IN THE COURT OF APPEALS
STATE OF GEORGIA

JOHN TAYLOR, Appellant, vs. ARGOS USA and ACE AMERICAN INSURANCE COMPANY c/o ESIS, Inc., Appellees.	)	COURT OF APPEALS NO.: A24A1246

APPELLEE'S BRIEF TO THE COURT OF APPEALS

Mark J. Goodman
State Bar of Georgia No. 301180
G. Scott Hoffman, Jr.
State Bar of Georgia No. 380309
Swift, Currie, McGhee & Hiers, LLP
1420 Peachtree Street, NE, Suite 800
Atlanta, Georgia 30309
(404) 874-8800

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PART ONE

INTRODUCTION

This is very simple factually dependent case regarding a light duty job offer and whether the failure of the Claimant to return to work due to a fear of COVID-19 was justified. It is respectfully suggested that as the evidentiary record shows the Appellant (hereinafter, "Claimant") admitted he never knew the Appellees (hereinafter, "Employer/Insurer") had even offered him light-duty work in April and May 2020 despite his attorney being notified in writing, he was not justified in not returning to the light duty job which was offered. The underlying arguments presented in the Claimant's brief regarding his alleged entitlement to workers' compensation wage benefits are entirely disingenuous and the Claimant conveniently ignores this glaring omission throughout his brief. Review of any alleged underlying legal issue is not warranted under this factual premises and this Court should affirm the findings of the DeKalb County Superior Court and Appellate Division under an "any evidence" standard of review as there is ample record evidence to support those findings.

The "any evidence" rule is applicable to all courts reviewing a State Board of Workers' Compensation final Award. See Howard Sheppard, Inc. v. McGowan, 137 Ga. App. 408, 224 S.E.2d 65 (1976). The Employer/Insurer was under no legal obligation to provide the Claimant information regarding COVID-19

precautions (even though they indicated they would be taking precautions) and the Claimant's refusal to return to the suitable light-duty job offered by Argos was unjustified. Furthermore, the evidence demonstrates the Claimant was unaware of the light-duty job offer, even though it was conveyed to his attorney, thus negating his entitlement to TTD benefits. The evidence also demonstrates that the Claimant testified he would have returned to the job had he known about it. The Employer/Insurer later commenced TTD benefits for the time period between Arms Wide Open's closure due to COVID-19 and the Claimant's termination for cause. The record does not support that the Claimant has established entitlement to indemnity benefits following his termination for cause as he has not looked for work. Following the Claimant's termination, the Employer/Insurer was under no obligation, six months after the fact, to offer the Claimant yet another a light duty job after the Claimant testified at his deposition he wanted to return to work. Since there was ample evidence to support the Award of the Appellate Division as affirmed by operation of law at the Superior Court level, there is no legal basis for this allegation of reversible error.

PROCEDURAL HISTORY

1. Original Evidentiary Hearing and Order

An evidentiary hearing was held in this claim on November 7, 2022 based on the Claimant's request for TTD benefits from March 16, 2020 and continuing,

and for assessed attorney's fees. (V4). At the hearing, the Employer/Insurer contended that the Claimant was not entitled to TTD benefits from March 16, 2020 forward as he could not meet his burden of proof to establish a work-related economic disability. (V2-108-116). The Employer/Insurer additionally requested that they were entitled to a 10-week credit for a TPD benefit overpayment if the Administrative Law Judge awarded TTD benefits. (V2-760-761). The Employer/Insurer further asserted their defense of the claim was reasonable. (V2-119).

On January 9, 2023, the Administrative Law Judge issued an Award correctly finding the Employer/Insurer were entitled to a credit for a TPD benefit overpayment, that the Employer/Insurer's job offer was made pursuant to O.C.G.A. § 34-9-240 and properly communicated to the Claimant's attorney, and appropriately denying the Claimant's request for attorney's fees and penalties.[1] (V2-138, 141). However, despite the overwhelming evidence presented at the hearing and in the Employer/Insurer's briefing that the Claimant's economic disability was unrelated to his work injury, the Administrative Law Judge awarded the Claimant TTD benefits from March 16, 2020 and continuing. (V2-140).

