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BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

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Heckler & Frabizzio

KRISTOPHER SMALL, SR.,)	
)	
Claimant,)	
)	
v.)	Hearing No. 1492931
)	
FIELDSTONE GOLF CLUB,)	
)	
Employer.)	

ORDER

This matter came before the Board on August 24, 2021, on a motion filed by the Workers' Compensation Fund ("the Fund") seeking to dismiss a pending Petition for Review filed by Fieldstone Golf Club ("Employer") on April 21, 2021. In the underlying petition, the Employer seeks to terminate Claimant's temporary total disability benefits, which have been ongoing since September 15, 2020 at the compensation rate of \$314.05 per week, based on an average weekly wage of \$471.05. According to the pre-trial memorandum, Claimant Kristopher Small, Sr., seeks ongoing payment of temporary partial disability benefits from June 28, 2021. The Fund seeks dismissal of the Petition for Review based on Claimant's alleged consent to terminate total disability by returning to parttime work for a new employer. The Fund further argues that Claimant has the burden to file a Petition for Additional Compensation Due if he wants to pursue a claim for temporary partial disability benefits.

An evidentiary hearing was held on August 24, 2021 to consider evidence and argument on the Fund's motion to dismiss. The Fund's motion was filed as the Fund's Response in Opposition to Stipulation and Order for Continuance reached by Claimant and Employer on July 16, 2021. Thus, as a secondary matter to the request for dismissal, the Board will determine

whether to grant the stipulation and order for a 120-day continuance of the merit hearing on the petition.¹ In response to the Fund's motion, Claimant seeks an Order requiring the Fund to pay temporary partial disability benefits until the Petition for Review is resolved by agreement or by a hearing on the merits. Claimant also seeks an attorney's fee.

Statement of Facts submitted by the parties: Claimant Kristopher Smalls injured his low back in a compensable work accident on June 7, 2019 while working for Fieldstone Golf Club. Claimant's average weekly wage is \$471.05 and his compensation rate is \$314.05 per week. Claimant was placed on an open Agreement as to Compensation for total disability as of September 15, 2020. On April 21, 2021, the Employer filed a Petition for Review. The Workers' Compensation Fund paid total disability benefits from April 21, 2021 to July 2, 2021. Claimant began working a parttime job on June 28, 2021 with Deerfield Mowing and Property Maintenance.

Evidence presented:

Claimant Kristopher Smalls was called by the Fund and testified that, as of June 7, 2019, he was employed by Fieldstone Golf Club as the head of the maintenance department. He was carrying a heavy ladder through a tight area on that day when he felt a pop in his back. The next day his left leg was numb and he filed an accident report. Claimant underwent a fusion surgery at L4-5 in September 2020. He was unable to work after the surgery. He began receiving disability checks from the workers' compensation carrier every other week in the amount of \$628.10. At some point, the state took over making the payments. Claimant was asked to review an Agreement as to Compensation and agreed that he had signed the agreement on September 15, 2020. (Fund Exhibit 1) The agreement indicated that his compensation rate for total disability was \$314.05 per week. Claimant testified that he received a check every other week. Claimant recently began a new

¹ The continuance was requested by Claimant and Employer due to the unavailability of medical witnesses prior to the scheduled August 18, 2021 merit hearing on the petition.

job with Deerfield Mowing and Property Maintenance in June 2021, but he could not recall the exact start date. He works three days a week for four hours a day cutting grass. He works every other day. As of the week of the hearing, the new employer is planning to give him additional responsibility for mowing a polo field. This will increase his work hours by three hours a week. He gets paid \$16.60 per hour. Claimant agreed that he can perform parttime work and is not totally disabled from work anymore.

