

**DANIEL WHITE, Employee,**  
**v.**  
**PERDUE, Employer.**

**INDUSTRIAL ACCIDENT BOARD OF THE  
STATE OF DELAWARE**

**Hearing No. 1444919**

**Mailed Date: October 6, 2020  
October 2, 2020**

**DECISION ON PETITION FOR REVIEW TO  
TERMINATE BENEFITS**

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on September 21, 2020, via videoconference, pursuant to the Industrial Accident Board COVID-19 Emergency Order dated May 11, 2020.

**PRESENT:**

WILLIAM HARE

PATRICIA MAULL

Julie G. Bucklin, Workers' Compensation Hearing Officer

**APPEARANCES:**

Brian Lutness, Attorney for the Claimant

Francis X. Nardo, Attorney for the Employer

Page 2

**NATURE AND STAGE OF THE  
PROCEEDINGS**

On July 13, 2016, Daniel White ("Claimant") sustained a compensable industrial injury while working for Perdue and has been receiving total disability benefits. On October 23, 2019, Perdue filed a Petition for Review to terminate Claimant's total disability benefits, alleging that Claimant is capable of working in a sedentary duty capacity.

Claimant agreed that his doctor has released him to work with sedentary duty restrictions, but argues that he remains totally disabled, because he is a displaced worker.

Claimant earned \$1,034.18 per week at the time of the industrial accident and has a total disability compensation rate of \$689.45 per week. The parties stipulated to the admission of the surveillance reports and videos into evidence in this case.

On September 21, 2020, the Board entertained a hearing via videoconference on Perdue's petition and this is the Board's decision.

**SUMMARY OF THE EVIDENCE**

Samuel Matz, M.D., a board-certified orthopedic surgeon, testified by deposition on behalf of Perdue. Dr. Matz examined Claimant on November 28, 2017, March 26, 2019, and January 28, 2020 and reviewed Claimant's medical records in conjunction with the examinations. He believes Claimant is physically capable of working full-time in a sedentary duty capacity.

Claimant was injured on July 13, 2016 while employed at Perdue. He sustained a crush injury by a forklift to his left lower extremity. He was airlifted to Christiana Hospital and underwent a complex course of post-trauma treatment. He ended up with a left above-knee amputation and right shoulder injury. Claimant received compensation for six percent permanent impairment to the right upper extremity and 7.5-percent permanent impairment to the right knee in addition to the permanency for the left lower extremity amputation.

Page 3

As of the March 26, 2019 examination, Claimant complained of pain in the right knee and he had to stop walking with the prosthesis because his right knee bothered him too much. He also had some low back pain and right hip pain. His right shoulder was painful and he had pain with overhead activity. He continued to

complain of phantom pain about the left knee. Claimant ambulated in a wheelchair.

On examination, Dr. Matz found that Claimant had full range of motion of the right shoulder, but he complained of pain at the end of the range. Claimant had full strength with mild discomfort. Right knee motion was zero to 120, measured with a goniometer, which is within the normal range for Claimant's body habitus. He complained of discomfort to palpation over the medial aspect joint line of the right knee, but there was no lateral or patellar tenderness. There was retropatellar crepitus in the right knee, but no effusion or ligamentous laxity and there was a negative McMurray's test. Inspection of the left lower extremity revealed an above-knee amputation stump with no drainage or specific tenderness to palpation about the stump or lower extremity. Claimant complained of vague discomfort to palpation in the lumbar region. He was not asked to stand or ambulate, because he did not have his prosthesis with him at the appointment. There was no objective evidence of an injury to the lumbar spine.

Based on the examination, record review and complaints, Dr. Matz opined that Claimant required permanent restrictions due to his amputation. He was able to work full-time in a sedentary duty capacity as of the March 26, 2019 examination.

Dr. Matz reviewed updated medical records in conjunction with the January 28, 2020 examination, which including the March 12, 2019 functional capacity evaluation ("FCE") and the November 7, 2019 FCE. He also reviewed updated medical records from Dr. Matthew Handling, including the December 2, 2019 report in which he released Claimant to return to

Page 4

work in a full-time sedentary to light duty capacity, based on the November 7, 2019 FCE. Since the January 28, 2020 examination, Dr. Matz reviewed additional updated records from Dr. Handling dated June 29, 2020, wherein Dr.

