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CASELAW UPDATE

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Eugene Watson v. Wal-Mart Associates,* Del. Supr., C.A. No. 442, 2010, (October 21, 2011) *(en Banc)

Claimant suffered a compensable work injury to his low back while working as a laborer, a freight loader, for Wal-Mart. Following surgery, which did not relieve his pain, Claimant's treating physician and the defense medical expert agreed that Claimant could perform only sedentary to light duty work, with no lifting greater than 20 pounds. Employer filed a petition to terminate Claimant's ongoing total disability benefits. The only issue before the Board was whether Claimant was a displaced worker.

Claimant presented evidence of a job search that he performed after Employer filed the petition to terminate. Claimant testified that he applied for 28 jobs, without success. Two potential employers responded to Claimant's applications with letters indicating that they could not hire him due to his physical disability. Claimant received no other responses to his job applications. Claimant agreed that some of the potential jobs required lifting greater than his 20 pound restriction.

To rebut Claimant's displaced worker claim, Employer presented a labor market survey and vocational testimony regarding nine jobs in the open labor market that were within Claimant's physical limitations and vocational capabilities. According to Employer's vocational expert, 12 of the 28 jobs for which Claimant had submitted applications were outside of his physical restrictions. Three of the remaining 16 jobs (all of which were identified in the labor market survey) had been filled by the time Claimant submitted his applications.

The Board found that Claimant had not met his burden of proving that he was a displaced worker because his job search was not adequate and he failed to demonstrate that he was denied employment because of his work injury. The Board based its conclusion on the fact that Claimant had not heard back from most of the potential employers; some of the jobs were not hiring; and other jobs were beyond his restrictions. In addition, the Board held that the labor market survey and vocational testimony refuted Claimant's displaced worker claim by identifying jobs within Claimant's physical restrictions that were available in the open labor market. Accordingly, the Board granted Employer's petition to terminate and awarded partial disability benefits based on the labor market survey. The Superior Court affirmed.

On appeal, the Supreme Court reversed holding that the only conclusion that was supported by substantial evidence was that Claimant was a displaced worker. The Supreme Court held that the Board was required to accept the undisputed evidence that Claimant had applied for 28 jobs, including 6 jobs from the labor market survey, and the only two responses he received indicated that he could not be hired due to his disability. The Court also held that Employer's failure to re-

hire Claimant for a position within its many, large retail stores was strong evidence that he was a displaced worker. According to the Court, a small labor market survey indicating the possibility of available jobs, was not enough to overcome Employer's failure to re-hire Claimant, let alone Claimant's unsuccessful job search. It concluded that Employer had to demonstrate that appropriate jobs were actually available and that prospective employers would hire, not merely consider hiring, a person in Claimant's position to rebut the displaced worker claim.

***State of Delaware v. Dawn Sturgeon,* Del. Super., C.A. No. N10A-09-016, Slights, J. (June 9, 2011), 2011 WL 2416306**

Employer filed a Petition to Terminate Claimant's ongoing total disability benefits which she had been receiving since September 2008, due to a recurrence of her initial 2005 low back injury. Employer presented testimony from its defense medical expert, Dr. Samuel Matz, indicating that Claimant was capable of returning to work with sedentary restrictions, so long as she could take breaks while working. Employer also presented a Labor Market Survey and vocational testimony identifying potential jobs available to Claimant within the restrictions recommended by Dr. Matz. Claimant testified that she did not believe she could work due to ongoing pain and side effects to her pain medications. Claimant did not present any expert medical testimony.

The Industrial Accident Board denied Employer's Petition to Terminate, holding that Employer had not demonstrated a change in Claimant's condition or circumstances, since the September 2008 recurrence of total disability, that allowed her to return to work in some capacity. Employer appealed the IAB Decision to Superior Court arguing that the Board committed legal error when it applied the "change of condition" standard set forth in 19 Del. C. §2347, regarding modifications of a prior award. Employer argued that the appropriate standard when considering a cessation of disability benefits, pursuant to Brokenbaugh v. Chrysler Corp., 460 A.2d 551 (Del. Super. 1983), is whether the claimant is no longer entitled to receive the compensation at issue. The Superior Court agreed with Employer, holding that when an employer petitions for a termination or cessation of benefits, evidence must be presented to demonstrate that the claimant is medically able to return to work and employment is available within his or her restrictions. In the instant case, the Superior Court held that the Board impermissibly required Employer to show a "change in condition" rather than to demonstrate that Claimant was no longer entitled to receive compensation. Accordingly, the decision was reversed and remanded.

Monica Dixon v. State of Delaware (SEE ATTACHED)

Alvador Avila-Hernandez v. Timber Products, Cecil Palomino v. Christiana Care Health Services, Julio Munoz v. Berger Brothers (SEE ATTACHED)

***Sinnott v. Thompson,* 2011 WL 5569447 (Del.).**

In this choice of law decision, the Delaware Supreme Court affirmed the trial court's denial of defendants' motion for summary judgment. The case arose from a single-vehicle accident caused by a Delaware resident in North Carolina, while operating a motor vehicle registered in Delaware. Plaintiffs' Complaint asserted a claim for personal injuries against the driver and negligent entrustment against the vehicle's owner. The Court held that Delaware law applied to both causes of action. As to the personal injury claim, although the accident occurred in North Carolina, the Court found North Carolina's doctrine of contributory negligence (which functions

as a complete bar to recovery in negligence actions) repugnant to the settled public policy of Delaware. The Court also found that Delaware law applied to the negligent entrustment claim reasoning that the initial entrustment of the vehicle, which led to the operation of the vehicle in North Carolina, occurred in Delaware.

***Brandywine Smyrna, Inc. v. Millennium Builders, LLC, et. al.*, Del. Supr., C.A. No. 08C-11-065, Holland, Jacobs and Ridgley (November 9, 2011).** (SEE ATTACHED)

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

MONICA DIXON,	)	JAN 04 2012
	)	
Employee,	)	CF _____ IAB _____
	)	MF _____ REHAB _____
v.	)	Hearing No. 1358419 FACT _____
	)	
STATE OF DELAWARE,	)	
	)	
Employer.	)	

DECISION ON PETITION TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on December 7, 2011, in the Hearing Room of the Board, in Milford, Delaware.

PRESENT:

HARBOLD B. BARBER

MARY MCKENZIE DANTZLER

Angela M. Fowler, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Walt Schmittinger, Attorney for the Employee

Nicholas Krayer, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Monica Dixon ("Claimant") suffered a compensable injury to her back in a work accident on August 23, 2010, while working for the State of Delaware ("the State") as a certified nursing assistant ("CNA"). Since this accident, Claimant has received certain worker's compensation benefits including periods of compensation for total disability at the rate of $567.78 per week, based on a wage at the time of the accident of $851.67 per week.

On July 14, 2011, Employer filed a Petition for Review[1] seeking to terminate Claimant's total disability benefits alleging that Claimant is capable of returning to work in a sedentary to light-duty capacity. Claimant maintains that while she is physically capable of working she is a displaced worker.

A hearing was held on Employer's petition On December 7, 2011. As part of the proceedings and in an effort to insure that due consideration was given to collateral evidentiary issues raised by the parties, the Board kept the record open, allowing a seven day extension of time (through December 16, 2011) to permit each side the opportunity to provide additional legal argument. Both parties provided timely legal submissions which the Board has taken under advisement in rendering this Decision. The Board concluded its deliberations on December 27, 2011, and this is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant, who was called initially to testify as part of the State's case-in-chief, indicated that she is a 47 year old high school graduate who can read, write, perform basic mathematics and operate a motor vehicle. Claimant obtained a CNA license in 2005. Before working for the

[1] Subsequent to Employer's filing of the present Petition for Review, both parties filed cross Motion(s) *in Limine* seeking exclusion of evidence that each believes was untimely discovered and/or is based on hearsay. Preliminary determination of these issues was deferred and the testimony (including that in question) was allowed pending further review. The issues raised by these objections and motions have since been considered and addressed by the Board in this Decision in the testimonial context in which each was raised.

State for three years as a CNA at the Delaware Veterans Home, Claimant was employed as a CNA for Pinnacle, worked as a slot attendant at Midway Slots, performed warehouse and shipping clerk duties for Hanover Foods and served as a residential program technician and advocate for developmentally disabled adults in the Chimes program.

Subsequent to both her August 2010 industrial accident with the State and resulting February 11, 2011 back surgery with Dr. Kalamchi, Claimant was released to return to work with light duty restrictions in the summer of 2011. Claimant testified that even after she was released to return to work by Dr. Kalamchi, she was reluctant to immediately return to work with her limitations hoping, instead, that after additional therapy she would recover sufficiently to return to the CNA work that she was doing before the industrial accident. In fact, according to Claimant, it was only after she realized that the State was taking her back to court to terminate her benefits that she really started looking for work and felt pressure to find a job.

Initially Claimant applied for and was conditionally offered employment by Absolute Home Healthcare as a home health aid but later had that offer of employment revoked according to Claimant, because of her workers' compensation history. Shortly thereafter, Claimant was briefly employed by Comfort Suites. While unsure of the exact dates of this employment, Claimant confirmed that it is her belief that she worked for Comfort Suites at the end of August 2011 into the beginning of September 2011. According to Claimant, she became aware of this job through a friend who also worked there and was able to secure the employment despite informing Comfort Suites representatives of her history of back injury. Claimant confirmed that she worked only four or five days at this job indicating that a couple of days into the employment she began experiencing back spasms. Claimant confirmed that she reported to Dr. Keen her inability to stay at this job was attributable to discomfort she experienced while sitting for

extended periods of time as well as the effort required to set up the morning continental breakfast. Claimant later reported to Dr. Kalamchi the job required too much bending and lifting. Claimant also informed her attorney, who then wrote a letter to the State to the same effect, that she could not continue at Comfort Inn because extensive periods of standing were required. At the time that she ended her relationship with Comfort Suites, however, Claimant called Valerie Anderson, a Comfort Suites manager, to inform the organization that she was going to her doctor to address these increased symptoms and would be unable to return to work. At this hearing, Claimant indicated that there was too much sitting for her at the Comfort Suites job and that setting up the continental breakfast (including setting out breakfast supplies and hand mixing the waffle batter) exacerbated her low back condition.

When questioned about her report of the increased back symptoms which Claimant attributed to work for Comfort Suites, Claimant admitted that she contacted her treating physician, Dr. Ali Kalamchi, on a regular basis to report increased symptomtology but did not contact him during the period wherein she left Comfort Suites. Specifically Claimant made contact with Dr. Kalamchi on July 13, 2011, July 25, 2011, and August 11, 2011 to report increased symptoms related to therapy. After August 11, 2011, however, Dr. Kalamchi's notes fail to reflect any visits or calls regarding increased symptoms related to her work at Comfort Suites until Claimant saw Dr. Kalamchi in person on October 21, 2011. Claimant maintained that she called at some point and spoke to Russ, Dr. Kalamchi's physician assistant, regarding the issues raised during her brief stay at Comfort Suites but had no explanation as to why this alleged contact was absent from Dr. Kalamchi's records.

