IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH HOWELL,	§	
	§	No. 491, 2013
Claimant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for Sussex County
v.	§	
	§	
WILSON MASONRY,	§	C.A. No. S13A-02-003
	§	
Employer Below-Appellee.	§	
	§	

Submitted: December 3, 2013
Decided: March 7, 2014

Before **HOLLAND**, **JACOBS,** and **RIDGELY**, Justices.

O R D E R

On this 7th day of March 2014, it appears to the Court that:

(1) Claimant-Below/Appellant Kenneth Howell appeals from a Superior Court order affirming the decision of Industrial Accident Board (the "Board") in favor of Employer-Below/Appellee Wilson Masonry. Howell raises one claim on appeal. Howell contends that the Board erred in concluding that he was not a displaced worker and could return to employment in some capacity, thereby reducing his weekly workers' compensation payments. We find no merit to Howell's appeal and affirm.

(2) In 2009, Howell injured his left ankle while working for Wilson Masonry. Howell was approved for workers' compensation, which provided

medical costs and disability benefits at $333.35 per week. In 2012, Wilson Masonry filed a Petition to Terminate Benefits, arguing that Howell was no longer disabled. Howell disputed the petition and the matter was submitted to the Industrial Accident Board. A hearing was held on January 7, 2013, at which the Board heard testimony from Wilson Masonry's medical expert and Howell's expert. The testimony from both experts demonstrated that while Howell still had significant injuries and suffered from pain, he was not incapable of performing sedentary work. That was the first time Howell was informed by his doctor that he was not totally disabled.

(3) After the hearing, the Board issued a written decision finding that Howell was only partially disabled. The Board also found that Howell had failed to demonstrate that he was either *prima facially* displaced or actually displaced. As a result, the Board considered Powell's earning potential and found him capable of earning $492.50 per week. It also found that he was earning $500 per week at the time of his injury. As a result, Howell's earning capacity was found to have diminished by $7.50 per week. The Board ordered compensation of $5 per week in accordance with 19 *Del. C.* § 2325. Howell filed a motion for reargument with the Board, which was denied. He then appealed to the Superior Court, which affirmed the Board's decision in a written opinion.[1] This appeal followed.

[1] *Howell v. Wilson Masonry*, 2013 WL 5786256 (Del. Super. Ct. Aug. 20, 2013).

(4) Howell contends that the Superior Court erred in affirming the Board's decision that he was not a displaced worker and that he could obtain employment. Howell makes several arguments to support his claim. Judicial review of a Board's decision uses the same standard at both the Superior Court and the Supreme Court levels.[2] Thus, we review legal issues decided by the Board *de novo* and "factual findings to determine whether they are supported by substantial evidence."[3] "Substantial evidence equates to 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[4] But a reviewing court "does not weigh evidence, resolve questions of credibility, or make its own factual findings."[5]

(5) In *Ham v. Chrysler Corp.*, this Court adopted the Displaced Worker Doctrine.[6] The concept of the displaced worker "is used to refer to a worker who, while not completely incapacitated for work, is so handicapped by a compensable injury that he [or she] will no longer be employed regularly in any well known branch of the competitive labor market," requiring "a specially-created job if he [or she] is to be steadily employed" at all.[7] To qualify as a displaced worker, the

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[2] *Wyatt v. Rescare Home Care*, 81 A.3d 1253, 1258–59 (Del. 2013).
[3] *Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1246 (Del. 2003) (citing *Keeler v. Metal Masters Foodservice Equip. Co.*, 712 A.2d 1004, 1005 (Del. 1998) (per curiam)).
[4] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009) (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[5] *Scheers*, 832 A.2d at 1247 (citing *Alcoholic Beverage Control Comm'n v. Newsome*, 690 A.2d 906, 910 (Del. 1996)).
[6] *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).
[7] *Id.*

"claimant must be deemed totally disabled, within the meaning of the Workmen's Compensation Law, unless the employer is able to show the availability of regular employment within the claimant's capabilities."[8] Where an employer can show that the employee is no longer totally incapacitated, then the burden shifts to the employee to demonstrate that he or she is a "displaced worker."[9] The employee can demonstrate that he or she is *prima facie* displaced and thus totally disabled where he or she "has made reasonable efforts to secure suitable employment which have been unsuccessful *because of the injury*."[10] If the employee makes such a showing, "the burden shifts back to the employer to show the availability of work within the employee's capabilities."[11]

(6) In this case, the Board found that Howell was no longer totally disabled. It also found that Howell was not so limited by his physical restrictions, age, education, or otherwise, that he is *prima facie* displaced. Both findings are supported by substantial evidence. Howell's own doctor, Dr. Patrick Swier, testified that despite Howell's need for further orthopedic treatment, he believed that Howell could return to work in sedentary, light-duty capacity. Further, Howell is forty-eight years old with a high school education and no history of mental incapacity. Howell also did not introduce any evidence that he was unsuccessful in

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[8] *Id.* at 262.
[9] *Wade Insulation, Inc. v. Visnovsky*, 773 A.2d 379, 381 (Del. 2001) (quoting *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995)).
[10] *Id.* at 381–82 (emphasis added) (quoting *Torres*, 672 A.2d at 30).
[11] *Id.* at 382 (quoting *Torres*, 672 A.2d at 30).

securing employment due to his physical injury. Rather, the record demonstrates that Howell's limited attempts in obtaining employment were merely unsuccessful, separate from and unrelated to his physical injuries. Thus, there is substantial evidence to support the Board's finding that Howell was not a displaced worker. As a result, Howell's claim is without merit.

(7) Howell appears to argue that the Board erred in finding that he could obtain a sedentary job without any training or history of working in such a sedentary work environment. He contends that when evaluating partial disability and considering potential wages, the Board should be required to consider the particular claimant and the practical limitations he or she has in returning to the workforce. Howell offers no legal authority suggesting that the Board has any obligation to consider worker training. Moreover, the record is replete with instances of the Board considering Howell's physical condition and concluding that he could work in a limited, sedentary capacity in an entry-level position.

(8) Howell next suggests that the Board should have provided him with some kind of a grace period from the date it found that he is not a displaced worker, thus requiring him to obtain other work. The Board cited the Superior Court's decision in *Keeler v. Metal Masters Inc.*, which held there is no grace period past the cessation of disability.[12] Howell does not argue that this Rule of law is erroneous, only that his individual circumstances do not allow him to

[12] *Keeler v. Metal Masters Inc.*, 1997 WL 855721, at *5 (Del. Super. Ct. Dec. 31, 1997).

quickly return to the labor market. Instead, he merely suggests that our Workers' Compensation statutes are to be liberally construed.[13] Essentially, Howell argues that it was unfair for the Board to assume that he could immediately transition into a sedentary position that paid $492.50 a week because Howell had been a bricklayer most of his life and did not have any training or skills to work in another capacity. But without some basis in law or an erroneous factual determination, Howell's fairness argument is insufficient for reversal.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

[13] *See Del. Tire Ctr. v. Fox*, 411 A.2d 606, 607 (Del. 1980) (noting that Delaware's Workers' Compensation law is "a remedial statute with a benevolent purpose long subject to liberal construction").