Under questioning by his own counsel, Claimant testified that he gets a paycheck from the employer but there is no pay stub with the check. Claimant reviewed payroll documents provided via email by Deerfield Mowing and Property Maintenance. (Claimant's Exhibit 1) The first page shows the gross wages and net wages paid to him in July 2021. His gross wages of \$384.40 and net wages of \$236.02 represent two weeks of pay. He confirmed that the copy of the check he received on July 9, 2021 for \$236.02 corresponds to his net pay for that date. He was issued checks for the same amount on July 23, 2021 and August 6, 2021, and copies of these checks were attached to the email from the employer. Claimant testified that he has received four checks so far from the employer. Claimant has no other income besides the checks from Deerfield. He agreed that on average he has been receiving gross pay of \$199 per week since July 2, 2021 from Deerfield. He stopped receiving checks from the Workers' Compensation Fund after July 2, 2021; the final check was issued by the Fund on July 2, 2021.

Sharon Sharpe was called by the Fund and testified that she is employed by the Department of Labor in the Fiscal Department. She is the accountant for the Workers' Compensation Fund. When Ms. Sharpe receives a Petition for Review for an employer that is not self-insured, she contacts the adjustor on the case for information about average weekly wage, compensation rate, last day of payment, and child support liens. The claimant needs to fill out an eligibility

certification form certifying that they are not physically able to work. In the present case, Ms. Sharpe received the Petition for Review filed by Fieldstone Golf Club. Claimant indicated he was not working. The Workers' Compensation Fund began issuing checks to Claimant on April 21, 2021 for \$314.05 per week, based on the Agreement as to Compensation Due from September 2020. On July 2, 2021, Ms. Sharpe received notification from Claimant that he had started to work for Deerfield, so she stopped issuing checks after that date. The Fund did not issue checks for partial disability because the process used by the Fund has changed. Ms. Sharpe agreed that, in the past, the Fund has issued partial disability checks when a claimant returns to work at a wage loss. A claimant would provide Ms. Sharpe with pay stubs and the date s/he returned to work, and Ms. Sharpe would inquire if the work was parttime or fulltime. Ms. Sharpe would then compare the average weekly wage from the Agreement to the new average weekly wage, and the Fund would pay partial disability at two-thirds of the difference in wages. The new partial disability rate was calculated based on the information provided by the claimant. Ms. Sharpe agreed that, in this case, no new agreement as to compensation was completed for Claimant's partial disability and no new agreement was submitted to the Fund.

Ms. Sharpe was asked to review a payment ledger for Fund payments to Claimant. (Fund Exhibit 2) She confirmed that the Fund paid Claimant a total of \$3,230.23 through July 2, 2021. Ms. Sharpe also was shown a packet of email communications between her, the Claimant's new employer Deerfield Mowing, and the employer's accountant. Ms. Sharpe insisted that the documents provided by the new employer are not pay stubs, they are an Excel spreadsheet.

Under questioning by Claimant's counsel, Ms. Sharpe agreed that the Fund has not paid any partial disability benefits to Claimant. Ms. Sharpe was shown Claimant's Exhibit 1 and stated that she had not seen these documents before the hearing. She indicated that Fund counsel would

determine whether she should issue partial disability payments to Claimant. Ms. Sharpe agreed that the gross wages on the first page of Claimant's Exhibit 1 is \$398.40, the net wages are \$236.02, and the attached checks appear to correspond to the net wages listed. She agreed that the exhibit indicates Claimant worked for 24 hours per pay period. When asked if there was any regulation or rule requiring that formal pay stubs be submitted to receive Fund payments, Ms. Sharpe stated that she has always received pay stubs in the past, not an Excel spreadsheet. She does not know of any formal rule that requires a pay stub. Ms. Sharpe normally obtains a claimant's pre-injury average weekly wage from an Agreement as to Compensation. Ms. Sharpe confirmed that past practice has been for the Fund to pay partial disability to the claimant based on actual wages if the claimant returns to work during the pendency of a Petition for Review. She has worked for the Department for over twenty years and she believes this practice has continued throughout that period of time. She does not know if the Fund is denying payment of partial disability in all cases now. If someone receiving Fund payments were to notify Ms. Sharpe today that they have returned to work, she would direct the person to Fund counsel.

