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BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

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MICHELLE HOWARD,)
)
Employee,)
)
v.)
)
AVALANCHE STRATEGIES LLC,)
)
Employer.)

Hearing No. 1497645

**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 April 30, 2021, 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:

J. Jay Lazzeri, Attorney for the Employee

Nicholas Bittner, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On March 30, 2020, Michelle Howard ("Claimant") sustained a compensable industrial injury while working for Avalanche Strategies LLC ("Avalanche"). Claimant has been receiving total disability benefits at her compensation rate of \$283.03 per week based on her wages of \$424.91 per week. On November 17, 2020, Avalanche filed a Petition for Review to terminate Claimant's total disability benefits.

Avalanche alleges that Claimant is capable of working with restrictions of using only the right arm and offered a job to Claimant within those restrictions at no wage loss. Avalanche also presented a labor market survey showing jobs available in the open labor market at no wage loss. Claimant conceded that her physician released her to work with restrictions on August 13, 2020. She argues that she did not forfeit her right to disability benefits and remains entitled to disability benefits.

On April 30, 2021, the Board entertained a hearing via videoconference on Avalanche's petition and this is the Board's decision.

SUMMARY OF THE EVIDENCE

Claimant, age fifty-six, testified about her industrial injury and work experience. Claimant worked at Avalanche and she has not returned to the workforce since the industrial accident. She graduated from high school and went to one semester of college. Later, she attended a certificate program for one year. Most of Claimant's work experience has been in the hospitality industry dealing with customers and the public, working at the front desk, as a clerk, and in secretarial positions.

On March 30, 2020, Claimant was lifting boxes at work and felt left shoulder pain. On August 3, 2020, Claimant underwent left rotator cuff surgery with Dr. Gita Pillai. On August 13,

2020, Dr. Pillai's physician's assistant released Claimant to work with no use of the left arm, because she was still in a brace. Claimant is right hand dominant. Avalanche offered Claimant a modified duty job requiring use of the right arm only on a Friday to return to work on Monday. Claimant was living three hours away in Pennsylvania by then without transportation, so she declined the position.

On September 18, 2020, Dr. Pillai changed Claimant's restrictions to no repetitive reaching, overhead use, or pushing, pulling, or lifting more than five pounds with the left arm. Dr. Pillai did not restrict Claimant's ability to drive. Claimant transferred her care from Dr. Pillai to a doctor in Pennsylvania now. Claimant told Dr. Eric Schwartz during the defense medical examination on March 11, 2021 that she is not taking any medications for the industrial injury to her left shoulder.

Claimant believes she should continue receiving total disability benefits because she felt neck pain and a lot of tingling and numbness in her right hand during physical therapy. She told Dr. Pillai and her primary care physician about the right hand and neck complaints. Any repetitive movement impacts the right hand and neck. Claimant is unable to sit with her head down looking at a desk. Claimant confirmed that she injured her left arm at work at Avalanche and her current problems involve the neck and right arm. She is still able to lift only two pounds with the left hand and cannot lift the left arm overhead. An MRI is being scheduled because her left shoulder has not improved.

Claimant looked for work in Pennsylvania, but has not found a job yet. Although the job search log begins in February, Claimant thinks she started looking for work in January 2021, when she received the job search forms from her attorney. Claimant was released to work on August 13, 2020, but she did not look for work until she received the forms from her attorney

because places are closed due to COVID-19. Claimant knows that Avalanche offered her a job within her restrictions, but she moved to Pennsylvania in June 2020 for personal reasons and because she needed a place to live.

Eric T. Schwartz, M.D., a board-certified orthopedic surgeon and a certified physician pursuant to the Delaware workers' compensation system, testified by deposition on behalf of Avalanche. Dr. Schwartz examined Claimant on March 11, 2021 and reviewed Claimant's medical records in conjunction with the examination. He believes that Claimant is physically capable of working full-time in a one-handed duty capacity consistent with the restrictions Dr. Pillai imposed.

Claimant started treating with Dr. Pillai on April 8, 2020 and underwent left rotator cuff surgery on August 3, 2020. Dr. Schwartz agrees the surgery was appropriate for Claimant's left shoulder condition.

