IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DEANNA SHAW,	)
	) C.A. No. 01A-04-002 JTV
Claimant Below- Appellant,	))
	)
v.	)
	)
UNITED PARCEL SERVICE,	)
	)
Employer Below- Appellee.	))

Submitted: October 30, 2002
Decided: January 30, 2003

Walt F. Schmittinger, Esq., Dover, Delaware. Attorney for Claimant.

Nancy Chrissinger Cobb, Esq., Wilmington, Delaware. Attorney for Employer.

Upon Consideration of Claimant's Appeal From Decision of Industrial Accident Board
AFFIRMED

VAUGHN, Resident Judge

Shaw v. United Parcel Service
C.A. No. 01A-04-002 JTV
January 30, 2003

ORDER

Upon consideration of the appellant's brief and the record of the case, it appears that:

1. This appeal from a decision of the Industrial Accident Board ("Board") involves a dispute concerning the number of hours in the employer's average work week which should be used to calculate the appellant's wages. The facts material to determining this issue appear to be undisputed.

2. The appellant, Deanna Shaw ("claimant"), works as a preloader at the Harrington United Parcel Service facility ("employer"). A preloader loads and unloads packages from United Parcel Service cars and trucks. The preloaders are all part-time employees who typically work about four hours a day, five days a week, for an average work week of twenty hours. All of the preloaders work during roughly the same hours each morning. The employment application which Ms. Shaw filled out for her position at the Harrington facility was a part-time work application, but she indicated on the form that she was applying for part-time work because no full-time position was available. Ms. Shaw was available for and would have preferred full-time work. At the time of her injury in May 2000, there were about 70 employees, approximately 60 of whom were part-time. The only full-time employees at the facility were mangers and the regular drivers. Most of the part-time workers, like the claimant, want to work full-time. No full-time position was available for Ms. Shaw, however, at any time relevant to this proceeding. In November 1996 she had applied, unsuccessfully, for a full-time driver position in Louisville, Kentucky. She did not, however, seek full-time work with employers

other than United Parcel Service.

3. The claimant developed bilateral carpal tunnel syndrome as a result of her job as a preloader and was unable to work from June 30, 2000 to November 22, 2000. At the time of her injury, her rate of pay as a preloader was $10 per hour. She contended before the Board that since she wanted to work full-time and was capable of working full-time, her compensation for the period she was unable to work should be based upon a full-time work week. This measure of compensation, she contended, was necessary to compensate for loss of her earning capacity.[1] The employer contended that her wages were $200 per week based upon an average work week of twenty hours. The Board accepted the employer's position. Based upon this conclusion, it awarded her $144.89 per week, the minimum in effect at that time.

4. The scope of review for appeal of a Board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of

[1] At the time of her injury, the claimant also worked as an air driver for the employer, another part-time position, limited to three hours on Saturday at an hourly rate of $11.50. The Board disregarded this part-time position, stating that the air driver work was "dissimilar." The claimant has not argued this point on appeal. Therefore, it will not be further addressed. In her brief, the claimant mentions the air driver position only in pointing out that the amount of compensation awarded was based upon wages which are less than her actual wages. The Court construes the issue which it is being asked to decide, however, as whether the claimant's compensation should be calculated based upon a full-time work week versus twenty hours per week. If the Court misinterprets claimant's position regarding her work as an air driver, she may request reargument.

law.[2] "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[4] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.[5]

5. Under 19 *Del. C.* § 2302(b), the claimant's wages, for compensation purposes, are determined by multiplying her hourly rate by the "average work week of the employee's employer at the time of the accident." The claimant relies upon *Furrowh v. Abacus Corp.*[6], *Howell v. Supermarkets General Corp.*[7], *Fitzgerald v. Roy's Flying "A"*[8], and *Larson's Workers' Compensation Law*[9] in support of her contention that the employer's "average work week" is the work week of a full-time

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[2] *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. LEXIS 264 (Del. Super. 2000); *see Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[3] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *see Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

[4] 213 A.2d at 66.

[5] *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3 (Del. Super. 1999).

[6] 559 A.2d 1258 (Del. 1989).

[7] 340 A.2d 833 (Del. 1975).

[8] 266 A.2d 193 (Del. Super. 1970).

[9] 5 Arthur Larson, *Larson's Workers' Compensation Law* § 93.00 (2002) (5 *Larson's Workers' Compensation Law* § 93.00 was formerly 2 Larson *Workers' Compensation* § 60.00 (1987)).

employee.

6. In *Furrowh*, the claimant applied for a full-time position as a security guard with Abacus Corporation. Since all full-time positions were filled, she accepted a part-time position. She was injured on the job about four months after being hired. At the time, about twenty percent of the security guards worked full-time and about eighty percent worked part-time. The Board calculated Abacus' average work week by averaging the hours of all security guards, part-time and full-time. This calculation yielded an "average work week" of 23.46 hours. Citing the earlier case of *Howell v. Supermarkets Gen. Corp.*, however, the court stated that 19 *Del. C.* § 2302(b) should be read as requiring that a part-time employee who is capable of working full-time should be compensated based on his or her loss of earning capacity. The earning capacity of a person who is capable of working full-time, the court reasoned, was that of a full-time worker. Therefore, in Ms. Furrowh's case, the average work week for purposes of calculating her workers' compensation was held to be the average work week of the security guards who worked full-time. The other authorities relied upon by the claimant support the same principle. Ms. Shaw contends that since she was capable of working full-time, she must be compensated on the basis of full-time employment in order to compensate her for her lost earning capacity for the period of her disability.

7. *Furrowh* and the above-mentioned section of *Larson's* also state, however, that an employee's loss of earning capacity may appropriately be measured by part-time hours "if the employment itself or the employee's relation to it is inherently a

part-time one and likely to remain so."[10] The Board determined in this case that the claimant's employment is inherently part-time because all preloaders are part-time. The only relevant full-time position, that of a driver, is a completely different job position. The Board also determined that there was no reasonable expectation that the claimant would obtain full-time employment as a driver in the foreseeable future. Based upon these determinations, the Board concluded that the claimant's employment was inherently part-time and likely to remain so, thus justifying compensation based upon an "average work week" of twenty hours.

8. The Board's determination that the claimant's employment is inherently part-time is supported by substantial evidence and distinguishes this case from *Furrowh* and the other cases relied upon by the claimant. All of the preloaders worked approximately the same number of limited hours. On this record, its determination that the claimant's employment was likely to remain part-time is also supported by substantial evidence and will not be disturbed on this appeal. These facts lead to the conclusion that the employer's "average work week" for work of the character performed by the claimant is the twenty hours per week customarily worked by preloaders. The claimant has presented no persuasive case that her loss of earning capacity for her period of disability should be based upon that of a full-time worker.

9. Accordingly, the decision of the Board is ***affirmed***.

IT IS SO ORDERED.

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[10] 559 A.2d at 1260-61 (citing 2 Larson *Workmen's Compensation Law* § 60.00 (1987)).

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Resident Judge

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