BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

STEVEN KREBS,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1485457
	)	
DAVID G. HORSEY & SONS,	)	
	)	
Employer.	)	

KENNETH LEVIS,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1473779
	)	
HARRY CASELL INC.,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on August 26, 2021, on two motions filed by the Workers' Compensation Fund ("the Fund") seeking to dismiss pending Petitions for Review filed in two cases. Because of the similarity of issues involved, the two motions have been consolidated for consideration by the Board.

Background: Krebs: Steven Krebs ("Claimant Krebs") was injured in a compensable work accident on August 2, 2018, while working for David G. Horsey & Sons (Employer Horsey). As a result of the injuries sustained in the accident, Claimant Krebs underwent numerous surgeries. Most recently, Employer Horsey placed Claimant Krebs on an open agreement for total disability benefits effective March 6, 2020. On April 30, 2021, Employer Horsey filed a Petition for Review alleging that Claimant Krebs' total disability status should be terminated on the basis that Claimant

Krebs was physically able to return to work. In accordance with title 19, section 2347 of the Delaware Code, Claimant Krebs made application for Fund benefits during the pendency of the termination petition. The Fund began to pay Claimant Krebs's total disability benefits effective May 7, 2021. Claimant Krebs returned to part-time work (20 hours per week) on or about May 30, 2021. The part-time limitation was in accordance with the recommendation of Claimant Krebs' treating physician. Claimant Krebs notified the Fund of his part-time employment and offered to provide his paystubs so that his compensation rate could be adjusted. Employer Horsey maintains that Claimant Krebs is capable of full-time work. Rather than reduce Claimant Krebs' benefits based on the part-time earnings, the Fund ceased paying any benefits to Claimant Krebs effective June 18, 2021.

Background: Levis: Kenneth Levis ("Claimant Levis") was injured in a compensable work accident on March 28, 2018, while working for Harry Casell Inc. ("Employer Casell"). Claimant Levis was placed on an open agreement for total disability effective March 27, 2020, and he underwent a three-level lumbar fusion on July 2, 2020. On April 9, 2021, Employer Casell filed a Petition for Review alleging that Claimant Levis' total disability status should be terminated on the basis that Claimant Levis was physically able to return to work. Following an application for benefits from the Fund, the Fund began to pay Claimant Levis' total disability benefits effective April 9, 2021. Claimant Levis was released by his treating doctor to sedentary work (and later to light duty work). On July 16, 2021, Claimant Levis returned to part-time work two days per week (circa 16 hours per week). Claimant Levis offered to provide his paystubs so that his compensation rate could be adjusted. Employer Casell maintains that Claimant Levis' true earning capacity is greater than his current actual earnings (and thus that any entitlement to partial disability would be

less than Claimant Levis maintains). Rather than reduce Claimant Levis' benefits based on the part-time earnings, the Fund ceased paying any benefits to Claimant Levis effective July 16, 2021.

Argument: The Fund argues that, because the two claimants each returned to part-time work, the parties are now in agreement that each claimant is "physically able to return to work" and, by law, the employers are required to withdraw their pending Petitions for Review and reimburse the Fund. The Fund maintains that the sole issue for the Petitions was whether the respective claimants were able to return to work. That issue is incontrovertible because each claimant has already returned to some form of employment. The Fund argues that, if the claimants seek compensation for partial disability, the burden is on them to file a Petition to Determine Additional Compensation Due.

The claimants maintain that they have evidence of continued diminished earning capacity attributable to the work accident (neither has been released to full-time, full-duty work) and that, under long-established case law, the burden is on the respective employers, as part of the Petition for Review, to show that there is no lost earning capacity. Employer Casell argues that dismissing its petition denies it the opportunity to demonstrate Claimant Levis' earning capacity, which could affect the amount that Employer Casell would have to reimburse the Fund.[1]

Analysis: The Workers' Compensation Act ("the Act") provides that "[o]n the application of any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred . . . the Board may at any time, but not oftener than once in 6 months, review any agreement or award." DEL. CODE ANN. tit. 19, § 2347. However, the Act further provides that:

> Compensation payable to an employee, under this chapter, shall not terminate until and unless the Board enters an award

[1] Employer Horsey notes that, under the facts of its case, it will have to reimburse the Fund regardless. As such, it takes no position on the issue.