Handling again released Claimant to work full-time in a sedentary to light duty capacity with lifting up to ten to twenty pounds occasionally, pursuant to the FCE.

Dr. Matz agreed with Dr. Handling that Claimant was capable of working full-time in a sedentary duty capacity. Dr. Matz reviewed surveillance video of Claimant from March 28, 2019. Claimant went to his truck in a wheelchair, stood, put items inside the bed of a pickup truck while standing, lifted the wheelchair into the truck, and get in and drive the truck. Later in the video, Claimant was seen getting on and off of a large tractor and driving the tractor. On the same day, Claimant was driving a four-wheeler around the property. The surveillance video solidified Dr. Matz's opinion that Claimant is able to work. Dr. Matz is not aware of anyone restricting Claimant from driving an automatic transmission vehicle.

Dr. Matz reviewed the labor market surveys prepared in this case dated March 26, 2020 and June 10, 2010, which contain a total of nineteen jobs. All of the jobs are sedentary to light duty capacity and, if Claimant is allowed to perform the jobs in a wheelchair, then Dr. Matz believes Claimant is physically capable of performing the jobs identified on the survey. Claimant is not actually wheelchair-bound and the FCE indicated that he could walk short distances on occasion with the prosthesis and/or a four-pronged cane.

Claimant has not been restricted with regard to any medications he is taking. As recently as June 29, 2020, Dr. Handling continues to release Claimant to return to full-time employment pursuant to the FCE recommendations. Dr. Matz is not aware of any physician imposing any restrictions regarding Claimant's return to work because of his comorbidities, even in light of the

Page 5

risks involved with the Covid-19 pandemic. Dr. Handling's report from late June 2020 does not say anything about restrictions due to comorbidities related to Covid-19. Claimant is only forty-two years old, which is not in a high-risk age

category for Covid-19. There are a lot of people who are diabetic and obese, like Claimant, who are working and trying to stay as safe as possible by using proper PPE and hygiene techniques. Some of the jobs listed on the labor market survey are work-from-home jobs, which alleviates the concerns about the risks of Covid-19.

Robert Stackhouse, a vocational director, testified by deposition on behalf of Perdue. Mr. Stackhouse prepared two labor market surveys with Claimant in mind. The first one is dated March 26, 2020, with eleven positions, and the second one is dated June 10, 2020, with eight additional positions, available through June 2020. He is familiar with the physical requirements of all of the jobs listed on the survey.

Claimant graduated from high school and had additional trade school training. His work history is in the poultry processing industry with several different employers. He worked as an operator and eventually acquired positions as a supervisor with Perdue and oversaw operations in a pellet mill and poultry processing area. He has a Delaware driver's license and access to his own means of transportation. Claimant has transferable skills based on his education and work experience. He is able to read, write, do basic math, and has analytical skills. He uses Facebook and has an email address, so he likely has possession of a home computer and has at least basic understanding of computers in order to access that kind of medium.

When preparing the labor market survey, Mr. Stackhouse considered Claimant's sedentary duty restrictions from Drs. Handling, Attinger, and Matz and the FCE. Dr. Attinger indicated that Claimant could work, as long as it was a position he could perform from his wheelchair and he deferred to the FCE. Mr. Stackhouse understood that any lifting would have

Page 6

to be from the wheelchair. All of the jobs listed on the survey are wheelchair-accessible and are

located within a reasonable commuting distance of Claimant's home. Although the FCE indicates that Claimant can walk up to twenty-feet, Mr. Stackhouse assumed that Claimant was wheelchair-dependant when he prepared the survey.

Mr. Stackhouse included a total of nineteen sedentary duty jobs on the survey with an average weekly wage of \$455.23 for the full-time positions and a low average weekly wage of \$446.77.<sup>1</sup> All of the jobs listed on the survey are within Claimant's education level, experience, abilities and locale. All of the jobs listed on the survey provide on-the-job training. The jobs listed on the survey were available in March, April, May, and June 2020, as noted on the survey, so they were available despite the Covid-19 restrictions.

