

October 1, 2002

Henry C. Davis, Esq.
HENRY CLAY DAVIS III, P.A.
1203 E. Market Street
P.O. Box 744
Georgetown, DE 19947

Erik C. Grandell, Esq.
Heckler & Frabizzio
919 North Market Street #1300
P.O. Box 128
Wilmington, DE 19899-0128

Date Submitted: August 2, 2002

RE: Mary Wallace v. Mountaire Farms, Inc., C.A. No. 01A-10-003

Dear Counsel:

This is my decision on Mary Wallace's ("Claimant") appeal of the Industrial Accident Board's ("Board") decision denying Claimant's Petition to Determine Compensation Due ("Petition"). The Board's decision is affirmed for the reasons set forth herein.

STATEMENT OF FACTS

On October 30, 2000, Claimant was injured pushing a floor scrubber machine, while working for Mountaire Farms, Inc. ("Employer"). As a result of this incident, Claimant developed hernias which were surgically treated by Semaan M. Abboud, M.D. ("Dr. Abboud"). Following surgery, Dr. Abboud restricted Claimant from lifting more than twenty-five pounds. Claimant also had certain pre-existing medical conditions unrelated to the work accident. As a result of these conditions, Claimant was restricted from working in areas where the temperature was below sixty degrees.

Due to the lifting restrictions, Claimant was no longer able to perform the duties of her former job in the Housekeeping Department. Employer offered Claimant a job in the Evisceration Department at the same wage rate. This position was located in a part of the plant where the temperature was above 60 degrees and did not require any lifting in excess of twenty-five pounds. Claimant rejected this offer since she did not want to work with "blood and guts" and believed that her medical restrictions prevented her from working in any part of the

production portion of the plant. Claimant's former position in the Housekeeping Department was not located in the production portion of the plant.

On April 30, 2001, Claimant filed a Petition seeking payment of partial disability. The Board held a hearing to determine the merits of the Petition on September 12, 2001. Prior to the hearing, the Employer agreed that Claimant's hemia was a work-related compensable injury entitling her to payment of medical expenses and to a period of total disability. The parties did not reach an agreement regarding Claimant's entitlement to partial disability or calculation of the compensation rate or average weekly wage. Following the hearing, the Board found that Claimant failed to sustain a claim for partial disability since she declined a suitable position offered by Employer that complied with all of her medical restrictions. Since the Board did not award partial disability benefits, the Board did not address the issue of the proper compensation rate or average weekly wage. Claimant appeals from this decision of the Board.

ISSUES PRESENTED

The first issue is whether Employer waived the defense of forfeiture by failing to properly raise the issue before the Board.. The second issue is whether substantial evidence supports the Board's determination that Claimant failed to sustain a claim for partial disability benefits. The third issue is whether the Board erred in failing to determine the compensation rate or average weekly wage once it had concluded that Claimant was not entitled to partial disability benefits. The final issue is whether the Board erred in declining to award attorneys' fees and costs.

DISCUSSION

A. Standard of Review

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence, *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960), and to review questions of law *de novo*, *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super.), *app. disp.*, 515 A.2d 397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, 312 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d).

B. Waiver of Forfeiture Issue

The forfeiture issue has not been waived. The Superior Court does not consider on

appeal matters outside of the record below. *See Super. Ct. Civ. R. 72(g); 19 Del. C. § 2350(b)*. The Court will not consider evidence or issues not properly raised below. *Oakes v. Chrysler Corp.*, Del. Super., C.A. No. 98A-08-006, Barron, J. (Jan. 11, 1999) (Letter Op.). Thus, an issue is waived if it was not raised below. *Potts Welding & Boiler Repair Co. v. Zakrewski*, Del. Super., C.A. No. 01A-04-001, Herlihy, J. (Jan. 11, 2002) (Mem. Op.). Under the Industrial Accident Board's (IAB) Rule 9 (D)(3), at the time of the noticed pretrial, the Employer must provide "a complete statement of defenses to be used." Further, IAB Rule 9 (E) states that modifications to pretrial memorandum must be made at least thirty days prior to the hearing.

Here, Employer did not disclose the forfeiture issue in the pre-trial memorandum. Employer also failed to provide notice to opposing counsel of the forfeiture defense until two days prior to the hearing. While Employer's actions violate IAB Rule 9, the forfeiture defense was later presented to the Board. At the hearing, Employer raised the issue in his opening statement, developed the issue during cross-examination, and argued the issue in his closing statement. Thus, contrary to Claimant's assertion, the issue was raised below and had not been waived. *Potts Welding & Boiler Repair Co. v. Zakrewski*, *supra*. Since the issue is part of the record, the Court will consider the issue on appeal. *See Super. Ct. Civ. R. 72(g); 19 Del. C. § 2350(b)*.