> 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.

DEL. CODE ANN. tit. 19, § 2347.

However, if an employer is insured by an insurance carrier, then section 2347 also provides a means by which a claimant's disability benefits will be paid by the Fund (which is itself funded by the insurance carriers) following the filing of a termination petition.

> Compensation shall be paid by the Department [of Labor] to the employee after the filing of the employer's petition to review from the Workers' Compensation Fund until the parties to an award or agreement consent to the termination or until the Board enters an order upon the employer's petition to review.

DEL. CODE ANN. tit. 19, § 2347.

The Act further provides when an insured employer must repay the Fund for the amounts paid out by the Fund:

> After the parties to an award or agreement consent to the reinstatement of compensation or, after the employer withdraws its petition, or, if the Industrial Accident Board orders the employer's petition dismissed, the employer shall repay to the Workers' Compensation Fund the amount paid out by the Department. A petition to review must be withdrawn whenever the parties to an agreement settle the claim without a hearing before the Board or whenever an employee consents to a termination after a petition to review has been filed with the Board.

DEL. CODE ANN. tit. 19, § 2347.

This, then, is the core of the Fund's argument. The Fund's argument is that, by returning to any form of employment (even at diminished earnings), the injured worked has impliedly consented to the termination of total disability. Because there is this "consent" then, the Fund

argues, the employer is obligated by statute to withdraw its petition or (as is requested here) the Board should dismiss the petition. Under either scenario, under the language of the statute, the employer would then be required to repay or reimburse the Fund the amount that it paid out during the pendency of the petition.

Before proceeding further in the analysis, it is important to first review the basic policy of the Act as well as the specific purpose of the section 2347 provisions. There is an impressive abundance of case law on this subject.

The core principle of the Act is "to eliminate questions of negligence and fault in industrial accidents, and to substitute a reasonable scale of compensation for the common-law remedies, which experience had shown to be, generally speaking, inadequate to protect the interest of those who had become casualties of industry." *Hill v. Moskin Stores, Inc.*, 165 A.2d 447, 451 (Del. 1960) (citation omitted). While the Act made it easier for an injured worker to receive compensation (compared to common-law tort remedies), the legislature limited the benefits available to the employee under workers' compensation. In order to fulfill the humane and beneficial intent of the Act, the courts traditionally provide the provisions of the Act with a liberal interpretation, resolving all reasonable doubts in favor of the injured worker for whose benefit the Act was passed. *See Hirneisen v. Champlain Cable Corp.*, 892 A.2d 1056, 1059 (Del. 2006); *Histed v. E.I. DuPont de Nemours & Co.*, 621 A,2d 340, 342 (Del. 1993).

This brings us to the operation of section 2347. It was enacted to deal with the question of paying compensation to an injured worker during the pendency of a petition for review. If an employer is insured by a workers' compensation insurance carrier, the carrier is permitted to cease making payments of compensation upon the filing of the petition, but compensation would

continue to be paid to the injured worker through the Fund, which was itself funded by the insurance carriers.[2]

> The legislative purpose was to assure continued compensation to the injured employee until he is found not to be entitled to receive it, and the burden of bearing the cost of such compensation if the employee is ultimately determined not to be entitled to it was placed upon the Fund. Of course, it provided for reimbursement to the Fund by the employer if it is ultimately determined that the employee is still entitled to compensation.

