IN THE SUPREME COURT OF THE STATE OF DELAWARE

GENERAL MOTOR CORPORATION,	)	
	)	No. 540, 2005
Employer Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
JAMES KANE,	)	C.A. No. 04A 08 003
	)	
Claimaint Below,	)	
Appellee.	)	

Submitted: March 29, 2006
Decided: June 13, 2006

Before **STEELE**, Chief Justice, **HOLLAND**, and **JACOBS**, Justices.

O R D E R

This 13th day of June, 2006, upon consideration of the briefs of the parties, it appears to the Court that:

(1) General Motors Corporation, employer-below appellant, appeals from a Superior Court order affirming the Industrial Accident Board decision that denied GM's petition to terminate claimant-appellee James Kane's total disability benefits. GM first claims that the Board and the Superior Court legally erred by finding that Kane was a displaced worker, because Kane did not present this issue before the board. Second, GM claims that the Board's decision was unsupported by substantial evidence for two reasons: (1) the evidence contradicts the Board's determination that Kane was not definitively informed that GM would never

provide him with a job, as required under *Hoey v. Chrysler Motor Corp.*,[1] and (2) the board misinterpreted testimony by finding that GM's ADAPT placement program gave Kane reason to believe continued employment at GM would be available.

(2) We conclude that the Board and the Superior Court did not legally err and that substantial evidence supports the Board's decision. Accordingly, we affirm.

(3) James Kane is a union employee of GM, who has been employed there since May 1985. In August 1999, Kane injured his right wrist while working on the assembly line. He underwent surgery for the injury in 2001, and since then has received total disability benefits.

(4) Kane's treating physician released him to return to light duty work in June 2002. Kane enrolled in GM's ADAPT program, a seniority-based program that places injured employees with work restrictions in available jobs at GM.[2] Under a national collective bargaining agreement ("CBA") with the United Auto Workers Union, GM must follow a certain procedure to terminate a union employee and cannot terminate an employee because he has sustained an injury. At the hearing, Paul Dobos, a GM human resources administrator, testified that he did

[1] 1994 Del. LEXIS 401 (Del.1994) (Order).

[2] GM also has a "Job Bank" program specifically for employees that have been laid off. Kane was ineligible for this program because he was receiving worker's compensation benefits.

not know whether GM had taken any of the required steps to terminate Kane's employment.

(5) Under the CBA, GM also has a contractual obligation to place an injured employee with restrictions in another position. ADAPT is GM's attempt to meet its contractual obligations under the CBA. Despite the fact that Kane enrolled in ADAPT, GM never placed Kane in a job because none were available within his restrictions and his seniority was not sufficient to place him ahead of other employees.

(6) Kane is still employed by GM, continues to accrue seniority, receives employee benefits, and periodically reports to company physicians as required by GM. He has not sought employment elsewhere because he believes that GM is still attempting to place him in a position compatible with his disability.

(7) In August 2003, Kane's attorney received a letter from GM's counsel stating that, based on Kane's seniority and work restrictions, GM did not have a job available at that time or in the foreseeable future. The letter also advised that Kane should seek employment "in the open labor market as appropriate to his education, vocational background and physical restrictions."

(8) On December 12, 2003, GM filed a petition with the Board to terminate Kane's total disability benefits claiming that Kane was physically able to return to work, that GM had no positions available for Kane within his restrictions

and did not expect such a position to become available in the foreseeable future, and that GM had notified Kane accordingly. On July 12, 2004, after conducting a hearing, the Board issued a comprehensive decision finding that Kane was a displaced worker. The Board, therefore, denied GM's petition and awarded Kane total disability benefits because it concluded that GM had not "definitively informed" him that "he would not be given a light duty position within his restrictions and would be discharged from GM," as required under *Hoey*.[3] In a well-reasoned opinion, the Superior Court affirmed the IAB's decision.[4] GM appealed.

(9) When reviewing an appeal from the Board, the limited role of this Court and the Superior Court is to determine whether the Board's decision is supported by substantial evidence and is free from legal error.[5] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to

---

[3] *See Kane v. General Motors Corp*., IAB Hearing No. 1153957 (July 12, 2004), at 8-9.

[4] *See GMC v. Kane*, 2005 Del. Super. LEXIS 331 (Del. Super. Ct. 2005). After the Superior Court judge issued his ruling in this case, and while GM's appeal was pending, we decided *Saunders v. Daimlerchrysler*, 2006 Del. LEXIS 84 (Del. 2006)(order). GM relies heavily on *Saunders* but we think it necessary to discuss *Saunders.* Had we not decided *Saunders* while GM's appeal was pending, we would have been inclined to affirm for the reasons stated in the Superior Court judge's opinion.