The jobs listed on the initial survey are administrative services, sales, and cashiering positions. In the second survey, due to the Covid-19 restrictions, Mr. Stackhouse included five jobs that could be performed from Claimant's home and are generally customer service and administrative positions.

Within the two weeks before the hearing, Claimant produced some notes about the labor market survey, such as "called them" or "no response," but the notes were undated. Mr. Stackhouse followed up with the employers listed on the survey on the day before the hearing. Eleven of the nineteen jobs listed on the survey are still available. The job at Herl's Bath and Tile was on a one-week pause, but they expected to hire in the next week or two and Mr. Stackhouse was encouraged to have Claimant put in his application for that opportunity.

Page 7

Mr. Stackhouse was able to discuss a person like Claimant with the employers listed on the labor market survey. It was interesting, because the employers were more willing to consider a person who is wheelchair-bound than they might actually consider other less obvious individuals who are either challenged or disabled. For some

reason, Mr. Stackhouse got a lot of cooperation from employers when he indicated that the person is wheelchair-bound. It seems that the employers will go out of their way to help out, in terms of trying to find a job or to accommodate something that might be available for a person in a wheelchair.

When looking at the June 2020 labor market survey, Mr. Stackhouse confirmed that some of the jobs were available in January through March 2020. The job at Minute Loan is no longer available in Lewes, but it is available in Milford. The jobs at OSL, Easy Cash, and East Coast Shutters are no longer available. The only job still available that was originally available between January and March 2020 is at Johnny Janosik. The job as a part-time booth attendant for Trap Pond State Park was listed as available in February and March 2020, because they were taking applications at that time for employment beginning in March, until Covid-19 developed and shut down the parks temporarily. During the closure, Trap Pond State Park was still accepting applications in order to hire once the Park reopened.

The job at Johnny Janosik is an office position, so it does not require extensive customer interaction. It is located on the second floor of the store, but there is an elevator to get upstairs, and there would be only one other employee in the office. The jobs at Home Depot and Lowe's require interaction with customers, but do not require lifting, because the job is overseeing the self-serve cash registers where the customers do their own lifting and checking out.

In order for Claimant to work from home, he would need an Internet connection, telephone line, and home computer. Mr. Stackhouse does not know if Claimant has an Internet

Page 8

connection, a telephone line, headset, and a home computer, but he would need to get them in order to perform the work-from-home jobs listed on the survey. Five of the jobs listed on the survey are

work-from-home. Mr. Stackhouse is not aware of any doctor imposing any restrictions on Claimant working during the Covid-19 pandemic.

The average weekly wage for the eight full-time jobs that are still available is \$443.50 with a low average of \$431.00. Mr. Stackhouse did not know the current unemployment rate in Delaware, because it changes weekly; however, before Covid-19, the unemployment rate was approximately three to four-percent. If Claimant made a reasonable job search, he would have found a job in his locale based on his education, skills, and experience.

Perdue submitted surveillance DVDs into evidence without objection from Claimant and without playing it for the Board. Surveillance was conducted on March 26, 2019 and April 27, 2019. The Board viewed the surveillance videos.

Christopher Attinger, M.D., a board-certified plastic surgeon who is trained in general surgery and vascular surgery, testified by deposition on behalf of Claimant. Dr. Attinger began treating Claimant on May 14, 2018 and believes Claimant is able to work full-time in a sedentary duty capacity consistent with the FCE.

On February 10, 2020, Claimant saw Dr. Brian Evans in Dr. Attinger's office for a consultation regarding a right knee replacement. Dr. Evans thought that Claimant was not a candidate for a total knee replacement because he is too heavy and needs to lose weight first. Claimant could not walk more than ten feet, secondary to right knee pain.

Dr. Attinger saw Claimant most recently on February 10, 2020. He believes that Claimant is able to work at a desk, because he is wheelchair-bound, but he could not do any type of physical work. Dr. Attinger was not aware that Claimant underwent two FCEs on March 12,

Page 9

2019 and November 7, 2019, but he would defer to the findings of the FCEs regarding the specifics

of Claimant's ability to work. Dr. Attinger is no longer prescribing any pain medications for Claimant.

