

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SEAN TRUE,)
)
) C.A. No. 03A-10-005 (CHT)
 Employee-Appellant,)
)
 v.)
)
 SKW MBT SERVICES,)
)
 Employer-Appellee.)

ORDER

_____This 13th day of January, 2005, after reviewing the record and arguments of the parties, it appears to the Court that:

1. On February 15, 2000, the Employee-Appellant, Mr. True, was injured during the course of his employment with SKW MBT Services ("SKW"), d/b/a/ Hardcore Composites. He sought workers compensation benefits pursuant to 19 Del. C. §§ 2301-2397 and was paid benefits by SKW in the amount of \$52,000.00. In addition, Mr. True instituted litigation against Diamond State Terminal ("Diamond State"), claiming that his injuries were caused in whole or in part by an employee of Diamond State and that he was entitled to additional compensation as

a result. 2. During the course of litigation against Diamond State, Mr. True and Diamond State agreed to resolve the question of Diamond State's liability for Mr. True's injuries through binding arbitration. Specifically, they agreed that if Diamond State was deemed by the arbitrator to be responsible, Mr. True would receive a maximum of \$250,000.00. If no liability was found by the arbitrator, he would receive \$20,000.00. The arbitrator, the Honorable Vincent A. Bifferato, Sr., a retired judge of the Superior Court, ruled that Diamond State was not liable for Mr. True's injuries. That decision was not appealed or otherwise challenged, and Mr. True received the agreed upon \$20,000.00.

3. SKW brought an action before the Industrial Accident Board to determine the extent of any lien to which SKW was entitled out of the \$20,000.00 paid by Diamond State to Mr. True pursuant to 19 *Del. C.* § 2363(a)(e). Nineteen *Del. C.* § 2363 states in pertinent part:

(a) Where the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured

employee . . . may also proceed to enforce the liability of such third party for damages in accordance with this section.

. . .

(e) In an action to enforce the liability of the third party, the plaintiff may recover any amount which the employee . . . would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance shall forthwith be paid to the employee . . . and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits

4. According to the portions of the statute noted above, there must first be an injury and that injury must be caused under circumstances creating a legal liability in a third party before an Employer can receive reimbursement for workers' compensation benefits paid or a credit against benefits that would be due in the future. See, *Moore v. General Foods*, 459 A.2d 126 (Del. 1983). The Board ultimately concluded that § 2363 applied and that Diamond State was entitled to reimbursement in the amount of \$20,000.00 minus expenses and attorney's fees. Mr. True filed a timely appeal of the Board's decision to this Court.

5. The Court is bound by the Board's findings if

they are supported by substantial evidence and absent abuse of discretion or error of law.¹ "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² It "is more than a scintilla and less than a preponderance" of the evidence.³ This Court does not weigh the evidence, determine questions of credibility or make its own findings of fact.⁴ This Court's function is to determine if the evidence is legally adequate to support the factual findings below.⁵ The Court's review of alleged errors of law is plenary.⁶ An evaluation of the Board's decision in light of these standards requires this Court to reverse that decision.

6. The Court finds the Board erred in holding SKW was entitled to be reimbursed out of the \$20,000.00 reward from the third party litigant for workers' compensation benefits. Subrogation under § 2363 is premised on the finding of some legal liability of a third party. The Board

¹ *Ohr* v. *Kentmere Home*, 1996 WL 527213, at *3 (Del. Super.).

² *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Streett v. State*, 669 A.2d 9, 11 (Del. 1995).

³ *City of Wilmington v. Clark*, 1991 WL 53441, at *2. (Del. Super.).

⁴ *Johnson v. Chrysler*, 213 A.2d 64, 66 (Del. 1965).

⁵ 29 Del. C. §10142(d).

⁶ *Brooks v. Johnson*, 560 A.2d 1001 (Del. 1989).

believed the guaranteed payment of \$20,000.00, resulting from the arbitration agreement, was equivalent to a finding of legal liability for the purposes of §2363(a)(e).

7. This finding is legally flawed and not supported by substantial evidence. At best, the \$20,000.00 appears to be an inducement or consideration paid to Mr. True for agreeing to resolve the case through binding arbitration. In return, Diamond State was able to put a limit on its exposure of being found legally liable for Mr. True's injuries. However it is viewed, the agreement did not amount to a determination of liability for purposes of § 2363 (a)(e).

8. Stated differently, it is readily apparent that the agreement to arbitrate did not establish liability between Diamond State and Mr. True. Otherwise, the arbitrator would not have ruled that Diamond State was not legally liable for Mr. True's injuries. And, if liability had been decided with the execution of the agreement to arbitrate, the only question to have been decided by the arbitrator would have been the amount of damages to which Mr. True was entitled. Payment of money, without more, is not enough. Section 2363 does not, therefore, provide the basis for credit and/or reimbursement to SKW.

8. In light of the foregoing, the decision of the

Industrial Accident Board's Decision must be, and hereby is,
REVERSED and REMANDED for further proceedings consistent with
this ORDER.

_____ **IT IS SO ORDERED.**

TOLIVER, JUDGE