[1] The Employer/Insurer also requested a credit against previously paid permanent partial disability (PPD) benefits in the amount of $10,125.00 if the Administrative Law Judge awarded ongoing TTD benefits.

2. Appeal to Appellate Division and Appellate Division Order

The Employer/Insurer appealed the Administrative Law Judge's decision to the Appellate Division. (V2-142-146). Before the Appellate Division, the Employer/Insurer argued the Claimant should not be entitled to TTD benefits as it was legal error for the Administrative Law Judge to find that the Claimant's personal concerns over returning to work during the pandemic, i.e. his fear of Covid, justified his failure to accept the position offered by the Employer/Insurer. (V2-162-167). Oral argument was held before the Appellate Division on March 14, 2023. (V2-149).

After careful consideration of the briefs and oral argument, the Appellate Division issued an Award on June 12, 2023. (V2-180-187). The Full Board panel reversed the Administrative Law Judge's finding that the Claimant's refusal of the light duty job was justified, and they determined his reasons for not returning to work were personal and unrelated to his compensable work injury. (V2-184-185). The Appellate Division found the light-duty job offered by the Employer/Insurer was suitable to the Claimant's work restrictions and physical capacity, and the Claimant's termination was for cause unrelated to his workplace injury. (V2-184-185). The Appellate Division further determined the Claimant had the burden of proof to show his inability to secure suitable employment was related to his work injury, and because there was no evidence in the record establishing that the

Claimant had looked for work, he was not entitled to TTD benefits. (V2-185-186). Per the terms of the Appellate Division Award, the Employer/Insurer timely issued payment of TTD benefits for the period between March 16, 2020 and May 19, 2020, inclusive of their credit for overpayment of TPD benefits.

3. Appeal to Superior Court and Affirmance by Operation of Law

Displeased with the Award, the Claimant appealed to the Superior Court of DeKalb County. (V2-188-190). An oral argument hearing was held on October 9, 2023 before the Honorable Judge Alan Harvey. (V2-856). Per O.C.G.A. § 34-9-105(b), the Superior Court had 20 days in which to issue an order regarding the Claimant's appeal. As the 20th day was Sunday, October 29, 2023, the last day for the Superior Court to issue an order was Monday, October 30, 2023. The Superior Court did not timely issue an Order and the Appellate Division Award denying benefits to the Claimant was affirmed by operation of law.

The Claimant filed an Application for Discretionary Review to this Court on November 29, 2023, which was granted on December 21, 2023. (V2-865). For reasons discussed below, this case should be denied, if simply for the fact that the Claimant's underlying arguments ignore his own admission and record evidence that he did not know Argos offered him light-duty work after his assigned job at Arms Wide Open ended due to the COVID-19 pandemic and provided conflicting

testimony as to whether he was ever even quarantining. Additionally, well settled Georgia Law also does not support the Claimant's contentions, and thus the Superior Court Order should be affirmed as a matter of law.

STATEMENT OF FACTS

a. Background and Accident

The Claimant was a driver for Argos at the time of his September 4, 2019 work accident. (V2-806). On September 4, 2019, the Claimant was struck by another vehicle while driving his truck back to the company shop for repairs. (V2-793-794). The Claimant reported pain in his neck, shoulder, and arm following the incident. (V2-794). The Employer/Insurer initially accepted the claim as medical-only, and the Claimant received light-duty restrictions from Dr. Sterling Roaf based on diagnoses of sprains in his cervical and lumbar spine and a left-hand strain. (V2-708-709).

b. Light Duty Work with Argos and Arms Wide Open

After the September 4, 2019 accident, the Claimant returned to light-duty work for Argos. (V2-806). Temporary partial disability (TPD) benefits were commenced via a WC-2, and the Claimant admitted at the hearing to working a 40-hour work week and stated Argos paid him for four hours while workers' compensation paid him the other four hours. (V2- 11, 807). The Claimant testified

his light-duty work at that time consisted of cleaning the breakroom, which involved sweeping and cleaning off the table. (V2-796). Claimant stated he cleaned bathrooms, which involved cleaning the toilet, sink, and mirror. (V2-796). The Claimant admitted he was capable of performing the job. (V2-812). The Claimant believed he performed the light-duty job at Argos for "two or three months." (V2-800).