Claimant, who admitted that she did not start working on her resume until late October 2011, maintained that despite the failure at Comfort Suites she continued to actively conduct a

job search particularly after the Labor Market Survey was provided. It was at this point that Claimant started to feel pressured to find employment. As such, Claimant began checking the Department of Labor computers for available jobs, contacted the Division of Vocational Rehabilitation to seek retraining, began attending a program at the Dover Library to assist job seekers with skills and applied for six of the fifteen jobs identified on the November 1, 2011 Labor Market Survey including Check-N-Go, Dover Downs, Comp USA, the Cancer Federation, Target and Sears. Claimant acknowledged that many of the details of her search were not recorded thoroughly (including names of people with whom she spoke or the exact positions applied for) either because she did not understand that level of detail to be necessary or because she applied online and did not have access to such information. Claimant also admitted that when compiling her job search log, she may have put the wrong dates down regarding when she actually applied. Claimant reported that she does have a job interview on Friday, December 9, 2010, with the Delaware Hospital for the Chronically Ill for a transporter position (an opportunity that Claimant discovered online at the Library) and further indicated that she should hear something within the week regarding a part-time nursing assistance position with Beebe Hospital. Claimant maintained, however, that none of the other employers with whom she has applied have offered to hire her.

Claimant confirmed that she has now completed her physical therapy and only takes medications for her back as needed. Claimant does have another follow-up scheduled with Dr. Kalamchi.

Claimant testified that her finances are "tight" at present especially since her son and three year old grandchild moved in with her in June 2011. Claimant indicated that she is "raising" this grandchild and that her son is leaving for Job Corps training soon.

Val Anderson, the front office Manager for Comfort Suites, testified on behalf of the State. Ms. Anderson indicated that Claimant worked for Comfort Suites beginning August 25, 2011 through August 31 2011, as a front desk agent floater[2] earning $8.00 per hour when working the 7 a.m. to 3 p.m. shift or 3 p.m. to 11 .m. shift and $9.00 per hour when working the 11 p.m. to 7 a.m. shift. While Ms. Anderson did not conduct Claimant's interview herself, she noted that Claimant had reported her prior work-related back injury as the basis for leaving the field of CNA work. In terms of the primary duties related to this position, Ms. Anderson testified that Claimant would be responsible for checking in guests and handling guest scheduling issues. According to Ms. Anderson, Claimant would be required to stand whenever guests were in the lobby or at the desk but would be allowed the flexibility to sit at other, slow times during her shift. Ms. Anderson testified that there would be very infrequent need for bending on this job. Ms. Anderson also noted, however, that any time Claimant worked the night shift (11 p.m. to 7 a.m.) she would be required to set up the continental breakfast for hotel patrons. This process includes setting out muffins, mixing batter for the waffle machine and moving the cereal dispenser (the heaviest piece of equipment, weighing in at approximately 15 to 20 pounds) from the kitchen to the lobby counter. Ms. Anderson denied that the extra responsibilities of the night shift were arduous indicating instead that Comfort Suites employs an elderly woman who frequently works the night shift and has no issues with setting up the breakfast.

In regards to Claimant's termination from Comfort Suites, Ms. Anderson indicated that Claimant called in at approximately 1 p.m. on the day of her last scheduled shift indicating that she had a virus, was not feeling well and had been to the doctor. Ms. Anderson asked Claimant

[2] Ms. Anderson specified that the term "floater" referred to the fact that Claimant was hired and trained to work all three shifts.

to produce a doctor's note explaining the need for her absence from work but Claimant indicated that she had not asked for one and did not think that she needed one. According to Ms. Anderson, she advised Claimant that she was still in her employment probationary period and would likely lose her job if she failed to report to work or produce the doctor's note. Ms. Anderson, however, noted that Claimant's response was for Comfort Suites to do what it had to do in terms of terminating her. Ms. Anderson testified that Claimant never mentioned to her any back complaints as part of this conversation or at any time.

On cross examination, Ms. Anderson reported that Claimant worked a total of seven, eight hour shifts for Comfort Suites. Of these seven shifts, Ms. Anderson trained Claimant once and worked on the same shift with her two other times

In terms of the demands of the job, Ms. Anderson admitted that some of the condiments required for set-up of the continental breakfast were stored in lower cabinets that might require Claimant to bend down to get them out when it was her responsibility to set up the continental breakfast.

Dr. Robert Keehn, M.D., a board certified orthopedic surgeon, testified by deposition on behalf of the State. Having examined Claimant in September 2011 in addition to reviewing Claimant's relevant medical records, Dr. Keehn opined that Claimant is no longer totally physically disabled and is capable of returning to work with some restrictions.

Dr. Keen testified that he examined Claimant on September 9, 2011. At that time, Claimant reported that she injured her low back while lifting a patient on the job for the State in August 2010. Prior to this 2010 injury, Claimant had undergone an L4-5 lumbar fusion with Dr. Kalamchi to address injuries sustained in an unrelated motor vehicle accident. Claimant had no complaints related to her neck and arms but complained of headaches and low back pain that was

an eight out of ten on a standard pain scale (ten being the worst pain imaginable). Claimant indicated that this low back pain would radiate up into the middle of her back causing it to cramp up.

Claimant informed Dr. Keehn that she had attempted to return to work in August 2011 as a hotel clerk but was unable to maintain the employment because of discomfort she experienced particularly with setting up the hotel's continental breakfast.

Physically, Claimant appeared to be in no acute distress. Claimant was able to ambulate ~~without a limp and had no spinal deformity. She had full cervical range of motion without pain~~ as well as full bilateral shoulder motion and good upper extremity strength. Claimant had good lumbar spine motion with some reported soreness. The muscles around the lumbar spine showed no signs of spasm. Furthermore, neurologically, Claimant was normal both in the upper and lower limbs in terms of reflexes, motor power and sensory power.

Dr. Keehn concluded that Claimant suffered a strain/sprain of her lumbar spine as part of the August 2010 work accident. There were no objective signs of ongoing injury or radiculopathy in this regard. Claimant's prognosis, according to Dr. Keehn is favorable despite her ongoing complaints of low back soreness which he attributes to both her age and the prior lumbar fusion that she underwent in 2007. Dr. Keehn indicated that he does not believe that Claimant could or should return to work as a CNA, an occupation that often requires consistent, heavy lifting, but did believe that Claimant could work full-time in a sedentary position lifting no more than ten pounds with no restriction on her ability to walk, stand or sit. Acknowledging that since he saw Claimant in September 2011, Dr. Kalamchi, Claimant's treating physician, has actually decreased Claimant's work restrictions indicating that she is capable of working in a light duty capacity lifting up to 20 pounds, Dr. Keehn testified that he has no reason to dispute

Dr. Kalamchi's recommendations as a natural progression of the manner in which Claimant presented to him.

Dr. Keehn was aware of the 2011 Labor Market Survey created on the State's behalf relevant to Claimant. He indicated that he reviewed the 12 jobs initially identified in the survey of November 1, 2011, along with the requirements for each finding all 12 jobs within Claimant's physical capabilities.[3]

On cross examination, Dr. Keehn confirmed that Claimant reported doing well after her 2007 lumbar fusion including the ability to perform heavy lifting as a CNA. Dr. Keehn also

[3] Dr. Keehn also indicated that he reviewed three additional jobs that were provided by Addendum on Employer's behalf on November 11, 2011. There was an objection, however, regarding the appropriateness of the Board's consideration of these jobs. Claimant objected to consideration of this testimony on the basis that she only became aware of the jobs a few weeks before the hearing and thus did not have the opportunity to fully and fairly explore them. Employer, on the other hand, argued that the Addendum was provided in an effort to comport with the seeming directives of the Supreme Court in *Watson v. Wal-Mart Associates*, Del.Supr., No. 442, 2010, op. (October 21, 2011), demonstrating that jobs within Claimant's capabilities and limitations exist up to the minute of the hearing.

The Board sustains Claimant's objection but, while doing so, acknowledges the issues raised regarding the contemporaneous availability or absence of availability of employment seemingly implicated by *Watson*. The Board rejects the notion, however, that it was the Court's intention in *Watson* to either favor or create the need for trial by last second ambush as may well be the case if the State's current evidence were allowed.

In terms of the type of testimony at issue here, the Board is not rejecting the three additional employers offered up in the State's Addendum because of a bright line test such as the *so-called 30 day* rule as both Claimant and the State have referred. In fact, the Board is satisfied that the spirit of Industrial Accident Board Rule 9, often cited as the *30 day rule*, is to insure that there is no such trial by ambush. Board Rule 9(B)(5) specifically requires the parties provide the names of witnesses and a complete statement of the relief sought including grounds for a petition and defenses, among other things. While this rule has been widely and pragmatically interpreted to include the introduction of documents that were not provided the adverse party at least thirty days prior to a Board Hearing, the rule does not specifically speak to that issue nor does the Board necessarily see how the protective spirit of the rule is abandoned once the parties are effectively put on notice of what each claims, what each is seeking and how they intend to defend against it. It should come as no surprise to an employer that an injured worker may well attempt to apply for jobs listed in its Labor Market Survey just as it should not come as any surprise to an injured worker that an employer may follow-up with identified employers on its Labor Market Survey to determine the ongoing availability of positions. That is measurably different, however, from the introduction of entirely new employers for whom neither side has any reasonable opportunity to prepare a defense. As such and under circumstances as *Watson* seems to have created, the Board believes that there must be some degree of reasonableness built in to determinations of admissibility where more recent information is offered so as to reconcile the requirements of both parties under *Watson*.

In the instant case, the November 2011 Addendum was provided to Claimant's counsel just before the Thanksgiving holiday which caused delay in Claimant's ability to effectively explore the positions identified in the Addendum. The Board, in this case, will accept Claimant's argument that the amount of time between receiving the document

confirmed that while he now thinks Claimant's prognosis is favorable, as part of his 2011 evaluation he documented her prognosis as guarded based upon her subjective complaints following two lumbar surgeries.

Robert Stackhouse, a vocational rehabilitation specialist with PROTO-WORX, testified on the State's behalf. Mr. Stackhouse testified that he created a Labor Market Survey[4] appraising Claimant's ability to be employed in the local labor market given her vocational and educational background as well as her physical limitations. According to Mr. Stackhouse, Claimant is employable in the local labor market.

