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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Re: Gertrude KOLLOCK v. ALLEN HARIM FOODS, LLC

C.A. No. S14A–06–002 ESB
|
Submitted: September 18, 2014
|
October 7, 2014

Attorneys and Law Firms

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Opinion

E. SCOTT BRADLEY, JUDGE

***1** Dear Counsel:
This is my decision on Gertrude Kollock's appeal of the Industrial Accident Board's finding that 19 *Del.C.* § 2302(b)(1) provides that Kollock's average weekly wage to be used in calculating her workers' compensation benefits is to be calculated by dividing the total wages she earned from the time she was hired until the time she was injured by the total number of weeks she worked during that period of time. Kollock earned $6,254.78 and worked for 18 weeks. Thus, Kollock's average weekly wage is $347.49 and her compensation rate is $231.66. The employees at Allen Harim Foods, LLC are covered by a collective bargaining agreement. Kollock was hired by Allen to work in its sanitation department on May 3, 2012. For the first 90 days of Kollock's employment, she was considered a "probationary" employee. At the expiration of the 90 day probationary period, Kollock became a "regular" employee. A "probationary" employee may be terminated for any reason. A "regular" employee may only be terminated for cause. Kollock's rate of pay started at $8.20 per hour. After 90 days, it went to $10.00 per hour. Kollock was involved in a compensable industrial accident on September 7, 2012. At the time of the accident, Kollock was earning $10.00 per hour. Kollock had the same job in Allen's sanitation department for the entire 18 weeks that she worked before getting hurt.

The sole issue before the Board was how to calculate Kollock's average weekly wage. Kollock was employed by Allen for a total of 18 weeks prior to her injury. For the first 13 weeks Kollock was paid at a rate of $8.20 per hour. After Kollock's probationary period ended and for the following five weeks she was paid at a rate of $10.00 per hour. Kollock argued that the proper rate of pay to use in calculating her average weekly wage was the $10.00 per hour rate she received once she became a "regular" employee. Allen argued that Kollock's wages for the 18 weeks that she was employed should be used in calculating her average weekly wage and not just the wages she earned for the five weeks after her probationary period ended. Since Kollock had worked less than 26 weeks, but more than 13 weeks, the Board found that § 2302(b)(1) was applicable. It provides that Kollock's average weekly wage should be based upon the full 18 weeks that she worked at Allen. Therefore, the Board found that Kollock's average weekly wage to be $347.49 and her compensation rate to be $231.66. Kollock now appeals to this Court.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4] We review errors of law de novo.[5] Absent an error of law, the agency's decision will not be disturbed where there is substantial evidence to support its conclusions.[6]

DISCUSSION

***2** The sole issue in this case is governed by 19 *Del. C.* § 2302. Section 2302(a) defines "average weekly wage." Section 2302(b) provides formulas for calculating the "average weekly wage" depending on how long an employee has worked. If an employee has worked less than 26 weeks, but at least 13 weeks, then § 2302(b)(1) applies. It states:

> If the employee worked less than 26 weeks, but at least 13 weeks, in the employment in which the employee was injured, the average weekly wage shall be based upon the total wage earned by the employee in the employment in which the employee was injured, divided by the total number of weeks actually worked in that employment.

I find § 2302 to be clear and unambiguous. Kollock worked 18 weeks prior to her injury. Since Kollock worked more than 13 weeks, but less than 26 weeks, 19 *Del.C.* § 2302(b)(1) applies. It provides that Kollock's total wages over the 18 weeks she worked are to be divided by 18 to arrive at Kollock's average weekly wage. This yields an average weekly wage of $347.49 and a compensation rate of $231.66.

Kollock argues that the Board should have used the wages she made over the last five weeks to calculate her average weekly wage, reasoning that she was a "regular" employee at the time. Kollock is attempting to draw a distinction between a "probationary" employee and a "regular" employee in order to calculate workers' compensation benefits. While it is true that a "regular" employee has more rights under the collective bargaining agreement than a "probationary" employee, that is irrelevant. Section 2302 is clear and unambiguous. In calculating an employee's average weekly wage, the deciding factor for making the calculation is the number of weeks the employee has worked. Whether or not an employee is "probationary" or "regular" is irrelevant. The clear and unambiguous language of 19 *Del. C.* § 2302 disposes of all of Kollock's arguments. The Board's decision is based upon substantial evidence and free from legal error.

CONCLUSION

The Industrial Accident Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

All Citations

Not Reported in Atl. Rptr., 2014 WL 5395759

Footnotes

1 *General Motors v. McNemar,* 202 A.2d 803, 805 (Del.1964); *General Motors v. Freeman,* 164 A.2d 686 (Del.1960).

2 *Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892, 899 (Del.1994); *Battista v. Chrysler Corp.,* 517 A.2d 295, 297 (Del.Super.1986), *app. dism.,* 515 A.2d 397 (Del.1986)(TABLE).

3 *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del.1965).

4 29 *Del. C.* § 10142(d).

5 *Person–Gaines v. Pepco Holdings Inc.,* 981 A.2d 1159, 1161 (Del.2009).

6 *Dallachiesa v. General Motors Corp.,* 140 A.2d 137 (Del.Super.1958).

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