IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOHNSON CONTROLS, INC.,	)	
	)	
Employer Below-Appellant,	)	
	)	
v.	)	C.A. No.: N13A-06-010 FSS
	)	
PATRICIA ANDRIES,	)	APPEAL
	)	
Employee Below-Appellee.	)	

Submitted: January 2, 2014
Decided: April 29, 2014

ORDER

***Upon Appeal from the Industrial Accident Board* – AFFIRMED**

1. Appellee alleges she injured her lower back in a work accident on April 4, 2012. Employer argues there was no accident then, or, if there was, Appellee was not injured. The Industrial Accident Board found Appellee's medical experts persuasive, and granted total disability benefits from April 23, 2012 onward. Appellant now argues the Board abused its discretion by relying on Appellee's medical expert and substituting its opinion for the expert's. Alternatively, Appellant argues any benefits should have been terminated and the Board's finding her to be a displaced worker was legal error.

2. Appellee worked as a forklift driver for Employer. Part of her responsibilities was picking up small bins of batteries, weighing approximately 25 pounds, and dumping them into larger bins. While working an overnight shift April 4-5, 2012, Claimant was lifting a smaller bin and felt a twinge in her back. Appellee testified that she notified her supervisor at that time, although he did not recall that. After her shift, she called the Dover Air Force Base medical department, which recommended she visit the Eden Hill Clinic. The clinic prescribed medication, an injection, and rest. Appellee returned to work April 9, 2012, but her condition worsened. On April 24, 2012, two doctors at the Dover Air Force Base referred Appellee for further treatment, physical therapy, and removed her from work. Employer did not complete an employee incident report until May 2, 2012.

3. Appellee's expert testified that as a result of her work-related injury, she suffers low back pain with radicular symptoms and must remain on light duty restriction. Appellee further claimed the prior knee injury and related treatment were unrelated to her current injury. Appellant's expert, on the other hand, testified Appellee suffered a minor sprain superimposed on significant, chronic back pain, which the records show began in 1987. He opined Appellee's lack of improvement is atypical for a lumbar injury, so the pain was not related to this incident. Further, Appellant's expert asserted Appellee could return to work without restriction.

4. Appellee is still employed by Employer. Throughout her treatment, Appellee was on light duty. Since April 24, 2012, Appellee has regularly provided doctors' notes. And, Appellee was never told to look for work outside of the company. She was, however, told that Employer could not accommodate the restrictions. Further, Appellee testified she believes Employer offers light duty.

5. Appellant makes three arguments: 1) the Board abused its discretion by finding Appellee's expert more persuasive, 2) the Board abused its discretion by substituting its opinion for the expert's, and 3) the Board erred as a matter of law in finding Appellee was a displaced worker.

6. Appellant acknowledges the limited appellate review available here. Review of the Board's decision is limited to whether the Board's findings were supported by substantial evidence and the decision is free from legal error.[1] The court will not weigh evidence, determine questions of credibility, or make its own factual findings and conclusions.[2] "The credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine."[3] In the so-called "battle of the experts," the Board is free to choose between the opinions and the court's role is limited to determining if the evidence was

[1] *Opportunity Ctr., Inc. v. Jamison*, 940 A.2d 946, *2 (Del. 2007).

[2] *Id.*

[3] *Coleman v. Dep't of Labor*, 288 A.2d 285, 287 (Del. Super. 1972).

legally adequate to support the choice.[4] If the Board did not abuse its discretion, the court must affirm.[5]

7. Essentially, the experts disagreed over whether Appellee's current complaints were due to her prior condition or the incident at work. The Board was persuaded by Appellee's medical expert who acknowledged Appellee's prior condition, but saw it as asymptomatic before the injury. The Board agreed, finding there was "no evidence this condition was symptomatic or limited Claimant in any way" before the injury. That finding is based on an expert opinion and arguably consistent with the record. Accordingly, the Board did not abuse its discretion in believing Appellee's expert.

8. Appellant overreaches when arguing the Board substituted its own opinion for the expert's. Appellant merely relies on one sentence from the Board's opinion: "The Board believes [Appellant's expert] was mistaken in his conclusions about the records from 2011." The Board, however, then explains the records demonstrate Appellee's doctors' primarily focused on her knee issue and "there was no definitive diagnosis ... of a low back injury or lumbar radiculopathy in 2011." This was supported by substantial evidence.

[4] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del.1992).

[5] *Opportunity Ctr.*, 940 A.2d 946, *2.

9. Last, Appellant argues Appellee is not a displaced worker under *Hoey v. Chrysler Motors Corp.*[6] In trying to terminate benefits, an employer must prove the employee can return to work. A displaced employee, on the other hand, is a person who can only work in a limited capacity, or has been unable to find work within her restrictions. Under the displaced worker doctrine, both the injured employee and the employer share a duty to obtain appropriate employment for the employee, but the burden is on the employee to make reasonable efforts.[7] *Hoey* held an employee who does not know or have reason to know she is a displaced worker cannot be expected to find employment elsewhere.[8] The employee in *Hoey* was a longtime employee who had not been terminated and continued to receive benefits after her injury. She also participated in a "work-hardening" program and her employer had previously accommodated other injured employees.[9] *Hoey*'s progeny turn on whether the employer terminated the employee, or at least notified them that no modified employment would ever be available.[10]

[6] 655 A.2d 307 (Del. 1994).

[7] *Id.* at *1.

[8] *Id.* at *2.

[9] *Id.*

[10] *Compare Gen. Motor Corp. v. Kane*, 901 A.2d 119 (Del. 2006), *with Saunders v. DaimlerChrysler, Corp.*, 894 A.2d 407 (Del. 2006).

10. Here, the Board found Appellee was entitled to total disability benefits as a displaced worker. The Board found Appellee "cannot return to her previous job without modifications, but continues to have a reasonable expectation of employment with Johnson Controls." That is arguably supported by the record. As discussed above, the Board is free to accept Appellee's expert's opinion that she must remain on light duty. Further, Appellee remains employed with Appellant and has never been told to look for work elsewhere. The Board's finding is supported by substantial evidence and, as discussed above, is not a legal error.

For the above reasons, the Industrial Accident Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

CC: Prothonotary
Michael P. Freebury, Esquire
R. Stokes Nolte, Esquire