Claimant, forty-two years old, testified about his industrial accident, medical treatment, current condition, work experience, and education. Claimant worked at Perdue as a foreman and was injured at work on July 13, 2016 when he was run over by a forklift with a one-ton load on front. He was flown to Christiana Hospital, where he stayed until late August 2016.

Claimant sustained several injuries as a result of the industrial accident. His left leg was amputated above the knee. He also sustained a tear of the right rotator cuff, a pulmonary embolism, and his right knee needs a total knee replacement. He cannot use the prosthetic on his left leg now because his right knee hurts too much, so he will fall down. Claimant gets around in a wheelchair and can transfer in and out of the wheelchair by himself.

Claimant is aware of the surveillance taken approximately one year ago. His right knee was a bit better then, so he could get around with the prosthetic on the left leg at that time. Since then, the right knee has worsened, so he cannot use the left leg prosthetic and needs to use his wheelchair at all times. Claimant cannot walk with the prosthetic now, but he can transfer in and out of his wheelchair to his truck and he drives an automatic transmission truck, as well as an ATV and tractor on his property.

Claimant participated in the hearing from his home by using his wife's work computer. He does not have his own computer. He lives in Laurel and used a hotspot from his wife's smart phone to access the Internet. She is generally at work all day and takes her computer and hotspot to work, but she stayed home that day so he could participate in the hearing. Claimant knows the work-from-home jobs listed on the labor market survey would require a computer and Internet

access, but he does not have a computer, Internet, or a hotspot. The cost of a computer and Internet or hotspot is too expensive and prevents Claimant from getting a computer and Internet access. Claimant has a Facebook account and can read it and post on it from his smart phone.

Dr. Attinger is Claimant's doctor for his surgery related to the bone infection he developed in his left leg. Dr. Attinger is at Georgetown University Hospital, where Claimant had to stay for approximately one month due to the infection.

Claimant takes medication for diabetes. He takes one pill and three types of insulin. Claimant is obese, but lost a little bit of weight and then his weight stabilized.

Claimant reviewed the labor market survey and is not sure if he could do any of the jobs listed. He called all of the jobs listed on the labor market survey. He was told that the job at Herl's Bath and Tile is not hiring; he thinks he called about two months ago, but he cannot remember. He never submitted an application. He called Johnny Janosik and was told that they were no longer hiring for the greeter position, but he thinks he could do the office job there that Mr. Stackhouse described. Claimant is afraid that the jobs at Home Depot and Lowe's would require him to raise his arms above his head and he is not sure he could do that.

Claimant would do his best at a job, so he is afraid that he will push himself too hard to impress his employer and get hurt even more. He agreed that if he performs the jobs as described on the labor market survey and stayed within his restrictions, he could do some of the jobs listed on the survey.

Claimant worked as a foreman of the entire plant at Perdue, including the maintenance of the plant, so he knows how to fix things and get a job done. Claimant was thinking about the stocking jobs at Lowe's and Home Depot and he has seen employees lift items for customers, even at the cash register, so he is afraid he would have to lift items. Although the job description



Page 11

indicates there is no lifting required, Claimant believes he would try to help customers anyway and could get hurt. It is possible he could do the job as described, but he would go above and beyond to help customers

Dr. Attinger did not handle Claimant's work release issues in February 2020. Dr. Handling addressed Claimant's work release in December 2019, after the November 2019 FCE, and again in June 2020. Dr. Handling released Claimant both times in a capacity consistent with the FCE recommendations. Claimant has not applied for a single job on his own since he was released to work in December 2019. He could apply for jobs online on his smart phone when his wife is home with the hotspot, but he has not done it.

When Claimant worked at Perdue, he worked his way up to foreman and managed seven people. He is good with people and good at managing people.

Claimant's right knee has worsened since the November 2019 FCE. He was able to walk a little bit with the prosthetic at that time, but cannot walk with it now. When he hops to transfer into his truck, the pain is excruciating. His wife helps him when possible. He is unable to undergo the right total knee replacement surgery because of his weight and diabetes. He is trying to lose weight, but it is difficult while confined to the wheelchair.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Termination of Benefits

When an employer files a petition to terminate total disability benefits, the employer bears the initial burden of proof regarding the Claimant's ability to work. *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995) (citing *Governor Bacon Health Center v. Noll*, 315 A.2d 601, 603 (Del. Super. Ct. 1974)). For the following

reasons, the Board finds that Claimant is no longer totally disabled.