[5] *Std. Distrib. v. Hall*, 2006 Del. LEXIS 2, *5 (Del. 2006) (citing *General Motors Corp. v. Freeman*, 53 Del. 74, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp*., 213 A.2d 64, 66 (Del. 1965)).

support a conclusion.[6] Because the appeal is determined on the record and is not *de novo*, it is well-established that we do not sit as the trier of fact, rehear the case, reweigh the evidence, make credibility determinations, or substitute our own judgment for that of the Board.[7] We do, however, review questions of law *de novo*.[8]

(10) GM first claims that the board committed legal error when it concluded that Kane was entitled to displaced worker status because Kane "never listed the displaced worker argument on his pretrial memorandum and never once made any claim during opening or closing arguments that [Kane] was a displaced worker." Generally speaking, we will not consider on appeal issues not fairly presented to the trier of facts in the first instance.[9] In this case, however, GM's argument lacks merit. The hearing transcript clearly reveals that, in both his opening and closing arguments before the Board, Kane argued that *Hoey* was factually indistinguishable and governed the outcome of his case. GM also

---

[6] *Saunders v. Daimlerchrysler*, 2006 Del. LEXIS 84, *4-5 (Del. 2006) (Order) (citing *Histed v. E.I. DuPont de Nemours & Co*., 621 A.2d 340, 342 (Del. 1983)).

[7] *Hall*, 2006 Del. LEXIS 2 at *6 (citing *Johnson*, 213 A.2d at 66-67); *Saunders*, 2006 Del. LEXIS at *5.

[8] *Saunders*, 2006 Del. LEXIS 84 at *5 (citing *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998))

[9] SUPR. CT. R. 8; *See Jenkins v. State*, 305 A.2d 610 (Del. 1973).

addressed the "displaced worker" issue in its closing argument to the Board. Therefore, the parties fairly presented the issue below.

(11) GM next argues that the Board's decision is not supported by substantial evidence. The allegedly incorrect factual conclusions the Board reached, GM claims, resulted in a misapplication of *Hoey*. First, GM claims that Kane's case is factually distinguishable from *Hoey* because GM's counsel's August 2003 letter and Dobos's testimony established that Kane was advised that no jobs were available at GM. Because GM properly notified Kane to look for work elsewhere, GM contends, the Board erred by finding that Kane had a reasonable expectation of continued employment at GM and was therefore entitled to disability benefits as a displaced worker.

(12) In *Saunders* we recently summarized the law as it applies to displaced workers:

> Under the displaced worker doctrine, an employer who petitions to terminate an employee's total disability benefits must show that the employee is physically capable of returning to work. If the employer satisfies that burden, to retain his disability benefits the employee must show that, although physically capable, he is a displaced worker. A displaced worker is one that is so handicapped by a compensable injury that he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if he is to be steadily employed.[10]

[10] *Saunders*, 2006 Del. LEXIS 84 at *6 (citing *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995)) (quotations, footnotes, and citation omitted).

> The employee may establish that he is "displaced" in one of two ways: (1) by making a prima facie showing that his physical impairment, coupled with his mental capacity, education, training or age, renders him displaced; or (2) by demonstrating that he has made reasonable efforts to secure suitable employment, but because of the injury has been unsuccessful….[11]

(13) In this case, the evidence established, and Kane conceded, that: (i) he is physically capable of performing work within his restrictions; and (ii) he never conducted a reasonable job search outside of GM. On the facts of this case, neither circumstance defeats Kane's entitlement to disability compensation.

(14) In *Hoey* we "elaborated the displaced worker analysis by holding that '[a] displaced employee … who does not know or have reason to know that [he] is a displaced employee cannot be expected to seek new employment.'"[12] As we explained in *Saunders*:

> [T]he claimant in *Hoey* was a long time employee of Chrysler, and had continued to be an employee and to receive benefits after her injury. Hoey had been required to report to the company physician for evaluations, she had continued to participate in a "work-hardening program," and she knew that Chrysler had provided other injured employees with new job placements to accommodate their injuries. In those circumstances, this Court concluded that it was unreasonable to expect Hoey to seek alternate employment until the employer had advised her that no light-duty work was available for her, and that she would be discharged. Until Chrysler had so notified Hoey and unless

---

[11] *Id. at* *6-7. (citation omitted).

[12] *Id. at* *7 (quoting *Hoey v. Chrysler Motor Corp.*, 1994 Del LEXIS 401 (Del. Super. 1994)).