Hamilton v. Trivits, 340 A.2d 178, 180 (Del. Super. 1975). Phrased another way, the legislative policy is "that an injured employee should not lose his compensation until there is an adverse decision." *Hamilton*, 340 A.2d at 180. *See also Clements v. Diamond State Port Corp.*, 831 A.2d 870, 880 (Del. 2003) (quoting *Hamilton*). "[A]bsent the employee's consent, the determination of whether an employee continues to be entitled to compensation under the law is to be made by the Board before compensation is suspended or terminated, and not by the employer or its insurer." *Huffman v. C.C. Oliphant & Son, Inc.*, 432 A.2d 1207, 1209-10 (Del. 1981). "The employer may not unilaterally terminate the benefits, even if the employer acts in good faith." *Blue Hen Lines, Inc. v. Turbitt*, 787 A.2d 74, 79 (Del. 2001). Consistent with this policy, it has been held that compensation to an injured worker "shall not be terminated during the pendency of a review of compensation for any reason other than an injured employee's consent." *Medrano v. Department of Labor*, Del. Super., C.A. No. 08A-06-008, Witham J., 2009 WL 5177147 at *2 (September 30, 2009) (citing *Foraker v. NVF Co.*, 358 A.2d 730, 732 (Del. Super. 1976)). There is, therefore, a

[2] Because they do not contribute into the Fund, self-insured employers do not get the benefit of the Fund picking up payments when the self-insured employer files a Petition for Review. *See* DEL. CODE ANN. tit. 19, § 2347 (stating that the Fund payment provisions "shall apply only to employers insured by insurance carriers. Nor shall they apply to self-insured employers who shall be responsible for payment of their own claims under this section"). Self-insured employers must continue to pay benefits to the injured worker during the pendency of the petition.

very strong legal precedent that an injured worker should not have his or her wage-replacement benefits stopped while the petition is still pending.

The Fund argues, though, that by returning to part-time work, the claimants in the present cases have impliedly consented to the termination of benefits, allowing it to stop payments and mooting the pending termination petitions.

Certainly, it has been held that a claimant, through his or her actions, can impliedly consent to a termination of benefits. *See Fague v. Delaware Park Racing Association*, Del. Super., C.A. No. 99A-05-004, Barron, J., 2000 WL 303457 at *3 (February 24, 2000); *Jones v. Spence Protective Agency*, Del. Super., C.A. No. 89A-MY-11, Gebelein, J., 1990 WL 177641 at *4 (October 26, 1990). However, it is important not to overread this statement. The specific nature of the acts that the claimant engages in is important.

In *Jones*, a claimant returned to work with light duty restrictions with the same employer, Spence.[3] The employer ceased making total disability payments to her upon her return to work, but the claimant never signed a final receipt to end benefits. About a month later, the claimant decided that she was unable to handle her job and left. The employer refused to resume workers' compensation disability payments. The Board found that the claimant's actions were the equivalent of consenting to the termination of her benefits. *See Jones*, 1990 WL 177641 at *1. The Superior Court agreed that the claimant's actions in returning to work for her prior employer and accepting full pay from that employer was substantial evidence of consent to the termination of benefits even though she had not signed a final receipt. *Jones*, 1990 WL 177641 at 4.

[3] It is clear that the claimant returned to work at Spence at no wage loss. The Court notes that, when the claimant did seek additional compensation, it was only for "the period she was unemployed after leaving her job with Spence and partial compensation for the periods she was unemployed at other jobs." *Jones*, 1990 WL 177641 at 1. There was no claim for partial disability compensation for when she was still working at Spence, indicating that she had received full wages upon her return to work.

That is not the situation in the present matters before the Board. In both cases, while the claimant has returned to part-time work, it has been with a different employer and at a wage loss. Such a return to work is not the sort of implied consent to termination as existed in *Jones*.

If anything, the situation was even more extreme in *Fague*. The claimant in that case was receiving total disability benefits. The employer's doctor opined that she could return to work with restrictions and the employer offered her a position with no wage loss (*i.e.*, no diminished earning capacity and therefore no entitlement to partial disability). *See Fague*, 2000 WL 303457 at *1. The claimant refused the job but, while still receiving total disability benefits as if she had total wage loss, began working part-time for a different employer. Her part-time wage plus the receipt of full total disability benefits exceeded the income she received from her pre-injury job. *See Fague*, 2000 WL 303457 at *1. The employer filed a petition for review, which was scheduled for hearing. At a motion hearing, the claimant failed to appear despite receipt of proper notice. Because of her failure to appear and the fact that she had return to employment, the Board terminated her total disability benefits. *See Fague*, 2000 WL 303457 at *1. On reargument, the claimant admitted that she continued to receive total disability checks while she was also receiving part-time wages and that the combination of those exceeded the income she earned at the time of her work accident. The Board again found that she had received proper notice of the hearing and that, by her own testimony, she was not entitled to ongoing total disability payments.[4] *See Fague*, 2000 WL 303457 at *2. On appeal, the claimant argues that she was entitled to "a fact-finding hearing regarding total disability" and was not, at that point, seeking any claim for partial disability