C. Partial Disability Benefits

The Board's decision rejecting a claim for partial disability benefits is supported by substantial evidence and is free from legal error. This Court liberally construes the provisions of the Workers' Compensation statute "to effectuate the statute's intended goal of compensation to the injured employee." *Johnson Controls Inc. v. Fields*, 758 A.2d 506, 509 (Del. 2000). Generally, an employee injured in a work-related accident is entitled to partial disability. *Id.* However, an injured employee forfeits the right to compensation in certain limited circumstances, such as where an employee unjustifiably refuses suitable employment. *Id.* Such a forfeiture furthers the policy behind the Workers' Compensation statute "to return individuals to the work force." *Brittingham v. St. Michael's Rectory*, 788 A.2d 519, 526 (Del. 2002).

Under Section 2353(c)¹, the employer has the burden to prove a forfeiture. *Johnson Controls Inc. v. Fields*, 758 A.2d at 509. An employer satisfies this burden by making a good faith offer of employment that is "within the physical and intellectual capabilities of the injured worker." *Counts v. Acco Babcock, Inc.*, Del. Supr., No. 135, 1988, Walsh, J. (July 15, 1988) (ORDER). Such an offer must be reasonable with respect to location, compensation and accessibility. *Id.* Once made, an employee must respond in good faith to the offer. *Id.* An injured employee refuses such an offer of employment at his own risk. *Wilmington Hous. Auth.*

¹Section 2353(c) provides: "If an injured employee refuses employment procured for the employee and suitable to the employee's capacity, the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Board such refusal was justifiable." 19 Del. C. § 2353(c).

v. Gonzalez, 333 A.2d 172, 175 (Del. Super.1975). The purpose behind this section is to “encourage injured employees to accept employers’ efforts to return them to the labor force.” *Id.* at 174.

In this case, Employer offered Claimant a position in the Evisceration Department at the same rate of pay. This position did not require lifting more than twenty-five pounds and was located in a part of the plant where the temperature was above sixty degrees. Based upon the evidence in the record, this offer was seemingly within Claimant’s physical and intellectual capabilities. Although Claimant believed that she was restricted from working in any part of the production portion of the plant, the medical evidence indicates that the restriction only applies to work areas with temperatures less than sixty degrees. The Board found that the job offer was within Claimant’s abilities and complied with her medical restrictions. Substantial evidence supports this finding. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d at 899. Pursuant to 19 *Del. C.* § 2353(c), Claimant forfeited her right to partial disability benefits by rejecting Employer’s suitable offer of employment. 19 *Del. C.* § 2353(c). Accordingly, the Board properly declined to award partial disability benefits.

D. Calculation of the Compensation Rate

The Board did not err in failing to address the issue of the compensation rate or average weekly wage. The function of this Court is to review and decide actual controversies. *Mitchell v. Bd. Of Adjustment of Sussex County*, 706 A.2d 1027, 1029 (Del. 1998). An action is dismissed as moot “when it fails to present a controversy that is capable of judicial resolution.” *Id.* The Court is not required to adjudicate hypothetical questions. *Id.* at 1030.

In the present matter, the parties reached an agreement as to the period of total disability. In her Statement of Facts Upon Failure to Reach an Agreement, Claimant acknowledged that she had received payment for the period of total disability. Presumably in reaching such an agreement, the parties agreed to the amount of compensation during the period of total disability and no longer needed a determination of the compensation rate or average weekly wage. Moreover, the Board found that Claimant was not entitled to partial disability benefits. Upon making that finding, the Board did not need to address the applicable compensation rate or average weekly wage, since there were no longer any issues remaining before the Board requiring such a calculation. Therefore, any issues regarding the compensation rate or average weekly wage are rendered moot by the Board’s findings and this Court’s affirmance of those findings.

E. Attorneys’ Fees and Costs.

The Board did not err in declining to award attorneys’ fees and costs. In the event that the employee receives an award, the fees for medical witnesses testifying before the Board are

assessed against the employer. 19 *Del. C.* § 2322 (e).² The employer must also pay the employee's reasonable attorney's fees if the employee is awarded compensation. 19 *Del. C.* § 2320 (10)(a).³ Here there was no award since the Board denied Claimant's Petition for partial disability benefits. *See Anderson v. Wheeler Constr.*, 267 A.2d 616, 617 (Del. Super.1970). As discussed above, the Board's denial of partial disability benefits was warranted. Accordingly, Claimant is not entitled to attorneys' fees and costs pursuant to Sections 2320(10)(a) and 2322(e). *See* 19 *Del. C.* §§ 2320(10)(a); 2322(e).

CONCLUSION

Based upon the foregoing, the decision of the Board is affirmed.

IT IS SO ORDERED.

Very truly yours,

T. Henley Graves

oc: Prothonotary's Office

²Section 2322(e) provides: "The fees of medical witnesses testifying before the Industrial Accident Board in behalf of an injured employee shall be taxed as a cost to the employer or the employer's insurance carrier in the event the injured employee receives an award." 19 *Del. C.* § 2322(e).

³Section 2320(10)(a) provides: "Attorney's fee. a. A reasonable attorney's fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party." 19 *Del. C.* § 2320(10)(a).