The Operations Manager for Argos' South Division, Mr. Warren McMichael, directed the Claimant's light-duty work and he testified Argos ran out of light duty tasks to assign the Claimant after some time. (V2-780). However, when such a situation arises, Argos sends employees out to "outer locations" like thrift stores or the Salvation Army with a "need" for workers. (V2-780, 790). Mr. McMichael reiterated that if Argos ran out of light-duty work, Argos would go to a Salvation Army or thrift store to secure light work for the employee, which is precisely what occurred in this claim. (V2-790). The Claimant stated that he then went to work at a non-profit, Arms Wide Open, which was also a 40-hour per week position, in November 2019. (V2-807).

The parties stipulated that Arms Wide Open closed down on March 15, 2020 due to the COVID-19 pandemic. (V2-764). Argos subsequently offered the claimant immediately available light duty work on April 14, April 16, and on May 19, 2020. (V2-416-417, 367-368). Despite these offers, the Claimant denied

Argos ever offered him a job performing the same light-duty work he had done before, which was not true. (V2-812-813). The Employer/Insurer continued to pay TPD to the Claimant after the job at Arms Wide Open closed.

On April 14, 2020, counsel for Argos emailed the Claimant's attorney Lisa Reeves with information that Argos was willing to make another light duty job available to the Claimant, which would include signing delivered material tickets, maintaining daily files, and cleaning the breakroom. (V2-417). Argos was willing to have the Claimant return to work immediately. (V2-417). Ms. Reeves responded that she would contact the Claimant regarding the offer. (V2-416). On April 16, 2020, counsel for Argos followed up a second time via email about the return to work. (V2-416). Ms. Reeves responded that the Claimant was diabetic and wanted to ensure Argos was taking precautions for workers "that are high risk" like the Claimant and to convey that the Claimant was "really scared" of COVID-19. (V2-416). Counsel for Argos responded on April 16 that "the company is taking all the necessary precautions to allow their employees to rtw (sic.) safely. Let me know when he is going to return." (V2-352). There is no evidence in the record to demonstrate that Argos was under any requirement to take any such specific precautions.

On May 19, 2020, counsel for Argos emailed Ms. Reeves for a third time and conveyed that light-duty work was available and the Claimant would be placed

on the schedule "immediately." (V2-367-368). Later that day, Ms. Reeves responded, "Mr. Taylor is high risk and has to shelter in place. He is a diabetic and 67 yoa (sic.) along with being an African American. He cannot return to work regardless of light duty." (V2-367).

At the evidentiary hearing, the Claimant agreed his attorney never told him about the job offered by Argos. (V2-813:1-3). He further testified he was unaware that his attorney referenced he would not be returning to because of COVID-19 and because he wanted to quarantine. (V2-813:4-11). The Claimant testified unequivocally that he did not tell that to his attorney. (V2-813:12-13).

However, the record evidence shows that the Claimant provided conflicting testimony as to why he stopped working and would not return to work. At his November 4, 2020 deposition, the Claimant stated that he remained at Arms Wide Open until March "when the virus came in, then I had to quarantine. I was there until . . . about the middle of March." (V2-815) (emphasis added). The Claimant was asked at his deposition if the quarantine he referred to was government-ordered. (V2-815). The Claimant responded that the governor and mayor said, "[i]f you're at high risk on your job . . . then you need to quarantine if you've got any kind of high risk as far as diabetes . . . or anything." (V2-816). He stated that "I worked, so I had to quarantine, and I notified everybody. I notified the lawyer.

I notified Mr. Morris; he's the guy at Arms Wide Open. I told everybody." (V2-816-817).

At the hearing, the Claimant denied that he had testified previously in his November 4, 2020 deposition that he could not work because he was quarantining in March 2020. (V2-813:25). The following exchanges from the Claimant's cross examination at the hearing from V2-813:21 to V2-814:2 are instructive:

Attorney Goodman:	Okay. So when we took your deposition in November of 2020, you at that time said you couldn't work because you were also quarantined?
Claimant:	No, sir.
Attorney Goodman:	So you never quarantined?
Claimant:	No, sir.

