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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.