Ms. Sharpe confirmed that Claimant's new employer and accountant both contacted her to explain that the checks and Excel spreadsheet were how the company handled their payroll. She was asked to review a packet of emails regarding Claimant's new job. (Claimant's Exhibit 2) She agreed that she sent an email to Claimant's counsel on July 8, 2021 indicating that she had removed Claimant from the Fund and "will await his first pay stub to determine if he is entitled to TP benefits." She agreed that she had planned to pay temporary partial disability upon receipt of the pay stub. Ms. Sharpe also confirmed receipt of an email from the new employer's accountant on July 26, 2021. In the email, the accountant, David MacMillan CPA, indicated that Kristopher Small was on the payroll at Deerfield Mowing and Property Maintenance and commenced employment

in July 2021. Ms. Sharpe acknowledged that, between July 2, 2021 and July 26, 2021, she did not deny payment of temporary partial disability and was awaiting additional documentation from Claimant. She does not know if the Fund denied payment of temporary partial disability after July 26, 2021. Ms. Sharpe conceded that, in an email dated July 13, 2021 (Claimant's Exhibit 2), she continued to request pay stubs from Claimant. She acknowledged that a policy change has now occurred regarding temporary partial disability payments from the Fund.

Under questioning by the Employer's counsel, Ms. Sharpe testified that she did not know the source of the policy change regarding TPD payments. She estimated the current balance of the Workers' Compensation Fund to be approximately \$300,000. Ms. Sharpe monitors the Fund balance to ensure enough funds are available to issue payments to claimants. The Fund has the power to assess more money from the insurance carriers to address any underfunding. Ms. Sharpe could not say how frequently in the past the Fund has paid temporary partial disability while a Petition for Review was pending. She follows the Workers' Compensation Act with regard to making payments from the Fund. She has not been instructed to maximize reimbursements to the Fund from employers or to minimize payments from the Fund to claimants. The Fund requests reimbursement for payments made when the Act requires it to do so. Every situation for Fund reimbursement is different and is considered individually.

Argument: The Fund contends that, by returning to parttime work on June 28, 2021, Claimant has agreed he is physically able to return to work and has consented to termination of his total disability benefits.² The Fund argues the pending Petition for Review should therefore

² The Fund cites *Jones v. Spence Protective Agency*, Del. Super., C.A. No. 89A-MY-11, Gebelein, J., 1990 WL 177641 at *4 (October 26, 1990), *Fague v. Delaware Park Racing Assn.*, Del. Super., C.A. No. 99A-05-004, Barron, J., 2000 WL 303457 at *3 (February 24, 2000), and *Beatson v Domino's Pizza*, Del. IAB, Case No. 1398518 at *8 (July 29, 2015) in support of its position that Claimant's return to work is consent to terminate total disability benefits.

be withdrawn or dismissed, Claimant compelled to sign a receipt for total disability benefits paid, and the Employer required to reimburse the Fund for all total disability benefits payments. DEL. CODE ANN. Tit. 19, § 2347. The Fund stopped paying disability benefits as of July 2, 2021, the date Claimant provided notification of his parttime job. The Fund denies any statutory authority to continue disability payments at a reduced rate based on Claimant's current parttime earnings. Instead, the Fund argues that Claimant has the burden to file a Petition for Additional Compensation Due if he wants to pursue a claim for temporary partial disability benefits. The Fund insists that the issue before the Board on the pending Petition for Review is whether Claimant is physically capable of returning to work, which is undisputed, not Claimant's loss of earning capacity.