The Claimant further tried to clarify at the hearing he "never" quarantined at all but was instead "ill" with pain. (V2-814). He also testified it was the pain from his accident that kept him from returning to work, not COVID-19. (V2-814:10). He also testified at the hearing he had already told his boss at Arms Wide Open he was hurting and having problems bending, and that COVID-19 was "getting too bad." (V2-816). He claimed his boss provided him with permission to go home. (V2-816).

After being read his prior deposition testimony at the hearing, when the Claimant was asked if the reason that he stopped work was because he

quarantined, he still answered, "no." (V2-817). When defense counsel asked the Claimant if he was ever aware that a job offer was made to him in April 2020, he answered "no" at V2-817:18-25:

Attorney Goodman:	Yeah. Were you ever . . . aware that the job offer was made to you?
Claimant:	No, because that's what I was doing before . . . All they had to do was call me and let me know.

When defense counsel referenced that the offer was made to the Claimant's attorney, the Claimant testified, "well it didn't ever get to me." (V2-818). He later added he would have come back to Argos "if they had called me and told me" and because he was doing the light-duty work before "so why would I not come back?" (V2-817, 819). He admitted at V2-819:6-8 that from a physical standpoint he could have performed the job:

Attorney Goodman:	Okay. So you could have gone back and done that job from a physical standpoint?
Claimant:	Of course with no problem.

c. Claimant's Termination for Cause, Testimony of Warren McMichael, and Lack of Post-Injury Employment

The Claimant was terminated for cause from Argos on May 21, 2020. (V2-841). Mr. McMichael testified the Claimant was terminated for not reporting to work. (V2-788). Mr. McMichael confirmed light-duty work was available on the day the Claimant did not report to work, and that the work would have continued if

the Claimant had shown up to work. (V2-789). Mr. McMichael testified the same light clerical work was available for the Claimant at the time he was terminated, including cleaning the breakroom and bathroom, filing, clerking, picking up paper, and other small duties. (V2-784-785). Mr. McMichael could not say for certain the light-duty job would have ended after a "couple of months." (V2-785).

The Claimant admitted that he had not worked anywhere since leaving Arms Wide Open in March 2020. (V2-819). At the hearing, he denied looking for work anywhere, despite having testified at his deposition he was willing to return to light-duty work if it was available. (V2-819, 827). The evidence shows such work was available and offered to the claimant. (V2-367-368, 416-417, 789). The Claimant denied receiving any light-duty job offer from Argos since March 15, 2020, despite the evidence in the record showing otherwise. (V2-826).

PART TWO

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this appeal pursuant to O.C.G.A. § 5-6-35(a)(1), as this is a decision of a Superior Court affirming, by operation of law, an order of the State Board of Workers' Compensation.

STANDARD OF REVIEW

When reviewing a workers' compensation award, the evidence must be construed in the light most favorable to the prevailing party before the Appellate Division of the State Board of Workers' Compensation, and when the Board's findings of fact are supported by any evidence, they are conclusive and binding on reviewing courts. Georgia-Pac. Corp. v. Wilson, 240 Ga. App. 123, 522 S.E.2d 700 (1999); (see also Blackwell v. Liberty Mut. Ins. Co., 230 Ga. 174, 196 S.E.2d 129 (1973), holding "the Full Board's decision cannot be disturbed as long as there is 'any evidence' to support it," and Liberty Mutual Ins. Co. v. Thomas, 99 Ga. App. 124, 108 S.E.2d 180 (1959), holding "every presumption in favor of validity of award of Board of Workers' Compensation should be indulged in by the reviewing court.").

Based on this any evidence standard, the Court of Appeals should affirm the Superior Court's correct determination that the Claimant was not entitled to ongoing TTD benefits because he refused to return to light-duty work properly communicated and offered by the employer, either because he was scared of COVID-19 or because his prior attorney never told him about the job offer. There is no legal issue for the Court to address regarding whether COVID-19 is a justifiable reason for refusing light-duty work because there is evidence that the Claimant never knew the job was offered in the first place. Further, the evidence

demonstrates that the Claimant cannot meet his burden of proof to entitlement for ongoing indemnity benefits because he has not looked for work at all.

