

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

POTTS WELDING & BOILER )  
REPAIR CO., INC., )  
 )  
Employer Below/Appellant, )  
 ) CIVIL ACTION NUMBER  
v. )  
 ) 01A-04-001-JOH  
WALDEMAR ZAKREWSKI, )  
 )  
Employee Below/Appellee. )

*Submitted: September 25, 2001*

*Decided: January 11, 2002*

MEMORANDUM OPINION

*Appeal from a Decision of the Industrial Accident Board -  
Appeal - **DISMISSED** - Decision - **AFFIRMED***

Christopher T. Logullo, Esq., of Chrissinger & Baumberger, attorney for employer below/  
appellant

David R. Scerba, Esq., of Ramunno & Ramunno, P.A., attorney for employee below/appellee

HERLIHY, Judge

Employer Potts Welding and Boiler Repair Co., Inc., has appealed an Industrial Accident Board decision awarding total disability benefits to a former employee, Waldemar Zakrewski. Potts and Zakrewski agreed that he was injured on the job. Potts started paying total disability benefits during the time he did not work. Several months later, he returned to work, but on a part-time basis. That was as much as his physician permitted. Upon his return to work, Potts terminated all his benefits, but without seeking Board approval or obtaining a final receipt from Zakrewski.

Zakrewski later filed for partial disability benefits and ten months after returning to work was fired. After several hearings, the Board awarded the continuation of total disability benefits. It ruled Potts had not petitioned to terminate them or obtained a final receipt from Zakrewski, allowing for termination. The Board did not off-set that award with credit for the part-time wages Potts paid to Zakrewski during those ten months. But, Potts never asked the Board to give it that credit.

Potts raises that credit issue for the first time on appeal. Based on the record below, the issue is whether Potts waived being able to raise that issue for the first time on appeal. This Court holds that it did. The appeal is, therefore, **DISMISSED** and the Board's decision is **AFFIRMED**.

#### *FACTUAL BACKGROUND*

Zakrewski suffered a work-related injury on December 5, 1999. Because he was unable to do any work, Potts began paying him total disability benefits. His pre-injury rate of

pay was \$404.25 per week and Potts paid him \$296.37 per week in benefits. Potts and Zakrewski did not enter into a formal agreement concerning these payments.

On February 11, 2000, Zakrewski returned to work at Potts, but on a part-time basis. That is all his doctor cleared him to do. Potts paid him for that part-time work but also ceased making disability payments. It did not get any receipt or release from Zakrewski when it did so. Nor did Potts petition the Board to review or cease benefits.

Potts petitioned the Board on July 29, 2000 to determine additional compensation due for partial disability benefits and medical expenses. Potts did not file its own petition with the Board. It terminated Zakrewski's employment on December 4, 2000.

The Board held an initial hearing on January 5, 2001 to consider Zakrewski's petition, the only matter before it. He sought partial disability benefits for the difference between his average weekly wage before the accident, \$404, and his part-time wage when he returned to work of \$9.52 per hour for 20 hours a week. The claim covered the period from the date that he returned to work on a part-time basis, February 11, 2000, forward. During this hearing, Zakrewski raised in argument the issue of Potts' wrongfully terminating his total disability benefits that by law should continue to be paid. Potts initially argued that a partial disability claim was never agreed upon or ever paid by Potts, and that Zakrewski refused a reasonable job offer in December 2000, therefore, forfeiting worker's compensation benefits.

After the hearing, the Board issued an order granting in part Zakrewski's petition for additional compensation by awarding him the medical expenses he claimed. It also awarded expert witness and attorney's fees. But, the Board recognized that Zakrewski

had raised a new issue, that of wrongful cessation of total disability payments, and that Potts needed an opportunity to respond. The Board said:

**Disability.** Based upon the foregoing, it appears that Potts improperly stopped payments of [Zakrewski]'s total disability benefits. The relevant code section provides that:

"[c]ompensation payable to an employee, under this chapter, shall not terminate until and unless the Board enters an award ending the payment of compensation after a hearing upon review of an agreement or award, provided that no petition for review, hearing or an order by the Board shall be necessary to terminate compensation where the parties to an award or an agreement consent to the termination."

19 *Del.C. §2347*. [Zakrewski] made this agreement in his closing statement. Perhaps because of the way the matter was pleaded, Potts did not respond to the §2347 argument in its closing statement.

The Board's Rules provide that formal pleading is not required. Rule 6 (A) of the *Rules of the Industrial Accident Board of the State of Delaware* (Mar. 10, 1998). However, because of the way the matter was pleaded and because the §2347 issue may result in a better result for [Zakrewski] than an award of partial disability benefits, the Board concludes that fuller discussion of the issue is appropriate. The Board therefore directs the parties to file briefs addressing the §2347 issue.<sup>1</sup>

Following up on this directive, Potts submitted its brief February 12, 2001 and Zakrewski submitted his brief February 27, 2001. Potts, however, did not argue that to award total disability benefits would overcompensate Zakrewski, since he had already been paid part-time wages for the same period covered by the disability benefits he was seeking.