Claimant maintains that the Fund's position is contrary to the Workers' Compensation Act, case law, IAB rules, and its own past procedures. Claimant contends that the Fund's unilateral decision to stop making disability payments violates Section 2347, which explicitly requires that the Fund pay compensation "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. Claimant argues that neither of these requirements has been met. Furthermore, long-standing case law requires that, when there is evidence that a claimant has a continuing disability that could reasonably affect earning capacity, the employer filing a petition to terminate benefits must not only show that the employee is no longer totally disabled, but also show that there is no partial disability.³ The courts have only allowed a shift of the burden of proof back to claimant in cases where the claimant has returned to regular, fulltime employment prior to the hearing on the

³ *Harsey v. Harbor Health Care Ctr.*, Del. Super., No. 98A-06-002, Graves, J. (Jan. 25, 1999), citing *Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., 1983 WL 413321 at *3 (June 7, 1983).

employer's petition for review.⁴ Here, Claimant has not returned to regular, fulltime work, so the burden of proof remains on the Employer to establish that Claimant is not partially disabled. Claimant goes on to argue that the Petition for Review must therefore proceed to a full hearing on the merits so the Board can determine whether Claimant has any continuing disability and whether he has suffered a loss of earning capacity. Claimant notes that he added the issue of partial disability benefits when completing the Pre-Trial Memorandum in this case, as permitted by IAB Rule 26(A), so this issue must be resolved at the hearing on the merits. Claimant denies that the current case meets any of the exceptional circumstances in the cases cited by the Fund where a claimant was found to have consented to termination of total disability benefits by a return to work. Claimant insists that unilateral termination of disability payments by the Fund is contrary to the purpose of the Fund and Section 2347 to provide the claimant with uninterrupted compensation until the termination petition is resolved.⁵ Forcing Claimant to sign a receipt for termination of total disability and file a DACD petition for partial disability, as the Fund requests, would cause a substantial delay between the end of total disability payments and a hearing on the new petition for partial disability benefits, causing harm to Claimant as he would be without wages for an extended period of time.

Claimant acknowledges that he had an obligation to notify the Fund about his income from the parttime job at Deerfield Mowing and this income should be used to calculate a reduced disability payment from the Fund until the petition is resolved. Claimant contends that he has submitted the necessary pay roll documentation to show his current earnings in the parttime job and the Fund therefore has the information it needs to pay disability benefits at a reduced rate. The Fund has paid temporary partial disability benefits in this manner in the past and has not cited any

⁴ *Mladenovich v. Chrysler Group*, Del. Super., C.A. No. N10A-05-010, Parkins, J. at *10 (Jan. 31, 2011).

⁵ *Medrano v. State of Delaware*, Del. Super., C.A. No. 08A-06-008, Witham, J. (Sept. 30, 2009).

change in statute, regulation, or rule that would justify a change in procedure. Claimant wants the Fund ordered to pay temporary partial disability benefits as of June 28, 2021 until a final receipt is signed or the Board issues an order that the disability has terminated. Claimant also requests an attorney's fee.

The Employer agrees with Claimant's position that the Fund must pay partial disability benefits during the pendency of the Petition for Review. The Employer's petition cannot be dismissed, because Claimant's claim for partial disability benefits is still in controversy. The Employer notes that historically the Fund has paid partial disability while a termination petition is pending and that the statute makes no distinction between total and partial disability as it pertains to Fund payments. In addition, the Employer concurs with Claimant that, under IAB Rule 26, Claimant does not have to file a separate petition to pursue a partial disability claim when a petition to terminate total disability is pending. The Employer further argues that dismissing its petition would deny it the opportunity to prove retroactive termination of disability or to prove Claimant has forfeited his entitlement to benefits due to a refusal of a reasonable job offer. The outcome of a hearing on the merits could thus affect the amount that the Employer has to reimburse the Fund. Finally, the Employer contends that the Fund has no substantive or statutory right to seek dismissal of a Petition for Review filed by the Employer against Claimant.

Analysis: The IAB addressed virtually identical issues to those presented here in a decision issued on September 8, 2021 in the consolidated matters of *Krebs v. David G. Horsey & Sons*, Del. IAB, Hrg. No. 1485457, and *Levis v. Casell, Inc.*, Del. IAB, Hrg. No. 1473779 ("Krebs-Levis"). (Attached) The present Board adopts the analysis from *Krebs-Levis* and reaches the same conclusion, that the Fund's motion to dismiss must be denied and the Fund must promptly reinstate

compensation payments to Claimant, retroactive to the date they ceased, with an adjustment based on the current earnings submitted by Claimant of \$199 per week.