Mr. Stackhouse testified that in conducting the Labor Market Survey at issue in this case, he relied on Claimant's relevant medical, educational and vocational history in identifying jobs that may be available to Claimant in the local labor market. Medically, Mr. Stackhouse looked to the recommendations of both Dr. Keehn and Dr. Kalamchi which indicate that Claimant is physically capable of working full-time in a sedentary to light-duty capacity lifting, at most, up to 20 pounds. Educationally, Mr. Stackhouse noted that Claimant is a high school graduate with a certificate issued by Delaware Technical and Community College as a CNA. Vocationally, he indicated that prior to Claimant's 2008 - 2011employment as a CNA for the State, Claimant worked in a similar capacity for Green Valley Pavilion and also worked for Midway Slots, Hanover Foods and Chimes. Despite, however, determining that Claimant has a number of transferable skills based on her sustained education, ability to work as part of a team, skill in recordkeeping and clerical ability, Mr. Stackhouse identified 12 entry level positions in the local labor market for which Claimant would be capable of competing. According to Mr. Stackhouse, all 12 of these jobs were available when identified as part of the survey and when his November

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and having an opportunity to explore the positions was not reasonable. As such, the doctor's testimony (and any later testimony) related to the jobs identified in the Labor Market Survey Addendum has been discounted.

1, 2011 survey report was issued.[5] Twenty one days after the Labor Market Survey was issued, Mr. Stackhouse followed up with the employers identified in the survey and determined that three of the positions (Carmike Cinemas, Dover Downs and Hertrichs) remained open.[6]

Mr. Stackhouse indicated that of the 12 jobs identified, eight were full-time positions generating an average weekly wage of $375.56 and a low average weekly wage of $361.50. The remaining four, part-time positions combined to produce an average hourly wage of $8.98.

Mr. Stackhouse testified that he attempted to review and follow-up on the job logs provided by Claimant regarding her initial job searches.[7] These logs[8] were very incomplete,

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[4] *See* Employer's Exhibit 2 (Labor Market Survey).

[5] As noted in FN3 *supra*, Mr. Stackhouse attempted to provide information regarding three additional jobs not listed in the November 1, 2011 survey on or about November 23, 2011, however the untimely provision of this information precludes consideration of the additional jobs by the Board in this case.

[6] There was a substantial body of testimony offered by Mr. Stackhouse regarding his follow-up with Employer's listed on the Labor Market Survey to assess whether or not Claimant actually applied for the positions identified therein. Claimant objected to this testimony as hearsay arguing that the State should be made to bring each prospective employer in to testify and be subjected to confrontation and cross examination. The State argued that not only is such follow-up a regular and ordinary part of the witnesses work but maintained that it has essentially become a requirement to determine the veracity of an injured worker's alleged job search under *Watson*. According to the State, to require an employer to bring in representatives from dozens of local employers to confirm the information otherwise verifiable by the vocational expert is unworkable and contrary to the administration of justice.

The Board, having heard the arguments of the parties, sustains the objection under these circumstances. The Board does not find this testimony particularly probative in the instant case inasmuch as Claimant has offered no evidence, including her own testimony, to suggest that she has been turned down for employment by these various employers. Claimant did not testify that she denoted any disability on her applications, that she has interviewed with any of the employers to so inform them of her physical restrictions or been advised that she has been rejected as a candidate; only that she has not yet been offered employment by any of them. Given the timing of Claimant's alleged application to each, this is hardly evidence of specific rejection and certainly insufficient to raise the presumption that Claimant has been rejected for employment because of her disability. As such, while the Board is willing to give Claimant the benefit of the doubt as it relates to the applications that she alleges to have submitted to employers identified on the survey, it seems little more than speculation to suggest that Claimant has been disqualified by these potential employers as a candidate for future employment. The simple fact that the jobs are no longer open to applicants does not equate to an assumption that Claimant is not under consideration for employment. Without such an assertion on Claimant's part, even assuming *arguendo* that she applied for every job identified in the survey (which Claimant clearly admitted that she did not), the Board finds the issue of Mr. Stackhouse's attempt to verify those applications irrelevant without some other suggestion that Claimant has been rejected by the employers at issue.

[7] Much like the evidentiary issue raised by the State's attempt to provide updated jobs available in the labor market (*see FN 3 supra)* the Board rejects the admissibility of the job logs produced by Claimant to the State on December 6, 2011 – just a day before this Hearing – inasmuch as these job logs speak to jobs that Claimant has allegedly pursued outside of the jobs identified in the State's November 1, 2011Labor Market Survey. Specifically, the Board is satisfied that the State knew or could have anticipated that Claimant may well apply for jobs listed on that survey.

however, and made it difficult for Mr. Stackhouse to determine what positions Claimant had applied for. Even given these limitations, Mr. Stackhouse indicated that he was able to determine that several of the employer's with whom Claimant alleges to have sought employment (Beebe Hospital and Kent General Hospital specifically) have only positions that would exceed Claimant's lifting capacity. Mr. Stackhouse was, however, able to confirm that Claimant has been attending weekly sessions since October 19, 2011, at the Dover Public Library wherein she receives assistance in resume construction, interviewing pointers, completing applications and other job seeking related skills.[9]

On cross examination, Mr. Stackhouse acknowledged that the library program that Claimant has engaged since October 2011 is a reasonable tool for a job seeker to use as part of an arsenal of efforts.

As such, the State should not have been blindsided even by such a late confirmation of the same. The State was aware of what these jobs were and could have contacted the employer's to follow-up on Claimant's efforts with or without a log from Claimant. The Board is unwilling, however, to find it allowable for Claimant, just barley a day out from this hearing, to provide information of contacts made to additional jobs, outside of the November 1, 2011 Labor Market Survey and outside of any other previously alleged job search efforts as this would unduly restrict the State's ability to obtain information about these jobs or even information sufficient to cross examine Claimant as to these purported contacts.

As noted in FN 3 *supra* the Board appreciates the inherent difficulty that both injured workers and employers experience in providing an ongoing glimpse into what positions may or may not be available in the labor market and what ongoing efforts have been made to seek out such employment. There has to be some cut off for reasonableness, however, that preserves the right of both sides to fairly and adequately prepare for a hearing. The Board is satisfied that in this case one day is not enough. Accordingly, the Board has disregarded any testimony offered in regards to employment efforts made by Claimant that were not either related to the positions identified on the November 1, 2011 Labor Market Survey or provided to the State in a reasonable time (prior to December 6, 2011). The State has not objected to the Board considering the job log information provided by Claimant on November 30, 2011.

[8] *See* Claimant's Exhibit 2.

[9] Claimant offered a letter purportedly authored by Bernadette Connell, a Community Resources Administrator in the Delaware Libraries Job Center, in support of Claimant's testimony that she has engaged resources in an effort to find employment. The State objected to the Board's consideration of this letter as Hearsay. This objection is sustained. To allow Ms. Connell's opinions regarding Claimant's job seeking efforts to be considered without the State being permitted the benefit of cross examination is inappropriate and unduly prejudicial. While Claimant has argued that Ms. Connell's letter simply serves as collaborative evidence of what Claimant herself has testified to, the Board is satisfied that the letter, in fact, goes far beyond that in terms of offering Ms. Connell's personal opinion as to the nature of Claimant's efforts. As such, this letter (part of Claimant's Exhibit 3) has not been considered by the Board in rendering this Decision.

In terms of the 12 positions that he indentified on the November 1, 2011 Labor Market Survey, Mr. Stackhouse confirmed that only three of the jobs remain open for applicants as of the time of this hearing. With regard to how long a period employers leave a position open for applications, Mr. Stackhouse indicated that it often depends on the kind of job being filled; more professional jobs tend to be open and posted for applicants for longer periods of time. While Mr. Stackhouse testified that he is unsure of the number of applicants making application to each of the jobs identified on his survey for Claimant, he did concede that in the current economy, Employer's often have their pick of candidates.

When asked about measures he has taken in light of recent state Supreme Court case law on the issue of displaced workers, Mr. Stackhouse indicated that he eliminated public sector jobs from consideration in his survey because of the manner in which they open and close so quickly, followed-up with employers on his survey to assess whether or not jobs remained open[10] and attempted to provide additional jobs, more close in time to the actual hearing date, to show the ongoing availability of like positions.[11]

Dr. Ali Kalamchi, M.D., a board certified orthopedic surgeon and Claimant's treating physician, testified by deposition on behalf of Claimant. Dr. Kalamchi opined that Claimant is capable of working in a light-duty capacity lifting up to 20 pounds only occasionally.

Dr. Kalamchi confirmed that he first treated Claimant in July 2007 following a motor vehicle accident that she suffered in 2006. As a result of this initial injury, Dr. Kalamchi took Claimant to low back fusion surgery in the L5-S1 area of her lumbar spine on October 31, 2007. Claimant recovered very well from this procedure managing to return to work as a CNA in an unrestricted capacity.

[10] Mr. Stackhouse also testified that he contacted employers listed on his survey for Claimant to determine whether or not Claimant had made contact with them however the Board has found little relevance to these efforts under the present circumstances. *See FN 5 supra.*

Following Claimant's recovery from her 2007 surgery, Dr. Kalamchi did not see Claimant for a period of approximately two years until she suffered the August 2010 work injury and returned to his care on October 11, 2010. Claimant reinjured her low back in August 2010 when she twisted her back while lifting a patient in her capacity as a CNA for the State.[11] As a result of this accident, Claimant developed mid lower back pain with radiation into both buttocks. Therapy was unsuccessful, leading Claimant back to Dr. Kalamchi for evaluation in October 2010.

According to Dr. Kalamchi, Claimant presented in October 2010 with complaints of mid lower back pain, some buttocks pain but no numbness. Claimant had mild paraspinal spasm and slightly limited forward flexion with pain at the terminal bendings and rotation. Dr. Kalamchi indicated that he found Claimant to then be suffering with localized lumbar pain with spasm following the acute, recent injury. MRI confirmed that Claimant had no issues at the previously fused L5-S1 level but instead had more localized issues at L4-5. After a course of injections also failed, Dr. Kalamchi took Claimant for disc replacement surgery on February 9, 2011. Claimant's pre-operative back pain was resolved by this procedure though she continued to have some lingering symptoms as she worked through post-operative therapy.