On August 13, 2020, Claimant had intermittent pain that was a two out of ten on the pain scale. Dr. Pillai released Claimant to work eight hours per day while wearing a sling at all times and not using her left shoulder or arm. It is not uncommon to release a patient to work with that restriction within ten days of rotator cuff surgery. Claimant is right hand dominant and the restrictions were placed on the left arm. Returning to work is therapeutic and the release to work with these restrictions was reasonable.

On September 18, 2020, Dr. Pillai adjusted Claimant's work restrictions to no repetitive reaching, overhead use, or pushing, pulling, or lifting more than five pounds with the left arm. Dr. Schwartz agreed the restrictions were reasonable at that time. Dr. Pillai's corresponding office note indicates that Claimant was no longer using opioids, so she was off of medication by that point and was continuing with physical therapy.

On December 10, 2020, Dr. Pillai noted the same restrictions as in September and indicated that Claimant moved six hours away and was unable to go to her office in Delaware. Dr. Pillai has not seen Claimant since that date. Claimant went to physical therapy in Hatfield, Pennsylvania with the last date of service in the records provided on December 23, 2020, although she was not discharged from therapy at that time.

During the examination with Dr. Schwartz on March 11, 2021, Claimant reported having significant pain and loss of motion since surgery. She reported having pain with overhead activity, lifting, and repetitive use of the left arm. The examination showed that Claimant had no evidence of cervical radiculopathy. She complained of diffuse left shoulder pain and had restricted range of motion in the left shoulder. Dr. Schwartz did not see any problems with Claimant's right shoulder. Claimant did not complain of any right shoulder pain and she had full range of motion in the right shoulder. Claimant is right hand dominant. She was not taking any medication related to the shoulder surgery.

On March 11, 2021, Claimant told Dr. Schwartz she would be capable of full-time sedentary duty work if it was made available to her. Claimant reported she is seeing an orthopedist in Pennsylvania. Dr. Schwartz has not received any notes from the physician in Pennsylvania, but he understands that this new physician also confirmed that Claimant can return to work. Dr. Schwartz is not aware of any medical provider keeping Claimant out of work entirely since Dr. Pillai released her to work on August 13, 2020; he has not seen any total disability notes dated after August 13, 2020. Dr. Schwartz sees no reason why Claimant cannot return to work within the restrictions set forth on August 13, 2020; the restrictions Dr. Pillai imposed were reasonable and appropriate. Dr. Schwartz agrees with playing it safe and keeping Dr. Pillai's restrictions in place.

Dr. Schwartz reviewed the labor market survey prepared in this case. The survey lists ten jobs within the restrictions Dr. Pillai imposed of no pushing, pulling, overhead reaching, or lifting more than five pounds with the left arm. Dr. Schwartz believes Claimant is medically capable of performing the physical requirements of the jobs listed in the survey.

Dr. Schwartz is aware that the physician in Pennsylvania agrees that Claimant can return to work in a one-handed duty capacity, but imposed a two-pound restriction, which does not change Dr. Schwartz's medical opinion. There is no benefit to performing a functional capacity evaluation in this case, since the restrictions Dr. Pillai imposed are already extremely restrictive.

Jeff Sund, a Vocational Case Manager, testified on behalf of Avalanche. Mr. Sund prepared a labor market survey with Claimant in mind. He had very little information on Claimant, so he took a hypothetical approach to the survey.

When preparing the labor market survey, Mr. Sund used the geographical area of Hatfield, Pennsylvania, where Claimant lives now. He contacted all of the employers listed on the survey to make sure they were available when advertised and confirmed they would accept an application from someone with Claimant's background, medical capabilities, and restrictions. The jobs listed on the survey will allow for lifting with one-hand only or do not require any lifting at all. The labor market survey is a sampling of the jobs available and appropriate for Claimant in the open labor market.

There are ten jobs listed on the labor market survey, most of which are cashier positions. The wages range from \$9.50 to \$15.00 per hour with an average of \$12.45 to \$13.95 per hour, which equates to an average of \$498.00 to \$558.00 per week for full-time employment of forty-hours per week. Claimant earned \$424.97 per week. COVID-19 has not impacted these types of jobs (other than early on), because retail establishments have remained open with COVID-19

safety protocols in place and are hiring. Mr. Sund did not contact the employers on the day of the hearing, but these types of jobs become available often and stay open.