> Hoey had failed thereafter to seek other employment, her total disability benefits would not terminate.[13]

(15) The Board and the Superior Court correctly applied *Hoey* to the facts of this case. Here, substantial evidence supports the Board's finding that GM did not definitively inform Kane that he would never be given a light-duty position at GM within his restrictions, nor did GM inform Kane that it planned to terminate his employment. Like the claimant in *Hoey*, Kane was a long-time employee who was never terminated, who continued to receive benefits, and who continued to report to company physicians. Moreover, as a union member, Kane was protected by the CBA that required GM to place him in another position if he became injured.

(16) This case differs from *Hoey* in one respect. Here, unlike *Hoey*, GM's counsel sent Kane's counsel a letter in August 2003 advising counsel to inform Kane that "there was no job available for [Kane] within his restrictions *and* that none could be expected in the foreseeable future."[14] The Board made the factual finding that "GM [had] not previously notified [Kane] of this situation,"[15] and continued thusly:

---

[13] *Id. at* *7-8 (citing *Hoey*, 1994 Del LEXIS 401 at *2-4).(footnotes omitted).

[14] *Kane*, IAB Hearing No. 1153957 (July 12, 2004), at 8 (emphasis added).

[15] *Id.* The actual sentence that appeared in the Board's decision was, "While there was additional evidence of an August 2003 letter from employer's counsel to Claimant's counsel that

> Nevertheless, GM continues to pay [Kane] extended disability benefits and has not terminated him….Under the circumstances of this case, particularly the collective bargaining agreement and the regular return to work programs that GM has implemented for employees with restrictions, the Board does not find it reasonable to expect [Kane] as a displaced worker, to seek employment elsewhere … until he is definitively informed that he would not be given a light duty position within his restrictions and would be discharged from GM. *The Board did not find Mr. Dobos' testimony persuasive that GM has taken such action to date.* Indeed, his testimony underscored the fact that GM has taken such actions, through its regular placement programs like ADAPT …, to foster the reasonable belief in [Kane] that suitable work would be made available to him at some point.[16]

(17) GM takes great issue with the Board's "inexplicable" and "wrongful" finding that GM did not previously notify Kane of "this situation," noting that Dobos testified during direct examination that as early as August 19, 2002, Kane was informed that "there were no jobs available within his restrictions." Even if, as of August 19, 2002, GM informed Kane that there were no jobs available, it does not appear that GM informed him then that "none could be expected in the near future." Given the context, the Board's reference to "this situation" appears to refer to two facts: (i) that there were no jobs available *and* (ii) that none could be expected in the foreseeable future. In any event, the Board specifically concluded that it did not find persuasive Dobos's testimony that GM had definitively informed Kane that "he would not be given a light duty position within his

---

there was no job available for Claimant within his restrictions and that none could be expected in the foreseeable future, GM has not previously notified Claimant of this situation."

[16] *Id. 8-9.* (emphasis added).

restrictions and would be discharged from GM." This finding is based on a credibility determination that we cannot overturn on appeal.

(18) Moreover, we agree with the Superior Court judge's conclusion that:

> …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.[17]

(19) GM argues that *Saunders*, not *Hoey*, governs Kane's case. In *Saunders*, the claimant was a long time employee of Chrysler, was still employed and receiving benefits, underwent periodic examinations by employer physicians, had not sought employment elsewhere, and Saunders's counsel had received a letter from Chrysler's counsel stating that there were no positions available within his restrictions at that time or in the foreseeable future. Despite the letter, Saunders sought and Chrysler provided three different positions of employment in which Saunders was unable to perform the work because of his physical restrictions. [18]

---

[17] *GMC v. Kane*, 2005 Del. Super. LEXIS 331 at *12-13.

[18] *Saunders*, 2006 Del. LEXIS 84 at *3-4.

The Board found as fact that Saunders had no reasonable expectation of continued employment.[19] The Superior Court affirmed, as did we.

(20) We concluded that substantial relevant evidence supported the Board's conclusion because Saunders received the letter, Saunders's physician informed him that he could not perform assembly line work, and the unsuccessful attempts to place him in a position reinforced the notice given in the letter that there were no available positions that could accommodate Saunders's restrictions.[20]

(21) GM's reliance on *Saunders* is inapposite, however, because here as in *Saunders*, our function is limited to determining whether a factual finding of the board is supported by substantial evidence and whether the board's decision is free from legal error.[21] While the operative facts of *Saunders* and this case are similar, the decisions in both cases turn on witness credibility and the weighing of the evidence. The evaluation of both is the exclusive function of the Board.[22]

(22) In *Saunders*, the Board found that Saunders's testimony that Chrysler was continuing to look for positions for him was not credible and was outweighed

---

19 *Id.* at *8-9.

20 *Id.* at *9-10.

21 *Id.* at *4.