As set forth in detail in *Krebs-Levis*, Section 2347 of the Workers' Compensation Act provides for review of any award or agreement as to compensation by the Board upon petition by any party in interest on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred. *Krebs-Levis* at 3. The section further provides that compensation payable to an employee *shall not terminate* until the Board enters an award ending the compensation payment after a hearing or the parties to an agreement consent to the termination. *Id.* at 3-4 (emphasis added). If the employer is insured by an insurance carrier, the section establishes a means by which a claimant's disability benefits will be paid by the Fund during the pendency of the petition for review. *Id.* at 4. An insured employer must repay the Fund for amounts paid out by the Fund *if* the parties consent to reinstatement of the agreement, the petition is withdrawn by the employer, or the Board orders the petition dismissed. *Id.* However, as the IAB detailed in *Krebs-Levis*, very strong legal precedent protects an injured worker from unilateral suspension or termination of compensation benefits during the pendency of a petition for review by barring suspension or termination of compensation benefits in the absence of the worker's consent. *Id.* at 5-7. The purpose of the Fund is to continue these compensation benefits to the injured worker, without interruption, until the worker is found not to be entitled to receive them by the Board. *Id.* at 5-6.⁶

Here, the Fund has unilaterally terminated payment of total disability benefits to Claimant and justifies this action by arguing Claimant has impliedly consented to termination of his benefits by returning to work in any form, even though the work is parttime and his earnings are less than

⁶ Self-insured employers do not contribute to the Fund and therefore must continue paying benefits themselves during the pendency of the petition.

his wages from Fieldstone Golf Club at the time of injury. The Fund relies on two Superior Court cases to support its position, *Jones v. Spence Protective Agency*, Del. Super., C.A. No. 89A-MY-11, Gebelein, J., 1990 WL 177641 at *4 (October 26, 1990) and *Fague v. Delaware Park Racing Association*, Del. Super., C.A. No. 99A-05-004, Barron, J., 2000 WL 303457 at *3 (February 24, 2000). The court in *Jones* and *Fague* found implied consent to termination of total disability benefits when a claimant returned to work; however, the facts and circumstances of those case are very different from the case at hand. In *Jones*, the claimant returned to work with the same employer, which accommodated her light duty restrictions, and the employer stopped paying total disability benefits upon her return to work. *Jones*, 1990 WL 177641 at *1. Claimant refused to sign a final receipt for total disability benefits and, about a month after her return to work, she left and accepted a job with another employer. *Id.* Claimant later filed a DACD seeking additional total and partial disability benefits. *Id.* The *Jones* court agreed that the claimant's actions in returning to work for her prior employer and accepting pay implied consent to the termination of total disability benefits. *Id.* at *4. As the IAB pointed out in *Krebs-Levis*, the evidence indicates Jones returned to work at no wage loss because she never sought partial disability benefits for the time she worked at Spence. *Krebs-Levis* at n. 3. The present case differs from *Jones* in that Claimant returned to parttime work for a different employer, at a wage loss, and continues to seek compensation for partial disability going forward. As such, his return to work is not equivalent to the implied consent to termination of disability benefits found in *Jones*. The present case also differs from *Jones* procedurally, in that no petition for review was pending when Jones returned to work and Jones was not pursuing a claimant for partial disability benefits at the time total disability payments were terminated by the employer.

In *Fague*, the employer offered the claimant a return to restricted duty work at no loss of pay based on the opinion of a defense medical examiner, but the claimant rejected the job offer. *Fague*, 2000 WL 303457 at *1. The claimant thereafter started a parttime job with another employer and continued to collect total disability benefits, thus earning *more income* than what she had been earning at the time of her work injury. *Id.* The employer filed a petition for review asking for termination of total disability benefits and asserting a forfeiture of benefits due to claimant's rejection of a job offer for fulltime work at no wage loss. *Id.* When *Fague* failed to appear for a legal hearing, the Board granted the employer's request to terminate total disability benefits based on the claimant's return to work. *Id.* On a motion to re-open filed by the claimant, the Board affirmed its earlier decision to terminate total benefits based on the claimant's return to work and indicated she could file a petition to seek partial disability benefits. *Id.* at *2. The Superior Court heard an appeal and found the claimant had consented to termination of total disability benefits by returning to work for a new employer and rejecting the employer's offer of a fulltime job at the same rate of pay; the court thus affirmed the Board's decision to terminate total disability benefits. *Id.* at *3

The facts and circumstances in *Fague* can be distinguished from the case at hand. The claimant in *Fague* was attempting to reverse a Board order entered after a properly noticed legal hearing on the employer's petition for review and the claimant therefore bore the burden of proof on the motion. The Board's order granting termination had found the claimant had refused a restricted duty position offered by the employer with no loss of pay. At the hearing to re-open, claimant admitted she continued collecting total disability benefits after returning to work with another employer, which is not permissible under the Act. In the current case, Claimant timely notified the Fund that he had returned to parttime work with a new employer at a wage loss while

the Employer's Petition for Review to terminate total disability was awaiting a merit hearing. This allowed the Fund to reduce the disability payments and avoid any "windfall" benefits to Claimant while the Employer's petition was pending. Claimant had formally added a claim for partial disability benefits to the Employer's Petition for Review, as permitted under IAB Rule 26. Thus, while Claimant had admitted he was no longer entitled to payment of benefits at the total disability rate, he was not consenting to full termination of his disability payments. He continues to allege an entitlement to disability benefits at a reduced or "diminished" rate. *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). The Employer contests the claim for partial disability. Thus, a controversy still exists for resolution at a full hearing on the merits of the Petition for Review.

The Board has rejected the Fund's argument that Claimant impliedly consented to termination of disability payments by his return to parttime work. The Board also finds that the burden to prove Claimant is not entitled to partial disability remains with the Employer in this case and disability payments must continue until the partial disability issue is resolved. Under long-established case law, if a claimant has credible evidence of continued incapacity that could reasonably affect earning capacity, an employer seeking to terminate total disability benefits bears the burden of proving not only that total disability has ended, but that claimant is not entitled to partial disability as well. *See, e.g., Waddell v. Chrysler Corporation*, Del. Super., C.A. No. 82A-MY-4, Bifferato, J. (June 7, 1983). For employers who are covered by workers' compensation insurance, the Fund takes the place of the employer to pay wage-replacement benefits until the employee is found not to be entitled to the compensation. *Hamilton v. Trivits*, 340 A.2d 178, 180 (Del. Super. Ct.1975). The employer is not permitted to unilaterally stop disability payments, *Blue*

Hen Lines, Inc. v. Turbitt, 787 A.32d 74, 79 (Del. 2001), and the Fund cannot be permitted to do so in the employer's place. As the Board emphasized in *Krebs-Levis*, "[b]ecause 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." *Krebs-Levis* at 13.

The Fund cites the case *DeAngelo v. Del Campo Bakery*, Del. Super., C.A. No. 89-AP-1 & -2, Del Pesco, J., 1990 WL 74300 (May 23, 1990), for the proposition that the employer no longer has the burden of disproving partial disability when the claimant has returned to some form of work. The Fund contends that a claimant who has returned to work *in any capacity* thus has the burden to file a petition for partial disability benefits. As the Board explained in *Krebs-Levis* at pages 11-12, the court in *DeAngelo* shifted the burden to claimant to prove partial disability because claimant had returned to regular full-time employment while the Petition for Review was pending and did not offer any evidence of a continued disability that could reasonably affect the claimant's earning capacity. *DeAngelo* thus differs from the current case, where there is evidence of continued disability that could reasonably affect Claimant's earning capacity because Claimant has returned to only parttime work and has continuing work restrictions. Here, the burden of proof remains with the Employer to prove no partial disability under *Waddell*.