After this briefing, on March 26, 2001, the Board issued its decision which is the one now being appealed. It found that on February 11, 2000, Zakrewski returned to work

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<sup>1</sup>Board Order (January 22, 2001) at 1-2.

part-time in compliance with his doctor's orders. When he returned to work part-time, Potts ceased paying Zakrewski total disability benefits. At the time the benefits were terminated, Potts had not received a signed receipt from Zakrewski, a forfeiture order from the Board, or filed a petition with the Board for review seeking to terminate benefits. When Potts terminated benefits, after Zakrewski returned to work part-time, Zakrewski filed a petition to determine additional compensation due seeking disability benefits to supplement his part-time employment. Potts countered the petition by arguing that the unilateral termination of benefits was due to Zakrewski forfeiting his entitlement to those benefits.

The Board determined that an agreement was reached between the employee and employer that Zakrewski was entitled to total disability benefits, and "[t]herefore, Potts cannot legally stop paying those benefits until the Board enters an award ending the payment of compensation, the parties consent to termination of [Zakrewski]'s benefits, or Potts obtains a forfeiture order from the Board."<sup>2</sup> It went on to state that since it did not enter an award ending payments or order granting forfeiture, the issue before the Board was whether Zakrewski consented to the termination of total disability benefits.

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<sup>2</sup>Board Decision (March 26, 2001) at 3.

As to that issue, the Board referred to its own Rule 19(B), which provides that in the absence of a final receipt, compensation benefits cannot be ended except as provided in 19 *Del.C.* §2347.<sup>3</sup> The pertinent portion of §2347 provides:

Compensation payable to an employee, under this chapter, shall not terminate until and unless the Board enters an award ending the payment of compensation after a hearing upon review of an agreement or award, provided that no petition for review, hearing or an order by the Board shall be necessary to terminate compensation where the parties to an award or an agreement consent to the termination. No petition for review shall be accepted by the Department unless it is accompanied by proof that a copy of the petition for review has been served by certified mail upon the other party to the agreement or award. Within 5 days after the filing of a petition for review, the Department shall notify each party concerned of the time, date and place scheduled for the hearing upon the petition.<sup>4</sup>

In short, the Board is saying its Rule 19(B) defines consent as a signed receipt. Absence such a receipt, there can only be cessation of compensation with Board approval. The Board concluded, therefore, that Potts, on February 11, 2000, had improperly ceased making total disability payments to Zakrewski and ordered Potts to immediately pay those benefits to him. It did not decide the issue of partial disability benefits that were requested at the January 5, 2001 hearing. It further stated:

The Board finds that Potts, on February 11, 2000, improperly ceased making total disability payments to [Zakrewski] and orders Potts to immediately pay those benefits

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<sup>3</sup>*Id.* at 4.

<sup>4</sup>19 *Del.C.* §2347.

to [Zakrewski]. The Board is aware that, for a period beginning February 11, 2000, [Zakrewski] received part-time wages for his part-time work. The Board is therefore aware of a potential inequity to Potts. However, this problem was entirely created by Potts. Potts could have filed a Petition for Review or required [Zakrewski] to sign a receipt before allowing him to return to work.

The foregoing decision moots [Zakrewski]'s Petition to Determine Additional Compensation Due.<sup>5</sup>

### *PARTIES' CLAIMS*

Potts appealed the decision to this Court, initially raising three issues: Zakrewski's voluntary consent to termination, the Board's failure to acknowledge a credit, and a violation of 19 *Del.C.* §2353(c) in that Zakrewski refused suitable work disqualifying him from further benefits. Subsequently, Potts amended its appeal, voluntarily dismissing the first and third issue.<sup>6</sup> Potts' remaining claim is that the Board erred in failing to acknowledge or grant a credit for the wages Zakrewski was paid when he returned to work part-time. It argues that Zakrewski was awarded total disability benefits from February 11, 2000 through December 4, 2000, even though he had returned to work part-time and was paid for that part-time work. Potts asserts that, at best, Zakrewski is entitled to partial disability benefits. Potts argues that this issue was not waived because it was first raised in the Board's March 26, 2001 decision.

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<sup>5</sup>Board Decision at 4-5.

<sup>6</sup>Counsel letter to Court (November 19, 2001), Docket No. 14.

Zakrewski claims that Potts waived this argument because it failed to raise it during trial or post-trial briefing, even when alerted to the issue in the Board's first opinion. He contends he was legally entitled to total disability benefits under the worker's compensation statute, the Board recognized this, and found in his favor. Also, he claims that the worker's compensation statute permits only one type of credit against worker's compensation benefits due, and that is for third-party recovery and there was no such recovery here.