Page 12

When there is a conflict in the medical testimony, the Board must decide which physician is more credible. *General Motors Corp. v. McNemar*, 202 A.2d 803 (Del. 1964). As long as there is substantial evidence to support the decision, the Board may accept the testimony of one physician over another. *Standard Distributing Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993). In the case at hand, the physicians agree that Claimant is capable of working full-time in a sedentary duty capacity while in his wheelchair. Claimant agreed that Dr. Handling released him to work in a sedentary duty capacity on December 2, 2019, consistent with the November 2019 FCE recommendations. Claimant also agreed that he could do some of the jobs listed on the labor market survey if he stays within the restrictions imposed and descriptions on the survey. Therefore, the Board finds that Claimant has been physically capable of working full-time in a sedentary duty capacity since at least December 2, 2019.

Dr. Handling again released Claimant to work full-time in a sedentary duty capacity on June 29, 2020 and did not impose any additional restrictions in light of the Covid-19 pandemic, despite Claimant's comorbidities. Dr. Matz is not aware of any physician imposing restrictions on Claimant related to Covid-19.

Since Claimant is not physically totally incapacitated, the burden shifts to Claimant to prove that he is a displaced worker. *Wyatt v. State of Delaware*, Del. Super. Ct., C.A. No. 97A-05-004 HDR, Ridgely, J., at 3 (March 27, 1998)(Order). Given Claimant's age, physical limitations, education, mental capacity and training, the Board finds that he is not *prima facie* a displaced worker. *Torres*, 672 A.2d at 30 (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)). Claimant is only forty-two years old, is a high school graduate with some additional training, and has transferable skills

based on his education and work experience. He has analytical skills and is able to manage people, read, write, drive a vehicle, and function as an

Page 13

adult in today's society and he has sedentary-duty work restrictions. Claimant did not even argue that he is *prima facie* a displaced worker; Claimant argues that he is a displaced worker because he cannot find employment, especially in the current labor market with the Covid-19 pandemic and his restrictions.

Since Claimant is not *prima facie* a displaced worker, he may still prove that he is a displaced worker by showing that he has made a reasonable effort to locate employment, but was unable to do so due to his disability. *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910, 913 (Del. 1967) (claimant must show inability "to obtain employment because of his physical condition"); *Zdziech v. Delaware Authority for Specialized Transportation*, Del. Super. Ct., C.A. No. 87A-AU-10, Gebelein, J. (October 13, 1988) (four applications in over a year period is not a reasonable effort when there is no evidence that failure to obtain employment was because of disability); see also *Torres*, 672 A.2d at 30 (citing *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)).

Claimant testified that he conducted a job search by calling the jobs listed on the labor market survey, but has not obtained employment. The Board finds that Claimant has not conducted an adequate job search because he did not actually conduct his own job search or even apply for any job. Even though Claimant was released to work on December 2, 2019, which was more than three months before the Covid-19 pandemic, he did not conduct a job search at all, and many employers listed on the labor market survey were still open and hiring during the Covid-19 shutdown. Claimant simply assumed he could not perform the jobs listed on the labor market survey, because he would try to work beyond his restrictions and beyond the job duties as

described in the labor market survey. Although employers appreciate a strong work ethic, as

Page 14

Claimant described, the Board finds and Claimant agreed that he could perform the jobs listed on the survey if he stays within his restrictions and the job descriptions.