The Superior Court Order denying ongoing TTD benefits is supported by the evidence in the record which is conclusive and binding on this Court, and the Claimant's Appeal should be denied and the Superior Court Order affirming the Appellate Division Award should be affirmed.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

I. As a threshold matter, the Claimant's entire argument regarding his entitlement to TTD benefits from March 16, 2020 and continuing is disingenuous as the record conclusively establishes and the Claimant admitted several times under oath he was never made aware of light duty work offered by Argos after Arms Wide Open closed due to the Covid-19 pandemic, despite it being properly offered, and would have otherwise returned to the offered job if he had known about it.

There is undisputed record evidence establishing that the Employer/Insurer's offers of light-duty work were properly conveyed, as found by the ALJ at the trial level and never called into question on appeal. (V2-138). Specifically, Judge Drew stated in her Award that she found "the employer properly communicated with the employee's counsel regarding light duty work." (V2-138). The Claimant admitted several times under oath he was completely unaware that the Employer/Insurer had offered him another light-duty job performing the same

work he was doing before Arms Wide Open closed. Further undermining his own argument, the Claimant testified that he would have returned to the light-duty job if he had known about it. Moreover, the Claimant testified conflictingly at his deposition and later at the hearing as to whether he was ever even quarantining due to COVID-19.

In his brief, the Claimant used the fable of the Wolf and Crane to tritely illustrate the posture of this case for the Court. Despite the fact that the Employer/Insurer made several attempts to secure light-duty work for the Claimant, the Employer/Insurer is deemed the "Wolf" in that scenario, who asks the Crane to remove a bone from its throat and promises a reward. However, the Claimant conveniently ignores the evidence showing he did not know of the job offer and his testimony that he would have otherwise returned to work for the Employer/Insurer. In other words, the Crane had no reason to stick its head in the Wolf's mouth in the first place. Rather, the Claimant seeks redress from this Court for a failure on the part of his prior attorney to convey the job offer to him, not for any alleged precautions regarding COVID-19 that the Employer/Insurer should have afforded him with the light-duty job offer.

This entire appeal from the Claimant is predicated on the well-documented and unopposed fact that he was not aware the Employer/Insurer had offered light-duty work. The Claimant never references this in his briefing to the Court, and the

Amicus brief expounding on COVID-19 as an allegedly justifiable reason for refusing light-duty work certainly does not point out the Claimant's crystal clear testimony that he would have returned to work if he had known of the offer. This evidence renders the Claimant's argument meaningless.

The Claimant and Amicus further seek, in part, to have this Court exponentially expand what constitutes a justified refusal of suitable light-duty work as outlined in O.C.G.A. § 34-9-240 by separating out the "ability" to perform the work and severing any connection to the work restrictions that required the offer of light-duty work in the first place. That the Claimant makes this request of the Court while the evidence demonstrates he never knew the Employer/Insurer offered him his previous light-duty job because his attorney never told him is completely disingenuous and there is no legitimate basis for his Appeal.

II. The Superior Court Order affirming Appellate Division finding that the Claimant was not entitled to TTD benefits from May 19, 2020 and continuing should be affirmed because there is evidence to establish the Claimant's refusal of the employment procured for him was either due to a personal fear of COVID-19 having nothing to do with his work injury or because he was unaware the light-duty job, though properly communicated to his prior attorney, was available.

At the outset, it is important to note the "either/or" nature regarding the Claimant's refusal of light-duty work. The record evidence establishes that the Claimant either refused to return to work due to a fear of COVID-19, or because he never knew about the job offer. Neither factual presupposition constitutes a

justified refusal of suitable light-duty work because the refusal has nothing at all to do with the Claimant's work injury.[2] Further, there is no evidentiary support for the contention that Argos was required to address precautions in light of the COVID-19 pandemic, although the record reflects that Argos was taking necessary precautions at that time. That argument is simply a red herring on the Claimant's part to distract this Court from the Claimant's testimony that he was unaware the Employer/Insurer had offered him another light-duty job.

a. Argos' light-duty job was suitable to Claimant's restrictions.