According to Dr. Kalamchi, by June 17, 2011, Claimant was referred to a work hardening program and released to return to work in a light-duty capacity lifting up to 20 pounds. Dr. Kalamchi maintained that these restrictions would not allow for Claimant to return to her former CNA work and also indicated that Claimant would only be able to lift up to 20 pounds occasionally. Dr. Kalamchi further advised that Claimant should be in a position that allows sitting most of the time with flexibility to stretch as needed and stand and walk occasionally. Having been given these restrictions, Dr. Kalamchi testified that Claimant attempted to return to

[11] The Board has disallowed this testimony. *See FN 3 supra.*

light-duty work at some point but reported pain related to the activity. Nevertheless, Dr. Kalamchi maintained that Claimant can perform at light-duty levels lifting up to 20 pounds if the right job is located.

Dr. Kalamchi confirmed that he saw Claimant on August 11, 2011. At that time Claimant was attending the work hardening program but reported increased symptomotology when she lifted more than 10 pounds. Clinical examination and X-rays taken at this August visit confirmed that Claimant had no compression or root irritation and was thus simply suffering from pure back pain particularly if required to do a lot of lifting or twisting. Despite these complaints, Dr. Kalamchi maintained Claimant with light-duty work restrictions.

After August 11, 2011, Dr. Kalamchi next saw Claimant on October 21, 2011. Claimant reported that she was having a difficult time and informed Dr. Kalamchi of her attempted return to work at local motel where she was required cleaning, lifting and bending that she could not manage. Clinically, Claimant presented with some tightness in her back, paraspinal spasm and limited forward flexion (as compared to her August visit 2011). Dr. Kalamchi explained that a lot of bending and lifting could have caused irritation at the facet joint leading to the kinds of symptoms Claimant reported experiencing. Dr. Kalamchi again maintained Claimant at light-duty work restrictions lifting up to 20 pounds occasionally.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Termination

In a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated (*i.e.*, demonstrate "medical employability").[12] In other words, the initial burden is on the employer to show "that the employee is no longer totally

[12] *Howell v. Supermarkets General Corp.*, 340 A.2d 833, 835 (Del. 1975); *Chrysler Corporation v. Duff*, 314 A.2d 915, 918n.1 (Del. 1973).

incapacitated for the purpose of working."[13] In response, the claimant may rebut that showing, by showing that he or she is a *prima facie* displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury (*i.e.*, actual displacement). In rebuttal, the employer may then present evidence showing the availability of regular employment within the claimant's capabilities.[14] In this case, the Board finds that Claimant's total disability has terminated, but Claimant is entitled to compensation for partial disability.

~~The medical evidence is clear in this case. Dr. Keehn testified on behalf of the State that~~ Claimant is capable of working up to full-time hours in a sedentary duty capacity lifting no more than 10 (to 20) pounds. Dr. Keehn does not believe that Claimant should have any limitations on her ability to stand, sit or walk. Claimant's treating physician, Dr. Kalamchi, has echoed these sentiments. In fact, Dr. Kalamchi testified that Claimant is capable of lifting up to 20 pounds occasionally before Dr. Keehn indicated his initial restrictions for Claimant of lifting only up to ten pounds. It was only after reviewing Dr. Kalamchi's subsequent treatment notes for Claimant that Dr. Keehn indicated his willingness to increase his stated lifting restrictions for Claimant to comport with those recommended by Dr. Kalamchi. Moreover, Claimant's treating physician, Dr. Kalamchi, has maintained Claimant's light-duty restrictions despite some complaint on Claimant's part that return to work requiring that level of effort has led to increased symptoms. Thus, based upon the testimony of both physicians, there seems to be agreement that Claimant is no longer totally physically incapacitated from any and all work. As such, the Board is satisfied that Employer has met its burden of demonstrating that Claimant is no longer totally physically disabled.

[13] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).
[14] *Howell*, 340 A.2d at 835; *Duff*, 314 A.2d at 918n.1.

The next question to be addressed in the termination analysis is whether Claimant is a displaced worker. In this context, Claimant can still defeat Employer's efforts to terminate her benefits by establishing a *prima facie* case of being a displaced worker, shifting the burden back to Employer to show that regular employment (i.e., not a specially-created job) exists within her capabilities. The term "*prima facie* displaced worker" is used to refer to a worker who, while not completely incapacitated from working, is so disabled as a result of a compensable injury that he or she is no longer regularly employable in any well-known branch of the competitive labor market.[15] Generally, elements such as the degree of obvious physical impairment, coupled with the claimant's mental capacity, education, training, and age are considered in establishing the *prima facie* case.[16] Given these standards, the Board is satisfied that the instant record is insufficient to establish a finding that Claimant is a *prima facie* displaced worker.

Claimant is 47 years old. She is a high school graduate with an established work history leading up to the underlying industrial accident. There is nothing to suggest any obvious physical impairment resulting from her compensable injury that would prevent her from obtaining employment and in fact, in this case, Claimant was able to obtain employment despite disclosure of information related to her industrial injury. There has been no suggestion of any cognitive limitations suffered by Claimant and to the contrary her vocational history suggests that she is trainable in a variety of settings. There is simply no evidence that Claimant is a *prima facie* displaced worker.

Claimant can still defeat the State's Petition to Terminate, however, by showing that she made reasonable efforts to secure suitable employment which failed because of the injury (before

[15] *Duff*, 314 A.2d at 917; *Ham v. Chrysler Corporation*, 231 A.2d 258, 261 (1967).
[16] *Duff*, 314 A.2d at 916-17; *Facciolo Paving & Construction Co. v. Harvey*, 310 A.2d 643, 644 (1973); *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (1973).

the burden shifts back to Employer to show that suitable work is available).[17] In other words, Claimant must show that she is "actually" displaced. In conducting such a reasonable job search, Claimant must make a "diligent, good faith effort to locate suitable employment in the vicinity."[18] In assessing the reasonableness of an injured worker's job search, "[t]he Board cannot find against the claimant simply because the claimant did not do everything he could have done. Its task is to determine whether the claimant's efforts were reasonable, not whether they were perfect."[19]

The Board is satisfied, based largely upon issues underlying Claimant's credibility, that Claimant has failed to engage in a reasonable job search sufficient to establish that she is an actually displaced worker. Claimant testified that while she was aware that she was released to return to modified duty work in June 2011, she did not begin looking for employment at that point. Claimant, receiving ongoing total disability payments from the State at that time, opted to wait things out a bit in the hopes that her condition would improve enough that she could return to her work as a CNA. While the Board can appreciate that this is something that Claimant may well desire, the evidence seems clear from both physicians testifying in this matter that Claimant will likely never again be able to do the heavy lifting required of a CNA. Claimant's inability to rejoin the work force in the same line of work that she engaged prior to the injury is not however evidence of any ongoing total physical disability[20] nor does it seem reasonable to the Board as a basis to defer a job search after being released to return to work by one's physician.

Claimant herself testified that she did not feel any pressure to return to the labor force or even look for work until the State filed the current petition to terminate her total disability benefits and more specifically until she received the State's Labor Market Survey. Furthermore,

[17] *Kelly v. J & J Corp.*, 447 A.2d 427, 428 (1982); *Duff*, 314 A.2d at 917; *Harvey*, 310 A.2d at 644.
[18] *Bernier v. Forbes Steel Ensign Wire Corp.*, WL 3980 at 2 (1986), *aff'd*, 515 A.2d 188 (Del. 1986).
[19] *Watson*, op. at 6.

while she may have looked for job opportunities prior to receiving it, Claimant admitted that she did not become diligent in her job search or begin submitting applications until she received the November 1, 2011 Labor Market Survey. Thereafter Claimant applied for six of the 15 jobs listed on the survey in addition to attending sessions at the public library to assist with job seeking skills and checking the computers for potential employment at the Department of Labor. Claimant offered no explanation for why she did not apply for more of the jobs identified on the Labor Market Survey. Given the indisputably difficult state of the economy and nationally recognized levels of long term unemployment even for those actively seeking work, it seems unreasonable for Claimant, who was released to return to work in June 2011, to be so nonchalant in her job search, deferring most of her efforts until just a few weeks before this hearing.

Despite these delayed and somewhat questionable efforts however, Claimant, receiving word of the opportunity through a friend employed by the organization, was nevertheless able to secure employment with Comfort Suites earning $8.00 to $9.00 per hour (depending on the shift). According to Claimant, she worked this job for only a short time because of the increased symptoms she experienced as a result of the working conditions. Notably, however, the conditions of which Claimant complained changed depending on who she was reporting to with the work-related issues ranging from the job requiring too much standing, too much sitting, too much bending and twisting or too much lifting (particularly in regards to setting up the continental breakfast bar). These various assertions are inconsistent with the testimony of Ms. Anderson who indicated that Claimant would have enjoyed great flexibility in how much time she spent standing and sitting and that the job required very little bending, twisting or lifting (including nothing in excess of 20 pounds). Claimant's suggestion that she made clear from the time of her termination with Comfort Suites that she was not returning to work because the job

[20] *Federal Bake Shops, Inc. v. Maczynski*, 180 A.2d 615, 616 (Del. Super. 1962).

was too physically demanding was also sharply contrasted by Ms. Anderson's testimony that Claimant alleged to be ill from a stomach virus which was documented by her physician.

It is this very failure to contact her treating physician to report the alleged increase in symptoms deriving from the Comfort Suites employment that raises additional concerns for the Board in terms of the credibility of Claimant's basis for terminating that employment. As Dr. Kalamchi's records support, Claimant maintained relatively close contact with his office calling several times in August to report increased symptoms from the therapy she was undertaking. Then, however, despite the occurrence of her temporary return to work and the alleged symptoms that she claimed as a result of that, Claimant conspicuously went almost two months without any documented contact with Dr. Kalamchi's office until she saw him in late October 2011. While Dr. Kalamchi testified that Claimant seemed to be suffering an objective increase in symptoms at his October 2011 examination of her, Dr. Keehn failed to make the same objective findings during his September 2011 examination of Claimant. Claimant has attempted to suggest that the October 2011 findings made by Dr. Kalamchi are directly attributable to the Comfort Suites work, however, the fact that Dr. Keehn made no such similar findings a month earlier (still after the Comfort Suites employment) raises some question in regards to such an assumption. In fact, Claimant's testimony that she has been raising her grandson since June 2011 leaves room for one to just as reasonably conclude that Claimant was experiencing some increased spasm or other symptoms in October 2011 as a result of her changing lifestyle as it would to draw the conclusion that she must still be suffering in October 2011 from the seven shifts she worked for the Comfort Suites at the end of August 2011.

In assessing all of the evidence presented, the Board is thus persuaded that Claimant has failed to establish that she is an actually displaced worker who has been unable to locate work

due to her industrial injury. Despite somewhat minimal and last minute efforts, primarily in the four to six weeks leading up to this Hearing, Claimant herself demonstrated that she is employable by obtaining a job at Comfort Suites even after disclosure of her worker's compensation circumstances and injury. Moreover, Claimant's treating physician, despite Claimant's alleged complaints and increased symptomotology resulting from her short-lived return to work, has not modified her restrictions or again taken her out of work completely. To the contrary, Dr. Kalamchi testified that he remains confident that Claimant is capable of sedentary to light-duty work.