[4] The Board's focus on proper notice is important. "Unless excused for good cause shown, failure of any or all parties in interest to appear at a duly scheduled hearing or to petition for a continuance shall bar such parties from any further action concerning an adverse decision, a decision by default or a dismissal of a petition for hearing an award." DEL. CODE ANN. tit. 19, § 2348(c). In that sense, the claimant's total disability benefits were terminated not because of her consent, but because of her unexcused failure to appear at a duly noticed hearing before the Board.

benefits. *See Fague*, 2000 WL 303457 at *3. With her not pushing the issue of partial disability benefits, the Court agreed with the Board that, by returning to part-time work, the claimant was ineligible for total disability benefits. She had therefore consented to the termination of her total disability benefits. *See Fague*, 2000 WL 303457 at *3.

Thus, in *Fague*, the claimant sought to receive full total disability benefits while receiving her part-time income, a combination that would pay her more than she received at the time of injury. That result is improper and, as the Court observed, was "not envisioned or sanctioned by Delaware's workers' compensation law." *Fague*, 2000 WL 303457 at *3. By returning to employment, she had consented to terminating her total disability benefits.

That is not the situation in the present cases, where neither claimant seeks continued payment of total disability, but rather both have offered to present the Fund with evidence of their respective incomes so that compensation can be properly reduced. In addition, the termination of the claimant's total disability benefits in *Fague* occurred at a hearing held before the Board when she did not attend despite proper notice. In the present matters, the Fund terminated all compensation to the claimants without any hearing before the Board. As discussed earlier, no employer could legally do that and the Fund, which is paying benefits on behalf of the employer, should not do so either. In these situations, the Fund should seek permission from the Board to end payments.

This puts into proper focus the true issue in this case. Certainly, it is possible for claimants to impliedly consent to the termination of benefits by their actions, but what is the nature of that consent? In other words, did the claimants in the present matters give a full or only a partial consent? Both Claimant Krebs and Claimant Levis have returned to part-time work. As such, it is proper to conclude that the claimants consent that they are not entitled to ongoing total disability

benefits—and neither seeks that. They maintain, though, that the burden remains on their respective employers to establish that there is no entitlement to partial disability and, until that is decided, the Fund should pay the interim compensation contemplated by section 2347, properly reduced to take into account the income they are receiving. In other words, the claimants have only consented to the *reduction* of their wage-loss benefits, not the *full termination* of those benefits. *Cf. Spear v. Blackwell & Son, Inc.*, 221 A.2d 52, 54 (Del. Super. 1966)(finding that an order changing compensation from "total" to "partial" was an award "diminishing" compensation rather than "terminating" it).

What are pending are the employers' Petition for Review seeking to terminate the claimants' open Agreements as to Compensation for total disability. It has, though, been long established under Delaware law that an employer's burden in a termination case is not just to show the cessation of total disability, but also to show the absence of partial disability. In *Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J. (June 7, 1983), the Court, after finding that the claimant in that case was not a displaced worker, stated:

> This Court believes that the holding . . . imposing the ultimate burden of proving that the employee is not partially disabled [on the employer] should be applied in cases involving a petition for review of a compensation agreement involving total disability benefits where there is evidence that in spite of improvement, there is a continued disability, and such disability could reasonably affect the employee's earning capacity.

Waddell, *supra*, at 5. Thus, if a claimant has credible evidence of a continued incapacity that could "reasonably affect" earning capacity, then the legal burden is on the employer (not the claimant) to show that the claimant does not have a diminished earning capacity—that there are available jobs paying the same or more than claimant was receiving at the time of injury. In short, the legal

burden on the employer in a termination case is to show not only that the claimant is no longer totally disabled, but also that he is not partially disabled. *See Waddell*, at 5.