The Supreme Court of Georgia addressed the issue of whether a job was suitable and thus whether a refusal of the job was justified in City of Adel v. Wise. 261 Ga. 53, 401 S.E.2d 522 (1991). The Court established a two prong test that (1) the position must be suitable to the claimant's capacity and (2) the claimant's refusal must be one which was not "justified." Id. The Court stated that the "suitable to his capacity" language within the statute referred to a claimant's capacity to perform the work within his physical limitations or restrictions due to a job injury. Id. In this case, there is irrefutable evidence to support the Appellate Division's finding, as affirmed by the Superior Court, that the light-duty job offered by the Employer/Insurer was suitable to the Claimant's physical capacity. There is no support that the Claimant's refusal to return to the light-duty job was

[2] See Wise, *supra.*

justified because it was either for a non-work related reason, fear of COVID-19, or because he did not know about the job, despite it being properly communicated to his prior attorney.

Mr. McMichael confirmed in his testimony that this additional light duty work offered by Argos would consist of the same duties and responsibilities the Claimant completed previously without issue. (V2-784-785). The Claimant testified he could perform the light-duty job offered by Argos "with no problem" and "if they called and told me." (V2-819). Clearly, by the Claimant's own admission, he agreed he could have physically performed the work if he had known about it as he had performed those duties before.

b. The Claimant's refusal was based solely on a physical issue and was unjustified because it was unrelated to his physical restrictions from the work injury.

Moving to the second prong of Wise concerning justification for the refusal of light-duty work, the Superior Court correctly determined the Claimant's refusal to return to work due to a fear of COVID-19 was unjustified. The case law on what constitutes a "justified" refusal is well-established in Georgia and reflects the intent of the Act to ensure that a claimant's justified refusal to work must relate in some way to his physical capacity as relates to his job injury or his ability to perform the job. To find otherwise that there need be no connection between the refusal and capacity or ability to perform the job would needlessly expand what

constitutes a "justified" refusal as it would free up the justification to be based on anything, even factors unrelated to work. It would render almost any job offer moot if there was any conceivable medical condition, even one which is unrelated to a work injury, that would prevent someone from returning to work.

While ability in this context can be characterized as something other than a physical impediment to perform the job, such as whether a claimant can perform the job when incarcerated or without proper education, the Claimant's ability to perform the light-duty job with Argos was physical as he was in "fear" of physical illness from COVID-19. Where the refusal to return to work is based on a physical reason, to be justified, it must be tied to the Claimant's physical restrictions and suitability, and the Claimant testified he could perform the job.

1. Where refusing a light-duty job is justified under Georgia law.

The Georgia Court of Appeals have held that a claimant's refusal to accept proffered suitable employment was justified where a claimant is unable to accept as a consequence of his incarceration prior to adjudication of his guilt. Scott Hous. Sys. v. Howard, 180 Ga. App. 690, 350 S.E.2d 27 (1986). Clearly, an incarceration would impact one's ability to perform the suitable job, and if one has no ability to perform the job offered due to incarceration by the State, then it is justifiable reason for refusing the position. A claimant's refusal was also justified when the position required him to spend time in parts of a plant which were not air

conditioned since the lack of air conditioning could adversely affect the claimant's prosthetic arm (resulting from the work injury) and his ability to work. Clark v. Georgia Kraft Co., 178 Ga. App. 884, 345 S.E.2d 61 (1986). Therefore, the Courts have distinguished scenarios where the adverse effect and work injury are directly linked.

The Supreme Court of Georgia has noted it was not unreasonable for a nurse to refuse a typing job, which she was physically capable of performing, but lacked the skills to perform. City of Adel v. Wise, 261 Ga. 53, 401 S.E.2d 522 (1991), citing Shogren v. Bethesda Lutheran Medical Ctr., 359 N.W.2d 595 (Minn. 1984). In the same case, the Court also noted refusing work requiring relocation from one's home was reasonable as it was "life-disrupting." Id., citing Acco-Babcock, Inc. v. Counts, #87A-JL-1 (Superior Court of Delaware 1988). While these cases deal with a claimant's ability to perform the job for reasons other than a claimant's physical restrictions, Mr. Taylor's ability to accept the light-duty was impeded by a physical issue – fear of COVID-19. In Mr. Taylor's case, he testified could physically perform the job and his reason for not returning, assuming he actually knew the light-duty job existed, was fear of physical illness from COVID-19, which in turn has nothing to do with his work injury or restrictions.