22 *Anderson v. GMC*, 748 A.2d 406 (Del. 2000) (Order) (citing *Vasquez v. Abex Corp.*, 1992 Del. LEXIS 431 (Del. 1992)).

by the clear text of the letter and the failed placement attempts. Here, the Board determined that Dobos's testimony that GM had no light duty positions available and that GM had notified him of this fact, was not credible and was inconsistent with GM's obligations under the CBA and Kane's placement in the ADAPT program. We are not free to substitute our own judgment on witness credibility for that of the Board, even if we would reach a different conclusion based upon the facts presented.[23]

(23) GM also cites *Greene v. Kraft Gen. Foods* [24] in support of its position. The Superior Court judge properly distinguished *Greene* from this case as follows:

> 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. 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 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.[25]

(24) GM seizes on certain language from *Greene* to support an additional argument: "Under the *Hoey* scenario, a worker who reasonably expects to be given a light duty job ***soon*** is not to be expected to look for work elsewhere during the

---

[23] *Id.* (citing *Johnson* 213 A.2d at 66-67 (1965)).

[24] 1998 Del. Super. LEXIS 651 (Del. Super. Ct. 1998)

[25] *GMC v. Kane,* 2005 Del. Super. LEXIS 331 at *13.

interim."[26] GM suggests that the word "soon" is essential and that "there is no evidence in the record to support the inference that Kane believed he was going to receive a light duty job *soon.*" Dobos testified, however, that each time Kane goes back for a physical evaluation it makes it more likely, given the uncertainty of his standing relative to others with seniority, that there will be a job for him within restrictions. Dobos also testified that it was possible that there would be a job for Kane at the time of his next evaluation. Moreover, it appears that Kane was scheduled to report to GM's medical staff on November 18, 2004, several months after the June 15, 2004 hearing before the Board, to undergo an evaluation and to see if there was a job available to him. Finally, Dobos testified that there would be no job within Kane's restrictions in the foreseeable future, which he "guessed" would be "a minimum of two to three years."

(25) The "soon" language from *Greene* is not dispositive here. The Board had evidence before it on how long it might take for GM to find Kane a job within his restrictions. Given Kane's status as a union employee and given the CBA and the ADAPT program, even accepting Dobos's perhaps less-than-generous "guess" that two to three years were needed before a position within Kane's restrictions

[26] *Greene,* 1998 Del. Super. LEXIS 651 at * 7.

would be available, there was substantial evidence to support the Board's conclusion that Kane had a reasonable expectation of continued employment.[27]

(26) GM's final claim is that the Board's decision is unsupported by substantial evidence because the Board misinterpreted testimony concerning the function of the ADAPT program. That misinterpretation, GM argues, caused the Board to determine erroneously that these programs gave Kane reason to believe he would have continued employment at GM. GM suggests that it is being treated differently than other employers and is being punished for having a program that assists its employees when they are injured.

(27) Specifically, GM claims that Dobos's testimony shows that Kane was not qualified for job placement through the ADAPT program and that therefore, the program was legally incapable of fostering a reasonable belief of future employment in his case. What the testimony shows, however, is that the issue was

---

[27] GM also contends that *Zigman v. State*, 1995 Del. Super. LEXIS 383 (Del. Super. Ct. 1995) should apply in this case. *Zigman* is also factually distinguishable. There physical restrictions prevented the injured employee from returning to her previous position and the employer assigned a vocational rehabilitation expert to provide the employee with job placement assistance. *Id.* at *2. The employee completed job applications and went on job interviews, but was not offered any positions. *Id.* at *4. As the *Zigman* Court noted, "[claimant] knew she could not return to her previous position and she was told that [the employer] did not have any light duty positions available…. The [employer] also provided her with job placement assistance through a referral agency thereby placing her on notice that there might not be a light duty position available for her with the employer." *Id.* at 13. *Zigman* stands for the proposition, that "under *Hoey*, a claimaint [can] lose total disability benefits, even without a formal notice of termination, if the facts establish… that the claimant [has] no reasonable expectation of continued employment yet did not seek other employment." *See Saunders*, 2006 Del. LEXIS 84 at *11. Here, the Board concluded that Kane had a reasonable expectation of continued employment and, therefore, *Zigman* is inapplicable.

not whether Kane was unqualified or ineligible for the program, but whether any positions were available to him, given his restrictions and insufficient seniority. The testimony established that positions might become available to Kane in the future, although when that would happen was unclear. Moreover, GM created the ADAPT program to meet its obligations under the CBA. Employees like Kane were entitled to rely on this program. There is no evidence that GM is being treated differently than other employers because of a contractual obligation to its employees that GM voluntarily assumed.

(28) Substantial evidence supports the Board's decision and we find no legal error in the Board's application of the law. NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice