TOMAS GONZALEZ V., Employee,
v.
KRISPY KREME DOUGHNUTS INC., Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1181878

Mailed Date: March 6, 2002
March 5, 2002

DECISION ON PETITION TO TERMINATE BENEFITS

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on February 20, 2002, in a Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

APPEARANCES:

Bernard J. McFadden, Attorney for the Employee

Cassandra Faline Kaminski, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On January 7, 2001, Toinds Gonzalez Villegas ("Claimant") injured his back and right knee in a motor vehicle collision while working for Krispy Kreme Doughnuts Inc. ("Krispy Kreme"). Claimant began to be compensated for total disability at the rate of

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$393.74 per week, based on a weekly wage at the time of injury of $590.61. On October 18, 2001, Krispy Kreme filed a Petition to Terminate Benefits, alleging that Claimant was capable of returning to work. Disability benefits have been paid to Claimant by the Workers' Compensation Fund since the filing of the petition, pending a hearing and decision.

A hearing was held on this petition on February 20, 2002. The parties stipulated that this matter could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with 19 Del. C § 2301B(a)(4). When hearing a case by stipulation, the Hearing Officer stands in the position of the Industrial Accident Board. See 19 Del. C § 2301B.

This is the decision on the merits.

SUMMARY OF THE EVIDENCE

Dr. Andrew Gelman, an orthopedic surgeon, testified by deposition on behalf of Krispy Kreme. He examined Claimant on August 23 and December 18, 2001. In his opinion, Claimant is able to work on a full-time basis.

Because Claimant did not speak English, Dr. Gelman utilized a Spanish interpreter in order to get an accurate history. Claimant related that, on January 7, 2001, he lost control of a vehicle on an icy roadway and slid into a tree. Claimant injured his right knee and the spine in the areas of T11-12 and L1-2. Claimant had an anterior cruciate ligament reconstruction on the knee. Dr. Gelman first examined Claimant about two months after

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the surgery, on August 23, 2001. With respect to the spine, Claimant merely had some tenderness along the paravertebral musculature. The right knee had a 3' extension lag, with comfortable active flexion measured at 120'. There was no knee swelling and the ligament was tight. Claimant had a slight limp.

After that examination, Dr. Gelman opined that Claimant could work in a full-time sedentary capacity. He agreed with the restrictions Claimant's doctor, Dr. Evan Crain, imposed on August 20, 2001. These restrictions included no

lifting over fifteen pounds and no squatting, bending or prolonged standing.

Dr. Gelman examined Claimant again on December 18, 2001. Claimant displayed further improvement. He was no longer receiving any spinal care, and only had periodic attention to the right knee. Motion of the right knee appeared normal, although there was some non-painful crepitance on the right. Dr. Gelman reviewed the job analysis for a doughnut processor with Krispy Kreme and opined that it was within Claimant's abilities. In the doctor's opinion, Claimant should avoid squatting or kneeling on the right knee. He can sit for an unlimited time and engage in frequent standing and walking. He could do medium to heavy lifting and carrying.

Charles P. McGaffic testified on behalf of Krispy Kreme. He is a store manager and was Claimant's direct supervisor. When Claimant was hired in 2000, Claimant provided a social security card and photo identification. It was not until a week or two

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after Claimant's injury that Mr. McGaffic learned that Claimant did not possess a "green card" and was an illegal alien.

Mr. McGaffic explained that Claimant was paid the same as any other employee, with deductions for taxes and social security. When he was first hired, Claimant was a doughnut processor, being paid at the rate of $7.00 per hour. After a couple weeks, a position opened up for a "deli driver" and Claimant took it. The driver position paid about $590.00 per week. Once Claimant was released to return to work, were it not for the fact that he was an illegal alien, Krispy Kreme would have offered him a position within his restrictions (doughnut processor) while paying him commensurate to what he was paid at the time of his injury.

Mr. McGaffic explained that, in the doughnut processor job, one uses a machine to fill doughnuts. The machine is not stationary and weighs five to ten pounds. Claimant might have needed to have another employee put a hopper of filling on top of the machine, but there would have been no need to move the filler once that was done. A tray of filled doughnuts would only weigh about three pounds.

Barbara Stevenson testified on behalf of Krispy Kreme. She both developed the job description for a doughnut processor and prepared a labor market survey. With respect to the job description, there was no need to modify the position to fit Claimant's August 2001 restrictions, with the exception of Claimant having occasional help with lifting.

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Ms. Stevenson also prepared a labor market survey using the August 2001 restrictions given by Dr. Gelman and Dr. Crain. It was Ms. Stevenson's understanding that Claimant had received the Mexican equivalent of a high school education and had been a police officer in Mexico. He understood, spoke and read only Spanish, so the jobs identified on the survey are suitable for non-English speakers. Ms. Stevenson identified five jobs that, on average, paid $347.00 per week. They were all within a reasonable commute of Claimant's residence. She observed the jobs being performed and confirmed that they were within Claimant's restrictions and that Claimant would be a viable candidate if he had a green card.

With the assistance of Pete Lizarzaburu, a translator, Claimant testified that he is married and has six children. He was bom in Mexico, but came to Delaware in November of 1999. He started to work for Krispy Kreme on January 4, 2000. He was hurt on January 7, 2001 and was released to return to work with restrictions in September of 2001. He looked farjobs within his restrictions.

In September, Claimant applied at Arby's and the Washington Street Ale House. Both places indicated that they would be hiring in the near future and they told him that they would call when they needed somebody. Neither place called

him back. In October, Claimant applied at Linens 'n Things. When they called, he let them know about his medical restrictions. They told him to contact them when his doctor released him, which happened at the end of December. He reapplied in January of 2002, but has heard nothing

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further. That job involved the loading and unloading of trucks, so it was not within his original restrictions. In November of 2001, Claimant applied at Burger King, in response to a sign. Eight days later he returned and was told that they had filled the vacancy. On January 4, 2002, Claimant saw a help-wanted sign in a Wendy's, but when he tried to apply he was told that they were not taking applications. They took his name and address. On this same day, he applied at ADVO, which mails promotional material. The position was for a machine operator. He has not heard back from them. On January 13, he applied at TGI Fridays and, on February 18, at Lone Star Steakhouse and Hadfield's Seafood, but none of them have contacted him. On February 13, he applied with Courtyard Marriott, for a job cleaning rooms. He has been called in for an interview.

Mr. McGaffic was recalled to provide additional testimony. He stated that, based on Dr. Gelman's medium to heavy duty restrictions given in December, Claimant was capable of returning to his driving position. That job requires no squatting or kneeling. He would just have to roll racks of doughnuts up a ramp into the truck, and then down the ramp when he got to the stores. The route was approximately 160 miles long, with fifteen to twenty stops. The most distant location was in Oxford, PA. Each stop would take five to seven minutes, if the driver hurried, and the rest of the time would be riding in the truck. Mr. McGaffic thought that the driver position had been available at some point since December of 2001.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Termination

In a total disability termination case, the employer is initially required to show that the claimant is not completely incapacitated from working. In response, the claimant may rebut that showing, show that he or she is a prima facie displaced worker or submit evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury. The employer would then have the burden of showing the availability of regular employment within the claimant's capabilities. Howell v. Supermarkets General Corp., 340 A.2d 833, 835 (Del. 1975); Chrysler Corporation v. Duff, 314 A.2d 915, 918 n.1 (Del. 1973).

There is no dispute that, physically, Claimant is capable of working in some capacity, and has been at all times since Krispy Kreme filed its petition. Not only did Dr. Gelman find that Claimant could work in a sedentary capacity in August, but Claimant's own doctor similarly released Claimant at about the same time. The next question, then, is whether Claimant should be considered a displaced worker, either on a prima facie basis or because Claimant, as a result of his injury, was unable to secure employment after a reasonable job search.

The term "prima facie displaced worker" is used to refer to a worker who, while not completely incapacitated from working, is so disabled as a result of a compensable injury that he or she is no longer regularly employable in any well-known branch of the competitive labor market. Duff, 314 A.2d at 917; Ham v. Chrysler Corporation, 231 A.2d

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258, 261 (Del. 1967). Generally, elements such as the degree of obvious physical impairment coupled with the claimant's mental capacity, education, training, and age are considered in establishing the prima facie case. Duff, 314 A.2d at 916-17.

In August, Claimant's knee injury restricted him to sedentary work. According to Dr. Gelman, his condition has improved since then so that, by December, Claimant could handle medium to heavy lifting. While Claimant is unable to converse in English, he is not unintelligent. It is uncontradicted that he received the equivalent of a high school education in Mexico. I am satisfied that Claimant is notprimaJacie displaced because of his physical injury coupled with his mental capacity, education, training and age. While Claimant may have difficulty finding work, that difficulty stems from his illegal alien status and is completely unrelated to the work injury.

Unless prima facie displaced, the claimant has the primary burden to make reasonable efforts to secure employment. Franklin Fabricators v. Irwin, 306 A.2d 734, 737 (Del. 1973); Hoey v. Chrysler Motors Corp., Del. Supr., No. 85, 1994, Hartnett, J., at Par. 7 (December 28, 1994). Claimant submitted evidence of his job search efforts. These efforts have not been particularly strenuous. He submitted two applications in September, one in October, one in November, none in December, and then a cluster in January and February. Despite these sporadic efforts, many of the employers confirmed that they were hiring, although they did not hire Claimant. The only one that suggested that its failure to hire Claimant was because of his injury was Linen 'n Things, which invited Claimant to

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reapply when his restrictions were eased. Because of the easing of Claimant's restrictions in January, he has since reapplied. Claimant also admitted that one potential employer has recently called him in for an interview.

Far from proving that there are no jobs available because of his physical restrictions, Claimant's efforts suggest that suitable jobs do exist. From this evidence, I am satisfied that a more diligent effort on Claimant's part would have located a suitable job, but for his illegal status. Indeed, were it not for his status, he would still have a job with Krispy Kreme. Thus, from the evidence presented, I find that Claimant is not a displaced worker.

Accordingly, Claimant is no longer totally disabled. However, when there is evidence that a claimant has a continuing disability that could reasonably affect his earning capacity, the employer is required to show that he is not partially disabled. Waddell v. Chrysler Corporation, Del. Super., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983). Although Claimant's restrictions were eased considerably in December, he still needs to avoid squatting and kneeling, and has some limitation on the amount of weight he can lift and carry. These restrictions could possibly affect Claimant's earning capacity. Accordingly, Krispy Kreme must show that Claimant does not actually have a decrease in his earning capacity as a result of his injury.

Krispy Kreme argues that Claimant has no entitlement to partial disability because, but for his status as an illegal alien, even with sedentary restrictions, Claimant would

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have been given a suitable position at Krispy Kreme at no loss in pay. In addition, once his restrictions were eased in December, Claimant could have returned to his former job. Claimant argues that these offers are not credible and are only made because Krispy Kreme knows Claimant cannot be re-hired because of his lack of a green card. Claimant argues that he would not actually have been offered a job as a doughnut processor, normally paying $7.00 per hour, while continuing to be paid as a driver, a position paying approximately twice as much.

I find Mr. McGaffic's testimony on this point to be credible. It is certainly not unusual for an employer to take an employee back on modified duty, especially when, as here, Claimant's condition was still improving following surgery. While Krispy Kreme might not have been willing to keep Claimant employed as a doughnut processor at a high rate of pay permanently, it is believable that they would have kept an

experienced employee "on the books" until he was able to return to his former job duties. Based on Mr. McGaffic's description of the duties of a deli driver, I am also satisfied that Claimant could have returned to that position by December.

Accordingly, I find that Claimant's injury did not prevent him from returning to work at Krispy Kreme at no loss in pay. Claimant's inability to return to work there was because of his status as an illegal alien, a factor completely independent from his injury. Claimant does not have a decreased earning capacity as a result of the work injury. Therefore, there is no entitlement to partial disability benefits.

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STATEMENT OF THE DETERMINATION

For the reasons set forth above, Krispy Kreme's petition to terminate benefits is granted.

IT IS SO ORDERED THIS 5th DAY OF MARCH, 2002.

INDUSTRIAL ACCIDENT BOARD

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date: 3/6/02

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OWC Staff

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