Furthermore, the Board accepts the testimony of Mr. Stackhouse, who prepared a labor market survey that shows jobs for which Claimant is physically and vocationally suited that are within Claimant's restrictions and are available in the open labor market. Mr. Stackhouse explained that although Claimant has work restrictions, there are jobs in the open labor market that are suitable for him while in a wheelchair, even during the Covid-19 pandemic. The jobs on the survey are entry-level, provide on-the-job training, and are within Claimant's restrictions, so he is capable of performing the job duties. Mr. Stackhouse found that the employers were more willing to consider an applicant who is wheelchair-bound even more readily than a person with less obvious disabilities and the employers seemed willing to go out of their way in terms of finding a position or accommodating a person in a wheelchair. Dr. Matz reviewed the job descriptions and believes Claimant is physically capable of performing all of the jobs listed on the labor market survey. Therefore, the Board finds that the survey and Mr. Stackhouse's testimony are sufficient to prove that Claimant is employable and not a displaced worker.

Based on the foregoing, the Board finds that Claimant is not a displaced worker and, therefore, is no longer totally disabled. Perdue's Petition for Review is granted as of December 2, 2019, the date on which Claimant's treating physician (Dr. Handling) released him to work. *Gilliard-Belfast v. Wendy's*, 754 A.2d 251 (Del. 2000).

### **Partial Disability**

Where there is evidence that there continues to be some disability that could affect a claimant's

earning capacity, the employer must demonstrate that the claimant is not partially disabled. *Waddell v. Chrysler Corp.*, Del. Super. Ct., C.A. No. 82A-MY-4, Bifferato, J., slip op.

Page 15

at 5 (June 7, 1983); see also *Del. Code Ann.* tit. 19, § 2325. Since Claimant may return to work with restrictions, there is a disability that could affect his earning capacity.

The Board accepts the opinions of Drs. Matz and Handling regarding Claimant's full-time sedentary duty restrictions. The Board also accepts Mr. Stackhouse's testimony and the labor market survey, which indicates that Claimant will suffer a partial disability. *Globe Union, Inc. v. Baker*, 310 A.2d 883, 887 (Del. Super. Ct. 1973), *aff'd*, 317 A.2d 26 (Del. 1974) ("partial disability" refers to when claimant suffers "a partial loss of wages as a result of his injury"). Claimant earned \$1,034.18 per week at Perdue. The jobs listed on the survey pay a low average of \$446.77 per week; therefore, it is clear to the Board that Claimant will suffer a wage loss of \$587.41 per week and is entitled to partial disability benefits at a compensation rate of \$391.61 per week. Based on the foregoing, the Board finds that Claimant is entitled to partial disability benefits in the amount of \$391.61 per week beginning on December 2, 2019. Perdue must make the appropriate reimbursement to the Workers' Compensation Fund.

#### Attorney's Fee and Medical Witness Fees

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Perdue in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann.* tit. 19, § 2320.

However, when the employer submits a settlement offer to Claimant or Claimant's counsel at least thirty days before the hearing that is equal to or greater than the Board's award, the Claimant is no longer entitled to receive an award of

attorneys' fees. *Id.* At the conclusion of the hearing, Perdue submitted a settlement offer that was sent to Claimant's counsel before the hearing. The settlement offer was equal to the award; therefore, Claimant is not entitled to an attorney's fee award in this case.

Page 16

As there is an award, medical witness fees are taxed as costs against Perdue. *Del. Code Ann.* tit. 19, § 2322(e).

#### STATEMENT OF THE DETERMINATION

Based on the foregoing, Perdue's Petition for Review to terminate Claimant's total disability benefits is GRANTED as of December 2, 2019. Claimant is entitled to partial disability benefits in the amount of \$391.61 per week beginning on December 2, 2019, as well as to medical witness fees. Perdue must make the appropriate reimbursement to the Workers' Compensation Fund.

IT IS SO ORDERED THIS 2<sup>nd</sup> DAY OF OCTOBER 2020.

#### INDUSTRIAL ACCIDENT BOARD

/s/ William Hare

/s/ Patricia Maull

I hereby certify that the above is a true and correct decision on the Industrial Accident Board.

/s/ \_\_\_\_\_

Julie G. Bucklin  
Workers' Compensation Hearing Officer

Mailed Date: 10-6-20

/s/ \_\_\_\_\_

OWC Staff

-----

Notes:



<sup>1</sup> Mr. Stackhouse included a few part-time positions on the labor market survey in case Claimant's restrictions changed between the preparation of the survey and the hearing, but he did not include those positions when calculating the average weekly wage.

-----