Accordingly, the Board finds that Claimant is no longer totally physically disabled and is not either a *prima facie* or actually displaced worker. As such, Claimant's total disability is terminated effective upon the filing of the State's current petition (July 14, 2011).

Termination of Claimant's total disability benefits aside, there is no dispute that Claimant cannot return to her previous work as a CNA due to lingering physical limitations related to her compensable work injury. Specifically, Claimant has been released to return in up to a full-time, sedentary to light duty work capacity, as testified to by both Drs. Keehn and Dr. Kalamchi. Consideration must therefore be given to any potential loss of earning capacity suffered by Claimant as a result of these limitations. In this regard, the Board looks to both the employment that Claimant was able to secure at Comfort Suites as well as the labor market survey created by Mr. Stackhouse[21] to determine the amount, if any, of lost earning capacity that Claimant has suffered as a result of her work-related injury.

[21] While the Supreme Court in *Watson* noted that "[i]f the claimant has applied for most of the jobs on the survey, without success, the labor market survey's evidentiary value is significantly diminished," this analysis seems to presume that Claimant conducted a reasonable, good faith job search. *Watson*, op. at 7. As previously noted, not only is the Board unconvinced that Claimant in the instant case conducted such a good faith, reasonable job search, there was insufficient evidence presented to establish, particularly given the late submission of relevant applications, that Claimant has effectively been rejected for employment by the employers identified in the labor market survey.

The Labor Market Survey identifies 12 entry level jobs compatible with Claimants educational and vocational background. These 12 jobs represent a mix of both full and part-time employment; all of which were open for application at the time that the Labor Market Survey was provided to Claimant. Mr. Stackhouse testified that of these 12 jobs initially identified, three remain open for application at the time of this Hearing: Regal Cinema (part-time positions only), Dover Downs (part and full-time positions) and Hertrichs Motors (part and full-time positions). The two full-time jobs still open for application suggest an average weekly wage of $320 to $400 per week while the part-time Regal Cinema job pays $7.50 per hour. The wages associated with these positions are commensurate with the $8.00 to $9.00 per hour that Claimant was paid by Comfort Suites. As such, the Board is satisfied that the State has demonstrated that Claimant is capable of earning at least $320 per week. Given that Claimant's average weekly wage at the time of her injury was $851.67, this new earning capacity suggests a weekly loss of wages totaling $531.67. Accordingly, Claimant is entitled to payment of partial disability at the rate of $354.45 per week effective upon termination of her total disability benefits on July 14,2011 ($320.00/week (current earning capacity); $851.67 (average weekly wage at time of injury) - $320 = $531.67; $531.67 x 66 2/3 = $354.45).

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is generally entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller."[22] At the current time, the maximum based on Delaware's average weekly wage calculates to $9,330.80. The factors that must be considered in assessing a fee are set forth

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As such, the evidentiary value of the Labor Market Survey in this case remains intact at least for purposes of assisting the Board in determining what wage Claimant is reasonably capable of earning.

in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded.[23] A "reasonable" fee does not generally mean a generous fee.[24] Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

While Claimant's entitlement to compensation for temporary total disability has been terminated herein, Claimant has achieved an award for payment of partial disability.[25] Claimant's counsel submitted an affidavit stating that he spent a total of 24.9 hours preparing for this hearing; the hearing itself lasting approximately three hours. Claimant's counsel was admitted to the Delaware Bar in 1995 and is experienced in workers' compensation litigation. Counsel or his firm's first contact with Claimant was on July 12, 2011. Thus, Claimant has been represented by counsel or his firm for approximately six months. This case was of average complexity involving no novel issues of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although he naturally could not work on other cases at the same time that he was working on this litigation. There is no evidence that accepting Claimant's case precluded counsel from other employment other then potential representation of Employer. There is no evidence that the employer lacks the ability to pay a fee.

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[22] DEL. CODE ANN. tit. 19, § 2320.
[23] *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996).
[24] *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966).
[25] Employer did make an offer of settlement in this case more than thirty days from the time of the Board Hearing however, that offer was for less than Claimant has been awarded herein. As such, Claimant is entitled to an award of reasonable attorney's fees.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board awards a total attorney's fee in the amount of $7,700.[26]

Claimant is awarded payment of medical witness fees for testimony on behalf of Claimant, in accordance with title 19, section 2322(e) of the Delaware Code.

[26] The Board's decision potentially confers upon Claimant the ability to receive partial disability benefits at the rate of $354.45 per week for up to 300 weeks. This Decision could therefore be worth in excess of $100,000 to Claimant.

STATEMENT OF THE DETERMINATION

For the reasons set forth above, Claimant's total disability status is terminated as of the date of the State's filing in this matter.

Claimant is entitled to payment of partial disability benefits effective July 14, 2011, to be paid at the rate of $354.45 per week as well as attorney's fees in the amount of $7,700 and payment of medical witness fees.

IT IS SO ORDERED THIS 29 DAY OF DECEMBER, 2011.

INDUSTRIAL ACCIDENT BOARD

for

HAROLD B. BARBER

MARY MCKENZIE DANTZLER

I, Angela M. Fowler, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Mailed Date: 12-29-11

Karen Mills
OWC Staff

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

SALVADOR AVILA-HERNANDEZ, Appellant, v. TIMBER PRODUCTS, Appellee.	)	
CECIL PALOMINO, Appellant, v. CHRISTIANA CARE HEALTH SERVICES, Appellee.	)	C.A. No. N10A-06-002 DCS (Consolidated)
JULIO MUNOZ, Appellant, v. BERGER BROTHERS, Appellee.	)	

Submitted: October 6, 2011
Decided: January 6, 2012

Appeal of Decisions of the Industrial Accident Board
Hearing Nos. 1333032, 1285570, and 1308606
*Decisions **REVERSED and REMANDED***

MEMORANDUM OPINION

Appearances:

Gary S. Nitsche, Esquire, Wilmington, Delaware, Attorney for Appellants

Andrew J. Carmine, Esquire, Wilmington, Delaware, Attorney for Appellee Timber Products

Amy M. Taylor, Esquire, Wilmington, Delaware, Attorney for Appellee Christiana Care Health Services

Luciana M. Gorum, Esquire, Wilmington, Delaware, Attorney for Appellee Berger Brothers

STREETT, J.

Introduction

Appellants Salvador Avila-Hernandez, Cecil Palomino, and Julio Munoz, ("Claimants"), have consolidated their cases and petitioned this Court for review of three orders of the Industrial Accident Board, (the "Board"), dismissing as untimely Claimants' petitions appealing Utilization Review determinations.[1] These Utilization Review determinations found that various medical services received by Claimants for compensable work-related injuries were not in compliance with Health Care Practice Guidelines. Claimants (through their attorney) filed their petitions contesting these Utilization Review determinations after the 45-day time limit imposed by Workers' Compensation Regulation 5.5.1 which was adopted by the Department of Labor on June 1, 2009.[2] As a result, Timber Products, Christiana Care Health Services, and Berger Brothers, (collectively, the "Employers"), moved to dismiss the petitions for being untimely. Claimants appeal to this Court on the grounds that the provision contained in Regulation 5.5.1 limiting the time for filing a petition to 45 days after receipt of the Utilization Review determination is invalid.

The Court finds that the Board's decisions to dismiss Claimants' petitions as untimely are legally incorrect. Therefore, for the reasons discussed herein, the Court reverses the decisions of the Board.

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[1] *Salvador Avila-Hernandez v. Timber Products*, Hrg. No. 1333032 (Del. Ind. Acc. Bd. May 6, 2010); *Palomino v. Christiana Care Health Svcs.*, Hrg. No. 1285570 (Del. Ind. Acc. Bd. June 16, 2010); *Munoz v. Berger Brothers*, Hrg. No. 1308606 (Del. Ind. Acc. Bd. August 12, 2010).

[2] *See* 19 Del. Admin. C. § 1341-5.5.1; Claimant Avila's Hearing Transcript, 10 (May 6, 2010) (hereinafter "Avila Hrg. Tr.").

Factual and Procedural Background

After being injured in compensable work-related accidents, Claimants filed Petitions to Determine Additional Compensation Due with the Board contesting Utilization Review determinations that certain medical services they had received were not in compliance with Health Care Practice Guidelines. As such, the bills for these medical services would not be paid by the Employers.

On January 21, 2009, Claimant Avila-Hernandez was injured in a compensable work-related accident resulting in a low back injury. As of October 2009, forty sessions of physical therapy and two injections were administered to him for the injury.[3] On November 24, 2009, a Utilization Review determination was issued by the Department of Labor, (the "DOL"), approving two injections and twelve sessions of physical therapy.[4] The Utilization Review determination rejected the other twenty-eight sessions of physical therapy finding that they were not in compliance with Health Care Practice Guidelines.[5] Based on the Utilization Review determination, the employer's insurance carrier paid for twelve therapy sessions and two injections but denied payment for twenty-eight therapy sessions.[6] The Utilization Review determination was not issued by the DOL to Claimant Avila-Hernandez's counsel. However, Claimant Avila-Hernandez's counsel did receive a copy of the determination from the medical provider on December 29, 2009.[7] Claimant

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[3] Avila Hrg. Tr. at 6.

[4] Avila Hrg. Tr. at 6.

[5] Avila Hrg. Tr. at 6.

[6] Avila Hrg. Tr. at 6.

[7] Avila Hrg. Tr. at 9.

Avila-Hernandez contested the determination in a petition filed with the Board on February 22, 2010, more than 45 days after receipt of the Utilization Review determination by Claimant Avila-Hernandez's counsel.[8] The employer moved to dismiss on the grounds that the appeal was not timely. The employer's motion was granted by the Board on May 6, 2010.[9]

On April 27, 2006, Claimant Palomino was injured in a compensable work-related accident. Two UR determinations were issued by the DOL on September 30, 2009, and received by Claimant Palomino on October 14, 2009.[10] The Utilization Review determinations were not issued to Claimant Palomino's counsel.[11] Claimant Palomino, through his attorney, contested the determination in his petition to the Board dated February 26, 2010, more than 45 days after their receipt.[12] The employer moved to dismiss on the grounds that the petition was not timely, and the motion was granted by the Board on June 16, 2010.[13]

On August 29, 2007, Claimant Munoz was injured in a compensable work-related accident. The Utilization Review determination that his medical services were not in compliance with Health Care Practice Guidelines was issued by the DOL on March 17,

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[8] Avila Hrg. Tr. at 6.

[9] Avila Hrg. Tr. at 15.

