Hearing at 82-102.

<sup>21</sup> IAB Hearing at 18; Decision of IAB ("Decision of IAB"), Nov. 4, 2005, at 13-14.

<sup>22</sup> *Brooks v. Chrysler Corp.*, 405 A.2d 141,143 (Del.Super.1979).

<sup>23</sup> *Id.*

## Commencement of Retirement Pension

The claimant decided in July 2004, that the following year when he became eligible for retirement pension on the basis of his age, he would retire. His decision was driven by fears related to the economic condition of NVF.<sup>24</sup> As planned, a year later, on July 18, 2005, claimant applied for pension benefits. His retirement became effective August 1, 2005. Upon retirement, he became ineligible to return to work at NVF. In addition, he lost his entitlement to unemployment compensation benefits.

The employer infers that claimant's retirement was a refusal to work, which is a forfeiture of the right to compensation.<sup>25</sup> Such an argument, even if it had been squarely presented, would have no application to this case where the employer did not prove that a suitable position was offered to the claimant who refused it.<sup>26</sup>

Claimant's retirement has limited relevance to this petition for worker's compensation benefits. The decision to retire because NVF was bankrupt and there was no realistic prospect of returning to work, reflects a practical economic decision which is unrelated to a claim for worker's compensation benefits *except* that it may be considered an expression of the claimant's intentions regarding full time work.<sup>27</sup> The Board concluded that the evidence of voluntary retirement, in the context of NVF's precarious financial condition, was not a conclusive statement of claimant's intent regarding work. Rather, the claimant's testimony, and his participation in vocational rehabilitation training with the Department of Labor, form the basis

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<sup>24</sup> From November 2 – 6, 2004, November 16 – 29, 2004, December 13 – 20, 2004, and December 22, 2004 – January 3, 2005, employees of NVF experienced short term lay-offs due to economic conditions. IAB Hearing at 58.

<sup>25</sup> 19 Del. C. § 2353.

<sup>26</sup> *Sharpe v. W.L. Gore and Associates*, 1998 WL 438796 (Del.Super.Ct.); Decision of IAB at 13-15.

<sup>27</sup> *Brown v. Julian, Inc.*, 1997 WL 27095 (Del.Super.Ct.).

for the Board's decision that the claimant did not intend to remove himself from the full time work force.

**Conclusion**

The Board's award of partial disability is supported by substantial evidence and free from legal error. The decision of the Industrial Accident Board is AFFIRMED.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary  
xc: Industrial Accident Board; attn: Joan Schneikart  
H. Garrett Baker, Esquire  
W. Christopher Componovo, Esquire