> It is reasonable that the party seeking to terminate a claimant's total disability benefits must bear the burden of proving that the claimant is no longer totally or partially disabled. Total disability necessarily includes partial disability and it is not unreasonable to include within the burden of proving that a claimant is no longer totally disabled, the burden of proving that he is no longer partially disabled. Further, such a holding is consistent with the general judicial rule of construction that the Delaware Workers' Compensation Act is to be liberally construed, in reference to its intended benevolent purpose.

Murphy Steel, Inc. v. Brady, Del. Super., C.A. No. 90A-MY-9, Poppiti, J., 1991 WL 89771 at *4-*5 (May 17, 1991), *aff'd*, 608 A.2d 729 (Del. 1991). *See also Chickadel v. Delmarva Power & Light Co.*, Del. Super., C.A. No. 90A-04-3, Barron, J., 1992 WL 9059 a *3-*4 (January 6, 1992).

The Fund argues that this extra requirement of disproving partial disability does not apply when a claimant has returned to some form of work. The Fund cites *DeAngelo v. Del Campo Bakery*, Del. Super., C.A. No. 89-AP-1 & -2, Del Pesco, J., 1990 WL 74300 (May 23, 1990). In *DeAngelo*, the Court held that "the employer has no burden of disproving partial disability as part of a petition to terminate total disability benefits pursuant to § 2324 when the claimant has returned to regular full-time employment prior to the hearing on the petition." *DeAngelo*, 1990 WL 74300 at *3. Instead, the Court indicated that "[s]hould an employee whose total disability has terminated by virtue of his return to regular employment desire to secure compensation for a reduction in earning capacity, he then must file a petition for permanent [sic] partial benefits and carry the burden of proof as to that claim." *DeAngelo*, 1990 WL 74300 at *2.[5]

[5] The Court's reference to "permanent partial benefits" is in error. "Permanent" partial disability is an award under title 19, section 2326, for the permanent loss or loss of use of a body part due to a work injury. It has nothing to do with a loss of earning capacity. *See Aiken v. General Motors Corp.*, 687 A.2d 186, 188 (Del. 1997)(permanent impairment benefits paid regardless of earning power); *Ernest Di Sabatino & Sons,*

The key for reconciling *DeAngelo* with *Waddell*, *Murphy Steel* and *Chickadel* is that the claimants in *DeAngelo* returned, as the Court states, "to regular full-time employment." *See DeAngelo*, 1990 WL 74300 at *3. Indeed, the employer's contention before the Board was precisely that the claimants "were working and had provided no explanation as to why they would be entitled to partial disability benefits." *DeAngelo*, 1990 WL 74300 at *1. This is consistent with the holding in *Waddell*, which only puts the burden of disproving partial disability onto the employer when "there is evidence that in spite of improvement, there is a continued disability, and such disability could reasonably affect the employee's earning capacity." *Waddell*, *supra*, at 5. A claimant who returns to "regular full-time employment" and offers no evidence of a continued disability that "could reasonably affect the employee's earning capacity" has consented to the termination of wage loss benefits.

In the present matters, of course, neither claimant has returned to "regular full-time employment." Each has only returned to part-time employment. Each has work restrictions. This is evidence suggestive that there is a diminished earning capacity. While the employers dispute that conclusion, that remains an issue of fact to be proven at hearing and, under *Waddell*, the burden for disproving an entitlement to partial disability remains with the employers.

It would therefore be improper to dismiss the pending termination petitions because there remain disputed issues of fact concerning the proper compensation to be received by Claimant Krebs and Claimant Levis. Specifically, the burden remains on Employer Horsey and Employer Caswell to disprove that the respective claimants are entitled to partial disability compensation. The Fund's motions are denied.

Inc. v. Apostolico, 269 A.2d 552, 553 (Del. 1970)(same).The Court should have referred to "temporary partial benefits" such as are awarded under title 19, section 2325.