#### *APPLICABLE STANDARD*

Ordinarily, the duty of this Court on an appeal from the Board is to determine whether the Board's decision is supported by substantial evidence and free from legal error.<sup>7</sup> But, when the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record, and will not consider issues not raised before that agency.<sup>8</sup>

#### *DISCUSSION*

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<sup>7</sup>*General Motors Corp. v. Jarrell*, Del.Super., 493 A.2d 978 (1985).

<sup>8</sup>See *Tatten Partners LP v. New Castle County Board of Assessment Review*, Del.Super., 642 A.2d 1251, 1262 (1993); *Wilmington Trust Co. v. Connor*, Del.Super., 415 A.2d 773, 781 (1980).



The only petition pending before the Board was Zakrewski's petition for partial disability benefits. In summation, at the initial hearing, he raised the issue of Potts' alleged wrongful termination of his total disability benefits. Specifically, he stated, "there was no consent to the termination of total disability, there was no signed final receipt, and we all know there was no hearing before the Board. Those benefits by law had to continue to be paid."<sup>9</sup> Potts, in its summation, did not respond to this argument nor assert there should be, in any event, a credit for the part-time wages it paid.

In its January 22, 2001 order, the Board recognized the issue that Potts may have improperly terminated the benefits and ordered additional briefing, stemming from Zakrewski's argument in summation:

Based upon the foregoing, it appears that Potts improperly stopped payments of [Zakrewski]'s total disability benefits. . . . [Zakrewski] made this agreement in his closing statement. Perhaps because of the way the matter was pleaded, Potts did not respond to the §2347 [employer's requirements to terminate employee compensation] argument in its closing statement.

\* \* \*

However, because of the way the matter was pleaded and because the §2347 issue *may result in a better result for [Zakrewski] than an award of partial disability benefits*, the Board concludes that fuller discussion of the issue is appropriate. The Board therefore directs the parties to file briefs addressing the §2347 issue.<sup>10</sup>

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<sup>9</sup>Board Transcript (January 5, 2001) at 229-30.

<sup>10</sup>Board Order (January 22, 2001) at 1-2 [Emphasis added].

With that, both parties briefed the issue. On February 12, 2001, Potts submitted its brief and on February 27, 2001, Zakrewski submitted his brief. Potts did not raise the credit issue in its brief, despite Zakrewski's oral argument, and did not address it in briefing, despite the Board's order quoted above. On March 26, 2001, the Board rendered its decision ordering Potts to pay Zakrewski the total disability benefits unilaterally and improperly terminated by Potts on February 11, 2001. Potts did not ask the Board for a rehearing or reargument on the credit issue. Instead, it appealed the decision raising the credit issue for the first time.

In its January order, the Board stated that it appeared that Potts improperly terminated total disability benefits, following up on Zakrewski's argument that the benefits should continue. Potts, therefore, was or should reasonably have been aware that the Board was considering awarding total disability benefits because of its improper termination. This notice is especially clear, as illustrated by the Board's statement, that the issue may entitle Zakrewski to a better award than the award of partial disability benefits that he claimed.

Potts was well aware that Zakrewski was working part-time and paid him for ten months for part-time work. Yet, it never argued to the Board that total disability benefits, without credit, were improper on the basis that Zakrewski would be unfairly overcompensated. Potts' policy argument, raised for the first time in this Court, of unfair or overcompensation falls on unfertile ground. As the Supreme Court has recently said, "[t]he

employer may not unilaterally terminate the benefits, even if the employer acts in good faith.”<sup>11</sup>

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9. <sup>11</sup>*Blue Hen Lines, Inc. v. Turbitt*, Del.Supr., \_\_\_ A.2d \_\_\_ (2001) (mem. op.) at

It is settled Delaware law that an issue is waived for appeal if it was not raised below.<sup>12</sup> Potts' denies it waived the credit issue for appeal purposes because the issue was only raised by the Board's second decision. But, that was a decision from which it never sought relief before the Board. Potts had three opportunities to raise the issue: at oral argument at the initial hearing, in its brief submitted before the second decision, and by requesting reargument on the Board's second decision.<sup>13</sup> Potts did none of these. This Court will not hear the credit issue on appeal, and the remaining issues have been voluntarily dismissed by Potts. Its argument was not presented to the appropriate tribunal, the Board; therefore, the Court is without jurisdiction to hear the issue on appeal.<sup>14</sup> This leaves no other issues on appeal to decide.

#### CONCLUSION

Based on the foregoing, the appeal of Potts Welding & Boiler Repair Co., Inc., is **DISMISSED** and the decision of the Industrial Accident Board of March 26, 2001 is **AFFIRMED**.

**IF IT IS SO ORDERED.**

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<sup>12</sup>*Connor*, 415 A.2d at 780.

<sup>13</sup>If it had sought reargument and been denied it, there could be an abuse of discretion issue. But there is not. There is no argument that Potts would have been barred from seeking reargument of the second decision.

<sup>14</sup>*O'Brien v. Unemployment Ins. App. Bd.*, Del.Super., C.A.No. 92A-11-005, Gebelein, J. (October 20, 1993).

J.