[10] Claimant Palomino's Hearing Transcript, 5 (June 10, 2010) (hereinafter "Palomino Hrg. Tr.").

[11] Palomino Hrg. Tr. at 6.

[12] Palomino Hrg. Tr. at 5.

[13] Palomino Hrg. Tr. at 11.

2010.[14] The determination was not issued to Claimant Munoz's counsel, and Claimant Munoz did not provide a copy to his lawyer until June 9, 2010.[15] A petition contesting the determination was filed by Claimant Munoz's attorney immediately thereafter on June 10, 2010, presumably more than 45 days after Claimant Munoz's receipt of the determination.[16] The employer moved to dismiss on the grounds that the petition was untimely, and the motion was granted "very reluctantly" by the Board on August 12, 2010.[17]

Claimants have timely appealed the Board's decisions to dismiss the claims. The matters have been consolidated, and briefing is complete.

Contentions of the Parties

Claimants contend that the Board's decisions to dismiss their petitions for being untimely are legally incorrect because those decisions are based on Regulation 5.5.1 which is invalid. Claimants assert that the adoption of Regulation 5.5.1 by the DOL exceeds the DOL's authority because Regulation 5.5.1 shortens the statute of limitations contained in the authorizing statute. The regulation provides a 45-day limitation whereas the statute of limitations in the Workers' Compensation Act is five years. Claimants also contend that DOL notice of Utilization Review determinations should have been issued, not only to Claimants, but to Claimants' attorney.

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[14] Claimant Munoz's Hearing Transcript, 6 (Aug. 12, 2010) (hereinafter "Munoz Hrg. Tr.").

[15] Munoz Hrg. Tr. at 6.

[16] Munoz Hrg. Tr. at 5.

[17] Munoz Hrg. Tr. at 9-10.

The Employers argue that the time limitation of 45 days required by Regulation 5.5.1 (1) is reasonable and in Claimants' best interests, (2) is longer than comparable 30-day time limitations for appeals, (3) is allowable because it is in accord with the stated purpose of the authorizing statute, and (4) is necessary to accomplish that purpose.

The Board did not formally contribute its position on the issue. However, the Board indicated at the hearing for Claimant Munoz that it was "in a dilemma" over the regulation and granted the order to dismiss albeit "reluctantly."[18]

Standard of Review

The Court reviews the Board's decision to determine if substantial evidence exists in the record to support the Board's findings of fact and to determine if the Board erred in its application of the law.[19] The Court "consider[s] the record in the light most favorable to the prevailing party below."[20] The Court, however, reviews *de novo* questions of law such as the construction of the worker's compensation statute and whether the statute of limitations bars a claim.[21] Not only is the issue of construction of statutory law subject to plenary review by the Court but so is the application of that law to undisputed facts.[22] Thus, the Court may consider, but does not defer to, an agency's interpretation of a

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[18] Munoz Hrg. Tr. at 9.

[19] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Shively v. Allied Systems, Ltd.*, 2010 WL 537734, *9 (Del. Super. Feb. 9, 2010).

[20] *Shively*, 2010 WL 537734 at *9.

[21] *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007); *Anchor Motor Freight*, 716 A.2d at 156; *Shively*, 2010 WL 537734 at *9.

[22] *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 381 (Del. 1999) (quoting *Stoltz Mgmt. Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992)).

statute it administers even if the agency's interpretation is rational or not clearly erroneous.[23]

Discussion

Where a statute is unambiguous, the Court applies the plain meaning of the language and does not engage in statutory construction.[24] Where ambiguity exists, however, the statute is construed so as to "promote its apparent purpose and harmonize it with other statutes within the statutory scheme."[25] An ambiguity exists where 1) the language is reasonably susceptible to different meanings or 2) the plain meaning of the language would lead to an absurd result not intended by the legislature.[26] Furthermore, the Court evaluates the legislative scheme *en bloc* and not solely by its individual parts.[27] The goal of such statutory construction is to effectuate legislative intent.[28]

More particularly, when interpreting the Worker's Compensation Act, the Court engages in a liberal construction so as to accomplish the statute's purpose to compensate injured employees resolving "any reasonable doubts in favor of the worker."[29] In addition, the Workers' Compensation Act specifically states that "[n]o agreement, rule,

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[23] *DiPasquale*, 735 A.2d at 382-83.

[24] *LeVan*, 940 A.2d at 933; *Lawhorn v. New Castle County*, 2006 WL 1174009 (Del. Super. May 1, 2006) *aff'd*, 913 A.2d 570 (Del. 2006).

[25] *LeVan*, 940 A.2d at 933.

[26] *LeVan*, 940 A.2d at 933.

[27] *J.N.K., LLC v. Kent County Levy Court*, 974 A.2d 197, 204 (Del. Ch. 2009).

[28] *LeVan*, 940 A.2d at 932.

[29] *Lawhorn*, 2006 WL 1174009 at *2 (quoting *Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056, 1059 (Del. 2006)).

regulation or other device shall in any manner operate to relieve any employer or employee in whole or in part from any liability created by this chapter, except as specified in this chapter."[30] Furthermore, Delaware courts apply rules with a "liberal construction because of the underlying public policy that favors" a litigant's right to a day in court as opposed to a judgment due to default.[31]

Here, an ambiguity exists in that the Workers' Compensation Act contains a five-year statute of limitations[32] but also authorizes the DOL to adopt a Utilization Review process for the "prompt resolution" of medical service issues.[33] To that end, the DOL

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[30] 19 *Del. C.* § 2305.

[31] *Dishmon v. Fucci*, 784, 2010, 2011 WL 5438957, *5 (Del. Nov. 10, 2011).

[32] 19 *Del. C.* § 2361(b) (stating "Where payments of compensation have been made in any case under an agreement approved by the Board or by an award of the Board, no statute of limitation shall take effect until the expiration of 5 years from the time of the making of the last payment for which a proper receipt has been filed with the Department"); *see LeVan*, 940 A.2d at 932.

The Court notes that the Workers' Compensation Act also contains the following two-year statute of limitations:

> In case of personal injury, all claims for compensation shall be forever barred unless, within 2 years after the accident, the parties have agreed upon the compensation as provided in § 2344 of this title or unless, within 2 years after the accident, 1 or more of the interested parties have appealed to the Board as provided in § 2345 of this title. In cases of death, all claims for compensation shall be forever barred unless, within 2 years after the death, the parties have agreed upon the compensation as provided in § 2344 of this title or unless, within 2 years after the death, 1 or more of the interested parties have appealed to the Board as provided in § 2345 of this title." 19 *Del. C.* § 2361(a).

The parties have focused their arguments on the five-year statute of limitations. However, the Court, here, neither engages in a discussion of nor determines which of these two statutes of limitation govern. Rather, the Court uses the five-year statute of limitations as a basis for its discussion as to whether the 45-day time limit in Regulation 5.5.1 is invalid.

[33] 19 *Del. C.* § 2322F(j) (stating "The Health Care Advisory Panel shall develop a utilization review program. The intent is to provide reference for employers, insurance carriers, and health care providers for evaluation of health care and charges. The intended purpose of utilization review services shall be the prompt resolution of issues related to treatment and/or compliance with the health care payment system or practice guidelines for those claims which have been acknowledged to be compensable. An employer or

adopted Regulation 5.5.1which contains a 45-day time bar for contesting a Utilization Review determination, thereby significantly reducing the five-year statute of limitations for such claims.[34]

An administrative agency's authority to promulgate regulations is derived from the statute creating the agency and defining the power thereof.[35] The agency's power must appear affirmatively in the authorizing statute with any doubt as to the existence of the power being resolved against the agency.[36] Moreover, an express grant of power to an agency includes, by implication, the power to do what is reasonably necessary to implement the grant of authority.[37] And, while the legislature "is presumed to have had in mind the previous statutes relating to the same subject matter" when it enacts a provision, its "failure to craft language in a new statute that is identical to language addressing a similar topic in an older statute is not dispositive evidence of an intention to

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insurance carrier may engage in utilization review to evaluate the quality, reasonableness and/or necessity of proposed or provided health care services for acknowledged compensable claims . . . If a party disagrees with the findings following utilization review, a petition may be filed with the Industrial Accident Board for de novo review. Complete rules and regulations relating to utilization review shall be approved and recommended by the Health Care Advisory Panel. Thereafter, such rules shall be adopted by regulation of the Department of Labor pursuant to Chapter 101 of Title 29. Such regulations shall be adopted and effective not later than 1 year after the first meeting of the Health Care Advisory Panel").

[34] 19 Del. Admin. C. § 1341-5.5 (stating "If a party disagrees with the findings following utilization review, a petition may be filed with the Industrial Accident Board for *de novo* review. 5.5.1 The decision of the utilization review company shall be forwarded by the Department of Labor, by Certified Mail, Return Receipt Requested, to the claimant, the health care provider in question, and the employer or its insurance carrier. A decision of the utilization review company shall be final and conclusive between the parties unless within 45 days from the date of receipt of the utilization review decision any interested party files a petition with the Industrial Accident Board for de novo review").

[35] *Retail Liquor Dealers Ass'n of Delaware v. Delaware Alcoholic Beverage Control Comm'n*, 1980 WL 273545, *3 (Del. Ch. Apr. 23, 1980); *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 740 (Del. Super. 1962).

[36] *Tigue*, 183 A.2d at 740.

[37] *Retail Liquor Dealers Ass'n of Delaware*, 1980 WL 273545 at *3.

reject rights expressly contained in the older statute."[38] Therefore, ". . . an inferior body, cannot impose a deadline resulting in a forfeiture of the rights expressly conferred in a state statute."[39]

Even if the legislature by way of new legislation arguably contemplated change to an older statute, the omission of express language of such a change is deemed intended.[40] Furthermore, ". . . for a court to supply alleged statutory omissions by the legislature transcends the judicial function in a constitutional system that provides for a separation of powers."[41]

In this matter, given that Claimants' contention is that a provision of Workers' Compensation Regulation 5.5.1 is invalid, the Court begins by reviewing the Workers' Compensation Act. The Workers' Compensation Act, (the "Authorizing Statute"), provides a five-year statute of limitations for claims and also authorizes Utilization Review of contested health care services for compensable work-related claims[42] in order "to provide reference for employers, insurance carriers, and health care providers for evaluation of health care and charges," and promptly resolve issues related to treatment and compliance with health care practice guidelines including the quality, reasonableness

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[38] *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 780-81 (Del. Ch. 1998).

[39] *Univ. of Delaware v. New Castle County Dept. of Fin.*, 891 A.2d 202, 207 (Del. Super. 2006) *aff'd*, 903 A.2d 323 (Del. 2006).