It also follows from this that it was error for the Fund to cease paying all compensation to Claimant Krebs and Claimant Levis. As set forth earlier, the whole purpose of the Fund payments under section 2347 is "to assure continued compensation to the injured employee until he is found not to be entitled to receive it." *Hamilton*, 340 A.2d at 180. To cease paying total disability compensation but refuse to pay partial disability to the injured worker puts the burden on the injured worker during the pendency of the employer's termination petition. That is directly contrary to the recognized legislative intent of this remedial legislation. It must always be remembered that what is in issue are wage-replacement benefits—the injured worker, when totally disabled, is without any wages to support the worker or the workers' family. When an injured worker has a diminished earning capacity, the worker has injury-related reduced wages on which to try to support the worker and the workers' family. Because it is lost wages that are in issue, the strong public policy recognized by the courts is that the injured worker should not be deprived of such compensation until there is a finding that the worker is ineligible to receive it. To do otherwise causes unnecessary harm to the worker and the worker's family.

The Fund argues that it can pay total disability because it has an Agreement as to Compensation on file setting forth the compensation rate to be paid. The Fund argues that receiving a claimant's paychecks and recalculating the amount due is procedurally incorrect because it would be receiving evidence and adjusting an agreed-upon rate.

The Board is satisfied that this is an incorrect analysis. The Fund is not making any finding at all, nor is what the Fund pays a claimant evidence of what that claimant's earning capacity truly is. Rather, it is merely an administrative adjustment made for the reasons set forth earlier: by tendering paychecks received, the claimant is giving partial consent to a modification or diminution of the claimant's compensation rate. This avoids the clearly erroneous approach of the

claimant in *Fague* who incorrectly tried to receive both total disability compensation and part-time wages. Section 2347 merely states that the Fund is to pay "compensation" to the injured worker during the pendency of the petition. Nothing in the Act states that the Fund cannot reduce that compensation with the consent of the claimant upon submission of evidence from the claimant of receipt of wages. The claimant has consented to this reduction in benefits but the employer is not bound by it. It is not a finding of fact. That awaits a decision following a hearing on the merits. The issue for the respective hearings will be what the "earning capacities" of Claimant Krebs and Claimant Levis are. The evidence at hearing may show that their respective earning capacities are higher than their actual earnings (and thus their proper partial disability rates lower), but it seems unlikely that their earning capacities will be found to be less than what they are actually earning. By reducing the compensation paid to the injured worker based on the paystubs tendered by the claimant, the Fund properly pays compensation that is less than the full total disability rate, while also avoiding accidentally underpaying the injured worker. This is completely consistent with the purpose of the interim compensation payments made by the Fund under the Act.

Accordingly, the Board denies the Fund's motions to dismiss and instructs the Fund to promptly reinstate compensation payments to the claimants (retroactive to the date they ceased) as adjusted based upon the evidence of earnings submitted by the claimants.

Claimant Krebs made a claim for payment of attorney's fees in connection with opposing this motion. The Board finds an award of attorney's fees is inappropriate. First, it is clearly improper to assess such fees against Employer Horsey, who neither filed the motion under consideration nor supported the Fund's position. Employer Horsey is, so to speak, an innocent bystander in this dispute. While attorney's fees can be awarded under title 19, section 2320 to a successful claimant under certain conditions, the Fund is not authorized to make such payments.

The Act is clear that the Fund was "created for the purpose of making payments under § 2327, § 2334, or § 2347 of this title." DEL. CODE ANN. tit. 19, § 2396(a). Payments under section 2320 are not included. As such, the Fund cannot be required to pay attorney's fees under section 2320.

IT IS SO ORDERED this 7th day of September, 2021.

INDUSTRIAL ACCIDENT BOARD

Mark A. Murowany/ca
MARK A. MUROWANY

Vincent D'Anna/ca
VINCENT D'ANNA

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Christopher F. Baum

Mailed Date:

OWC Staff

Stephen T. Morrow, Esquire, for Claimant Krebs
David A. Boswell, Esquire, for Claimant Levis
Elissa A. Greenberg, Esquire, for Employer Horsey
Andrew J. Carmine, Esquire, for Employer Casell
Lynn A. Kelly, Esquire, for the Fund