The Board observes that the Fund's decision to unilaterally terminate all disability payments to Claimant upon notice of his parttime employment is contrary to the Fund's longtime past practice in similar cases. The Fund's accountant, Sharon Sharpe, acknowledged that the practice for the past twenty years or more, after a claimant returns to work at a wage loss, has been to reduce the Fund payments to the claimant based on evidence of current income provided by the

claimant. In fact, in this case Ms. Sharpe initially emailed Claimant with a request for pay stubs to establish his current earnings and allow her to calculate a reduced disability payment. She had objected to the form of income documentation provided but did not tell Claimant that no partial disability payments would be made. At some point, the Fund changed its position and denied that it could issue reduced disability payments after a claimant returned to work with a wage loss; however, Ms. Sharpe admitted there has not been a change in statute, regulations, or rules that she is aware of that would have prompted this policy change. Ms. Sharpe testified that, if she is provided with documentation of income from a claimant's current job, she is able to calculate a reduced disability payment based on two-thirds of the difference between Claimant's pay at the time of injury and Claimant's new income. This calculation is taken from the section of the Act that defines temporary partial disability benefits. DEL. CODE ANN. Tit. 19, § 2325. Thus, the Fund's argument that it has no authority or means for calculating a reduced disability payment based on current income is belied by its own practice of doing so for over twenty years the formula for calculating partial disability set forth in Section 2325. In addition, by tendering documentation of his current income at a parttime job, "the claimant is giving partial consent to a modification or diminution of the claimant's compensation rate" while the petition is pending. *Krebs-Levis* at 13. Nothing in the Act states that the Fund cannot reduce compensation payments in this manner with the consent of the claimant. It is important to recognize that the Fund is not entering into a new agreement as to compensation by reducing the Fund payment. Rather, the Fund is making a temporary, administrative adjustment in disability payments to avoid windfall benefit payments to Claimant, minimize any overpayment from the Fund, and minimize reimbursements required by employers after the Petition for Review is resolved. This type of temporary adjustment in payments is in keeping with the purpose and intent of the Workers' Compensation Act to provide

uninterrupted wage replacement benefits to claimants while a petition is pending.⁷ The same temporary adjustment in disability payments would be appropriate and reasonable for a self-insured employer to make as well. A new partial disability rate, if warranted, will be established by the Board after a full hearing or by agreement of the parties without a hearing, in accordance with Section 2347 and Section 2325. The appropriate date to terminate total disability and begin partial disability as well as the appropriate reimbursement to the Fund by the Employer will be determined at that time.

Conclusion: The Fund's motion to dismiss is denied. The Fund shall promptly reinstate compensation payments to Claimant, retroactive to the date they ceased, with an adjustment based on the current earnings submitted by Claimant of \$199 per week. This matter shall be scheduled for a hearing on the merits of the Petition for Review within 120 days from the date of this order, based on the Employer's representation in the proposed continuance order that its medical expert is unavailable for a deposition until December 2021.

Attorney's Fee: Claimant 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 the Employer, who did not support the motion under consideration or support the Fund's position. 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

⁷ If the Fund were to succeed in its argument that it lacks authority to administratively reduce the disability rate based on a claimant's actual earnings, then the outcome more in keeping with the purposes of the Act would be for the Fund to continue paying partial disability at the total disability rate until the petition for review is resolved, not stop making disability payments altogether. Unilaterally reducing disability payments to zero is an action by the Fund just as much as reducing payments based on a claimant's actual earnings.

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 15th day of SEPTEMBER, 2021.

INDUSTRIAL ACCIDENT BOARD

/s/ Robert Mitchell

ROBERT MITCHELL

/s/ Bud Freel

BUD FREEL

I, Susan D. Mack, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Susan D. Mack

Mailed Date:

11/17/21
OWC Staff

Matthew M. Bartkowski, Esquire, for Claimant
Nicholas Bittner, Esquire, for Employer
Lynn A. Kelly, Esquire, for the Fund