[40] *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 753, 2010, 2011 WL 6148717, *4 (Del. Dec. 12, 2011).

[41] *Friends of H. Fletcher Brown Mansion*, 753, 2010, 2011 WL 6148717, at *4.

[42] 19 *Del. C.* §§ 2322F, 2361(b).

or necessity of health care services.[43] The Authorizing Statute also affirmatively empowers the DOL to adopt rules and regulations related to Utilization Review which have been approved by a Health Care Advisory Panel.[44] In addition, the Authorizing Statute provides for *de novo* review of Utilization Review determinations by the Industrial Accident Board upon petition of a party.[45] However, although the Authorizing Statute provides no specific change of the five-year statute of limitations regarding such a petition, the DOL adopted a regulation limiting the time for the filing of this petition to 45 days from receipt of a Utilization Review determination.[46]

The provision empowering the DOL to adopt regulations pertinent to Utilization Review was enacted in 2007 with the intent of promptly resolving "issues related to treatment and/or compliance with the health care payment system or practice guidelines . . . ."[47] The DOL, per the mandate, adopted Workers' Compensation Regulations. Included in these regulations is Regulation 5.5.1, adopted in 2009, which limits the time for petitions contesting Utilization Review determinations to 45 days after receipt.

19 *Del. C.* § 2361(b), which precedes Regulation 5.5.1, states:

> "[w]here payments of compensation have been made in any case under an agreement approved by the Board or by an award of the Board, no statute of limitation shall take effect until the expiration of 5 years from the time of the making of the last payment . . . ."[48]

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[43] 19 *Del. C.* § 2322F(j).

[44] *Id.*

[45] *Id.*

[46] *See* 19 *Del. C.* § 2322F(j); 19 Del. Admin. C. § 1341-5.5.1.

[47] 76 Del. Laws ch. 1 (2007) (S.B. 1); 19 *Del. C.* § 2322F(j).

[48] 19 *Del. C.* § 2361(b).

Moreover, the Supreme Court has consistently emphasized that the Section 2361(b) statute of limitations is unambiguous in its provision "that *no* statute of limitations shall take effect until five years . . . ."[49] Thus, the provision in Workers' Compensation Regulation 5.5.1 limiting the contesting of a Utilization Review determination to 45 days drastically alters the rule and spirit of the Workers' Compensation Act which prohibits any statute of limitations of less than five years from the last payment and significantly impedes a claimant's right to petition for compensation. Furthermore, since an inferior body, such as the Department of Labor, is not permitted to impose deadlines that cause a party's statutory rights to be forfeited or ignore statutory limitations that have not been amended by the General Assembly, the 45-day deadline in the regulation does not stand.[50]

While the intent of the Authorizing Statute is to promptly resolve issues as to the reasonableness, necessity and payment of medical services, the statute provides no specific deviation from the five-year statute of limitations regarding the filing of a petition to review a Utilization Review determination. Instead, it is the regulation that creates a 45-day limitation that significantly curtails the five-year limitation of the statute.

Mindful of the legislators' intent to compensate injured employees, promptly resolve medical services issues, and the need to resolve any doubts in favor of the worker,[51] the Court looks to the application of the *expressio unius est exclusio alterius*

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[49] *LeVan*, 940 A.2d at 932.

[50] *See Univ. of Delaware*, 891 A.2d at 207.

[51] *See Lawhorn*, 2006 WL 1174009.

rule of statutory construction, namely, that the expression of one thing is the exclusion of another.[52] The five-year statute of limitations[53] in the Workers' Compensation Act is express—precise and affirmatively designated—and, therefore, excludes any ambiguity raised by the term "prompt resolution"[54] as that term relates to the creation of a shorter time limit for contesting Utilization Review.[55] In so doing, the express mandate of the statute of limitations acts to limit the DOL's power,[56] thus, invalidating the 45-day limit of Regulation 5.5.1. Therefore, since the statute of limitations specifically allows a five-year time limit, it cannot be significantly altered by a regulation. And, while the Authorizing Statute conveys the legislature's intent to promptly resolve issues concerning the reasonableness, necessity and payment of medical services by providing for the systematic Utilization Review of these services, it does not include express language that shortens the time limitation for the filing of petitions contesting such Utilization Review determinations. Moreover, the DOL cannot impose such language in a regulation without causing a forfeiture of rights expressly conferred in a state statute.[57] Likewise, the Court

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[52] *See Hickman v. Workman*, 450 A.2d 388, 391 (Del. 1982); *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) (stating that *Expressio unius est exclusio alterius* is a maxim applied to statutory interpretation meaning "where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature").

[53] 19 *Del. C.* § 2361(b).

[54] 19 *Del. C.* § 2322F(j).

[55] Indeed, the term "prompt resolution" may very well be pertinent to other aspects of Utilization Review and, thus, not excluded or ambiguous as to those other aspects.

[56] *See e.g. Hickman*, 450 A.2d at 391.

[57] *See e.g. Univ. of Delaware*, 891 A.2d at 207.

cannot imply the inclusion of such language without transcending its judicial function.[58] "If the policy or wisdom of a particular law is questioned as unreasonable or unjust, then only the elected representatives of the people may amend or repeal it."[59] If the General Assembly had intended in 19 *Del. C.* § 2322F(j) to change the statute of limitations by expediting resolution through Utilization Review, it would have expressly so stated.[60]

Therefore, because the time limit contained in Workers' Compensation Regulation 5.5.1 is in direct contrast to the statute of limitations in 19 *Del. C.* 2361(b) and cannot be reconciled, it does not disqualify Claimants' petitions to contest their Utilization Review determinations.

In *E-Town Quarry v. Goodman*,[61] the Court of Appeals of Kentucky encountered a similar issue regarding their Utilization Review regulation created pursuant to Kentucky's Workers' Compensation statute. In that case, the Court ultimately held that a utilization review regulation should not conflict with adjudicatory rights established by the Kentucky Legislature.[62] Although *E-Town Quarry* involves whether a claimant must exhaust the utilization review process before proceeding with adjudication on the merits, the Court there stated that the regulation did not mandate exhaustion of the utilization

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[58] *See e.g. Friends of H. Fletcher Brown Mansion*, 753, 2010, 2011 WL 6148717, at *4; *Reyes v. Kent Gen. Hosp., Inc.*, 487 A.2d 1142, 1146 (Del. 1984) ("Judges must take the law as they find it . . . .").

[59] *Reyes*, 487 A.2d at 1146.

[60] *See e.g. Friends of H. Fletcher Brown Mansion*, 753, 2010, 2011 WL 6148717, at *4 (stating that "[i]f the General Assembly had wanted to provide this same delegation authority for the Chief Engineer and the City Solicitor, it could have done so by including comparable delegation language"); *Leatherbury*, 939 A.2d at 1291 (stating that "if the General Assembly had intended to permit Notice of Intent to investigate . . . by using alternative means of actual notice, it would have done so").

[61] 12 S.W.3d 708 (Ky. Ct. App. 2000).

[62] *E-Town Quarry*, 12 S.W.3d at 710.

review process and that "applying a procedural bar for failure to complete the [utilization] review process would be inappropriate."[63] Here, as in *E-Town Quarry*, a regulatory procedural bar mandating dismissal of Claimants' petitions for being untimely would forfeit Claimants' rights under the five-year statute of limitations and is, thus, inappropriate.

While the Employers assert that Workers' Compensation Regulation 5.5.1 is reasonable and necessary in order to accomplish the Authorizing Statute's purpose to promptly resolve medical services issues and a 45-day time limitation may be a rational interpretation of the Authorizing Statute's stated purpose of prompt resolution, this is not a sufficient standard for the Court to defer to Regulation 5.5.1 and reject the rights expressly contained in the statute of limitations.[64]

For the reasons outlined above, the Court finds that the provision contained in Workers' Compensation Regulation 5.5.1 limiting the time to contest a Utilization Review determination to 45 days after receipt is invalid. As a result, the Court does not reach the argument of whether the DOL is required to provide notice of Utilization Review Determinations to Claimants' counsel as well as Claimants themselves. Moreover, since the provision for a 45-day limitation on petitions contained in Workers' Compensation Regulation 5.5.1 is deemed invalid, the Court finds that the Board erred in relying on it in its decisions to dismiss Claimants' petitions.

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[63] *E-Town*, 12 S.W.3d at 709-711.

[64] *See DiPasquale*, 735 A.2d at 382-83.

ACCORDINGLY, the decisions of the Board are ***REVERSED and REMANDED*** for consideration of Claimants' petitions on the merits.[65]

IT IS SO ORDERED.

Diane Clarke Streett, Judge

Original to Prothonotary

[65] *See* 19 *Del. C.* § 2350(b).

QF

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDYWINE SMYRNA, INC., and BCP SMYRNA, INC.,	§	No. 53, 2011
Plaintiffs Below, Appellants,	§	Court Below – Superior Court of the State of Delaware, in and for New Castle County
v.	§	C.A. No. 08C-11-065
MILLENNIUM BUILDERS, LLC,	§	
Defendant Below, Appellee.	§	

Submitted: November 9, 2011
Decided: December 9, 2011

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

Upon appeal from the Superior Court. **REVERSED and REMANDED**.

Jeffrey S. Goddess, Esquire, Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware, for appellants.

Francis X. Nardo, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, and Michael J. Budow, Esquire (argued), Budow and Noble, P.C., Bethesda, Maryland, for appellee.

HOLLAND, Justice:

The plaintiffs-appellants, BCP Smyrna, Inc. and Brandywine Smyrna, Inc. (together "Brandywine Smyrna"), own an automobile dealership in Smyrna, Delaware. BCP Smyrna, Inc. owns the real estate and structure and Brandywine Smyrna, Inc. operates the business. Joseph Renzi is the sole owner of both companies. In 2007, Mr. Renzi was having a second facility built across Route 13 from the existing dealership. During that construction, he decided to add a new roof to the original dealership. The defendant-appellee, Millennium Builders, LLC ("Millennium"), was hired to perform this roofing work.

On September 22, 2007, a significant rain storm moved through Smyrna. Unfortunately, the roofing work was incomplete and the new roof not yet sealed. The rain caused significant damage to the dealership: the rainwater dropped ceiling tiles, shorted out ceiling lights, buckled walls, generated sparking and short-circuiting in the electric box, and created water damage throughout the building. The dealership was evacuated and closed. The offices and showroom remained closed for approximately seven months to allow for repairs and additional updating.

Brandywine Smyrna hired Millennium for most of the repair work. Millennium was paid a total of $238,453 for this work. Brandwine Smyrna incurred additional expenses and losses associated with the water damage.