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.

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 Board accepts Dr. Schwartz's opinion that Claimant is physically capable of working in a one-handed duty capacity. Dr. Schwartz's opinion that Claimant is capable of working full-time with one-handed duty restriction is consistent with the release to work from her treating physician, Dr. Pillai. Claimant even conceded that she was released to work with one-handed duty restrictions on August 13, 2020.

Based on the foregoing, the Board finds that Claimant is no longer totally disabled. She has been physically capable of working full-time with one-handed duty restrictions since at least August 13, 2020. Claimant did not argue that she is a displaced worker; she argued that she should continue to receive total disability benefits.

Avalanche's Petition for Review is granted as of the date of filing of the Petition for Review on November 17, 2020. Claimant has a right to rely on her treating physician's advice regarding work capabilities or until the Board resolves the conflict and her treating doctor released her to work on August 13, 2020. *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251 (Del. 2000); *see also Clements v. Diamond State Port Corp.*, 831 A.2d 870 (Del. 2003); *Waddell v. Chrysler Corp.*, Del. Super. Ct., C.A. No. 82A-MY-4, Bifferato, J., slip op. at 5 (June 7, 1983); *see also Del. Code. Ann. tit. 19, § 2325.*

Partial Disability Benefits

When 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. at 5 (June 7, 1983); *see also Del. Code. Ann. tit. 19, § 2325.* Since Claimant may return to work, but is restricted to one-handed duty jobs, there continues to be a disability that could affect her earning capacity. Avalanche offered Claimant a job within her restrictions at no wage loss, which she declined for personal reasons; therefore, the Board finds that Claimant will not suffer a loss in her earning capacity and is not entitled to partial disability benefits. *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").

Furthermore, as stated above, Claimant agreed her treating surgeon released her to work and the Board finds that Claimant is able to work with one-handed duty restrictions. Claimant did not perform a reasonable job search. Claimant waited until she received the job search log form from her attorney in January or February 2021 before she started conducting a job search, despite being released to work five to six months earlier. The Board finds that given Claimant's

delay and reactionary job search, the job search was only conducted in anticipation and preparation of litigation rather than to actually find a job. Also, the vast majority of the entries on Claimant's job search log indicate that the employers contacted were not even hiring, some jobs were beyond Claimant's restrictions, and she did not apply to other jobs. Claimant did not prove that she did not find employment due to her restrictions.

The Board accepts Dr. Schwartz's opinion that Claimant is capable of performing the jobs listed on the labor market survey and Mr. Sund's opinion that the jobs listed are appropriate for Claimant. Claimant testified about her education, which includes a high school diploma, one semester of college, and a one-year certificate program. She also testified about her work experience, which includes working in the hospitality industry with customers and the public. The Board finds that the labor market survey shows jobs for which Claimant is physically and vocationally suited that are within Claimant's restrictions and are available in the open labor market. Therefore, the Board finds that the survey and Mr. Sund's testimony are sufficient to prove that Claimant has been employable in the open labor market even with her restrictions at no wage loss.

Claimant earned \$424.97 per week when she was injured at Avalanche. The low average weekly wage for the ten jobs listed on the labor market survey is \$498.00. Therefore, the Board finds that Claimant will not suffer a loss in her earning capacity and is not entitled to partial disability benefits. *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").

Based on the foregoing, the Board finds that Claimant is not entitled to partial disability benefits.

STATEMENT OF THE DETERMINATION

Based on the foregoing, Avalanche's Petition for Review to terminate Claimant's total disability benefits is GRANTED as of the date of this decision.

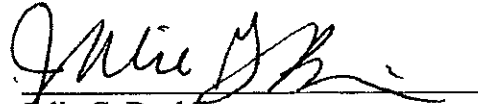
IT IS SO ORDERED THIS 6th DAY OF MAY 2021.

INDUSTRIAL ACCIDENT BOARD

/s/ William Hare

/s/ Patricia Maul

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


Julie G. Bucklin
Workers' Compensation Hearing Officer

Mailed Date: 5-10-21


OWC Staff