Brandywine Smyrna sued Millennium in contract and tort, alleging that Millennium failed to take necessary precautions to protect the premises from water damage. Millennium disputed the scope and the amount of the damages claimed by the plaintiffs due to the September 22, 2007 incident. The main source of contention was the fact that Brandywine Smyrna decided not to rebuild the water-damaged showroom to the same specifications as its original construction, but instead modernized that structure so that it would match the appearance of a new showroom which had just been constructed across the street.

Following an eight-day trial in the Superior Court, a jury awarded Brandywine Smyrna a total of $612,659 in damages. The itemized verdict reflected an award of $372,362 in property damage, $134,691 in lost car sales, $32,956 in lost parts and service sales, and $72,650 in additional interest expenses. This appeal does not concern the component amounts that were awarded by the jury.

The only issue before us on appeal is the trial judge's decision not to grant prejudgment interest on the amounts that were awarded by the jury. We have concluded that Brandywine Smyrna is entitled to prejudgment interest. Accordingly, this matter must be remanded to the Superior Court to

determine the amount of prejudgment interest owed to Brandywine Smyrna by Millennium.

Superior Court's Decision

Brandywine Smyrna filed a timely motion for prejudgment interest. The motion provided a computation of the prejudgment interest sought. On the amounts awarded for property damage ($372,362), loss of car sales ($134,691) and loss of parts and service ($32,956) (a total of $540,009), applying the statutory interest formula in title 6, section 2301(a) of the Delaware Code from the date of loss to the verdict, the prejudgment interest requested was $156,643.10. Brandywine Smyrna also asked for $4,315.41 of prejudgment interest on the additional interest expenses that were awarded by the jury. Thus, the total amount of prejudgment interest sought was $160,958.51.

The Superior Court denied Brandywine Smyrna prejudgment interest for two reasons. First, the trial judge concluded that Brandywine Smyrna was not entitled to prejudgment interest under title 6, section 2301(d) "because they requested a greater amount in their settlement demand than what the jury awarded." Second, the trial judge reasoned that the jury had already compensated Brandywine Smyrna for prejudgment interest by

awarding them $72,650 in additional interest expenses, so that a post-trial award of prejudgment interest would amount to a double recovery.

Tort Recovery – No Interest Due

The first issue is whether Brandywine Smyrna may recover prejudgment interest under title 6, section 2301(d) of the Delaware Code. We review the trial court's rulings on issues of statutory construction *de novo*.[1] Section 2301(d) reads:

> In any tort action for compensatory damages in the Superior Court . . . seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand . . . in an amount less than the amount of damages upon which the judgment was entered.[2]

As the statute unambiguously states, section 2301(d) applies only to tort claims, and it requires an award of prejudgment interest in the event that plaintiff's settlement offer is less than the amount of damages awarded at trial. In *State Farm Mut. Ins. Co. v. Enrique*, this Court, interpreting section 2301(d), stated that "[i]n Delaware, prejudgment interest only becomes an

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[1] *Christiana Care Health Servs., Inc. v. Crist*, 956 A.2d 622, 629 (Del. 2008) (citation omitted).

[2] Del. Code Ann. tit. 6, § 2301(d) (West 2011).

obligation of a litigating party . . . when that party rejects a demand before trial for an amount less than what the jury awards as damages."[3]

In this case, Brandywine Smyrna, in a letter dated March 25, 2010, demanded the sum of $1,000,000.00. That demand letter stated, in part:

> Consistent with 6 *Del. C.* § 2301(d), this settlement demand is valid and capable of acceptance for thirty days. (Parenthetically, and as requested in the complaint, plaintiffs believe that they are entitled to pre-judgment interest against Millennium (and Graphic Arts) in any regard. This offer, invoking the interest statute, is made without any waiver or implied concession relative to that demand in the complaint.)

The final judgment rendered in this case awarded Brandywine Smyrna damages in the total amount of $612,659.00. Brandywine Smyrna's settlement offer of $1,000,000 exceeded the $612,659 damage award awarded by the jury. Therefore, under section 2301(d), Brandywine Smyrna is not entitled to the recovery of prejudgment interest, insofar as their claim lies in *tort*.[4]

Contract Theory – Interest Due

That ruling is not dispositive, however, because the jury awarded Brandywine Smyrna $612,659 in damages on both its tort and its contract claims, without referencing what portion of the damage award was attributable to each of its respective theories of recovery. The plaintiffs'

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[3] *State Farm Mut. Auto. Ins. v. Enrique*, 2011 WL 1004604, at *2 (Del. Mar. 22, 2011).
[4] *Id.*

demand letter contained an express qualification that it was not waiving its request for prejudgment interest in the complaint, which alleged theories of both tort and contract. As earlier stated, section 2301(d) relates only to tort claims.

In *Moskowitz v. Mayor and Council of Wilmington*, we concluded that "[i]nterest is awarded in Delaware as a matter of right and not of judicial discretion."[5] In this case, the jury was not asked to specify, in its award, the particular amounts recoverable under the plaintiff's separate tort and contract claims. Therefore, Brandywine Smyrna's claim for prejudgment interest, based on Millennium's breach of contract, is not barred by section 2301(d). We hold that Brandywine Smyrna is entitled to recover prejudgment interest for the damages awarded for its breach of *contract* claim.

Interest as Damages

Although Brandywine Smyrna is entitled to recover prejudgment interest on its contract claim, the Superior Court denied Brandywine Smyrna prejudgment interest on an independent alternative ground: that the jury's award of $72,650 in "additional interest expenses" constituted an award of prejudgment interest. We conclude that that additional interest amount did

[5] *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978).

not constitute an award of prejudgment interest. Rather, that amount represented an element of the damages incurred by Brandywine Smyrna to account for the interest it was required to pay on the money borrowed as a result of Millennium's conduct.

Brandywine Smyrna's damages expert testified as to the additional interest expenses that Brandywine Smyrna claimed were incurred due to the water damage: first, $32,062 in floor plan interest because of the loss of a favorable borrowing rate due to the deterioration of its financial status; and second, $61,597 in interest on a loan to restore capital that was impaired by costs associated with construction. Accordingly, the jury was presented with expert testimony from Brandywine Smyrna that additional interest expenses totaled $93,659. Millennium presented contrary expert testimony in an attempt to mitigate the actual amount of interest expenses.

The record reflects that none of the expert testimony at trial addressed the issue of prejudgment interest. Nor was the jury advised that the amount claimed for additional interest expenses would include prejudgment interest. The jury was instructed, as follows:

> (c) Additional Interest Expense. The plaintiffs may be entitled to recover other aspects of damage which they suffered, or expenses which they incurred as a consequence of the accident, provided those damages are proven with a reasonable degree of certainty. It means that these damages, if any, may not be based upon conjecture, speculation or guesswork, but

> must be based upon actual facts from which a reasonably accurate conclusion regarding the amount of the loss can be logically and rationally drawn.

This instruction directed the jury to award Brandywine Smyrna the out-of-pocket interest expenses it incurred as a consequence of Millennium's conduct. On the jury verdict sheet, next to the words "additional interest expenses," the jury awarded Brandywine Smyrna $72,650 of the $93,659 that had been requested.[6] Those additional interest expenses were one component of Brandywine Smyrna's alleged actual damages. They were not prejudgment interest.

Prejudgment interest is conceptually separate and distinct from the additional interest expenses Brandywine Smyrna actually incurred and was awarded in this case. Prejudgment interest serves two purposes: first, it compensates the plaintiff for the loss of the use of his or her money; and, second, it forces the defendant to relinquish any benefit that it has received by retaining the plaintiff's money in the interim.[7] In this case, Brandywine Smyrna lost the use of the money it was required to pay as interest on the borrowing that was necessitated by Millennium's conduct. Accordingly, the

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[6] The difference between Brandywine Smyrna's request for $93,659 and the jury's award of $72,650 in additional interest expenses suggests that the jury concluded that it only took five months, instead of eight months as argued by Brandywine Smyrna, to return the dealership to its pre-casualty condition.

[7] *See Finkelstein v. Liberty Digital, Inc.*, 2005 WL 1074364, at *26 (Del. Ch. Apr. 25, 2005).

amount awarded to Brandywine Smyrna for "additional interest expenses" was not prejudgment interest. Rather, it was an element of damages on which Brandywine Smyrna was entitled to *receive* prejudgment interest. The trial court erred in holding otherwise.

Prejudgment Interest Due

In *Moskowitz*, this Court determined that, in addition to the principle that prejudgment interest in Delaware cases is awarded as a matter of right, the general rule is that "interest accumulates from the date payment was due the plaintiff, because full compensation requires an allowance for the detention of the compensation awarded and interest is used as a basis for measuring that allowance."[8] Millennium argues that Brandywine Smyrna is not entitled to prejudgment interest because their damage award was not calculable until trial and under Delaware common law, prejudgment interest is awarded only when damages are quantifiable prior to judgment.[9] We disagree with that overbroad assertion.

Millennium's defense is essentially that because the expert testimony varied as to the exact extent of the consequential damages, the amount was not calculable prior to trial. That argument was explicitly rejected in *Janas*

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[8] *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d at 210 (citations omitted).
[9] *Rollins v. Envtl. Servs., Inc. v. WSMW Indus., Inc.*, 426 A.2d 1363, 1364-66 (Del. Super. 1980).

v. Biedrzycki.[10] The Superior Court's *Janas* opinion is particularly instructive:

> [I]t is undeniable that the value of the injury is calculable. Simply because the precise amount of the damage was not ultimately fixed until the award was rendered, does not diminish its pecuniary nature. Applying such logic would result in never finding pre-judgment interest is allowable, because the exact value of any given case is not determined until the finder of fact returns a verdict.[11]

We approve and affirm that rationale from *Janas*. In *Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, this Court held that prejudgment interest must be awarded as a matter of right on an insurance contract claim, even though the amount of the loss under the insurance contract was in dispute prior to the verdict.[12]

In *Moskowitz*, this Court noted the strong public policy that favors providing full compensation to prevailing plaintiffs who do not contribute to the defendant's delay in paying.[13] In this case, Brandywine Smyrna did not delay its demand for payment for the consequential damages that were incurred as a result of Millennium's breach of contract. We hold that Brandywine Smyrna is entitled to prejudgment interest on the consequential damages that were awarded by reason of Millennium's breach of contract.

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[10] *Janas v. Biedrzycki*, 2000 WL 33114354 (Del. Super. Oct. 26, 2000).
[11] *Id.* at *5.
[12] *Metro. Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 781-82 (Del. 1966).
[13] *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d at 211.

Conclusion

The judgment of the Superior Court, on the issue of prejudgment interest, is reversed. This matter is remanded to the Superior Court for a determination of the amount of prejudgment interest that is due to Brandywine Smyrna. Jurisdiction is not retained.