2. Where refusal of a light-duty job is not justified under Georgia law.

In contrast, the Georgia Supreme Court has held that consideration of the loss of a part-time job does not constitute a justified refusal of work that the claimant is physically capable of performing. City of Adel v. Wise, 261 Ga. 53, 401 S.E.2d 522 (1991). In Wise, the Supreme Court reasoned that "the employee's refusal to accept employment must relate, in some manner, to his physical capacity or his ability to perform the job in order for his refusal to be justified within the meaning of O.C.G.A. § 34-9-240." Id. at 55.[3]

Notably, the Claimant tried to take the position in his brief that the Appellate Division "conflated" the two-prong test in Wise but he failed to import the clear intent and directive of the Supreme Court in the case establishing that a justified refusal must relate to the physical capacity or ability of the claimant to perform the job. The Amicus brief further takes this position into illogical territory by seeking to do away with any connection between such a refusal and the work injury, which would impermissibly expand and change the existing case law. These arguments simply ignore that the basis for the light-duty job was a work injury and work restrictions, and for a claimant to demonstrate a justified refusal, an inability to

[3] The Court of Appeals has also held a claimant's refusal to accept the proffered suitable employment was not justified because she did not want to work on the second shift. McDaniel v. Roper Corp., 149 Ga. App. 864, 256 S.E.2d 146 (1979). A claimant's refusal was not justified because she chose to take a lesser paying position with a new employer or when the position was non-union. Wal-Mart Stores, Inc. v. Harris, 234 Ga. App. 401, 506 S.E.2d 908 (1998); City of Adel v. Wise, 261 Ga. 53, 401 S.E.2d 522 (1991), citing Hamlin v. Michigan Seat Co., 112 Mich. App. 84, 314 N.W.2d 804 (Mich. App. 1981).

perform the job must be shown. If "ability" within the context of a work injury is a physical issue untethered from the assigned work restrictions precipitating the need for the light-duty job, what is to stop claimants from refusing work due to an inability to perform the job for any reason?

Importantly, in Brasher v. U.S. Xpress Enterprises, Inc., the Court of Appeals affirmed the Board's finding that an employee's assertion that a proffered light-duty job disrupted his life due to a lengthy commute did not constitute a credible and justified reason for refusing to work. 328 Ga. App. 20, 761 S.E.2d 448 (2014). While the Claimant tries to distinguish Brasher as more of a "credibility" case rather than addressing if the claimant's refusal of light-duty work was justified, it is clear that the Court of Appeals determined a lengthy commute did not impact that claimant's ability to perform the offered job.

The Claimant also tried to distinguish the Martines v. Worley & Sons Const. case to focus on the fact that the Court noted the claimant's refusal of work was unjustified because there were no physical or health-related reasons preventing the claimant from driving. 278 Ga. App. 26, 26, 628 S.E.2d 113, 113 (2006); (Claimant's Brief, pg. 22). Rather, the claimant in Martines could not do the job because he was undocumented and unable to produce a driver's license. The distinction the Claimant tries to draw in this case is that he was prevented from the light-duty job due to his health concerns (i.e., fear of Covid), but he fails to

consider that his health concerns are in fact a physical issue impeding his ability to work. Further, that physical impediment – a fear of physical illness from COVID-19 – has nothing to do with his work restrictions and his refusal is unjustified as he stated he could otherwise perform the job from a physical standpoint. It bears repeating this assumes the Claimant knew about the light-duty job in the first place.

Further, the record shows that the Claimant testified he would have returned to the light-duty job if he had known about it, which does not support that he was concerned with his health nor does it sound like returning to Argos would have been a "disruption" to his life, as that term is considered in Wise. The Claimant denied that he was quarantining, testifying instead at the hearing he had been "ill" with pain and denying he ever quarantined. Of course, the only information communicated to the Employer/Insurer by the Claimant's former attorney was that the Claimant was "really scared" of COVID-19, although his testimony seems to show otherwise as the Claimant denied telling his attorney he would not return to work due to fear of COVID-19. (V2-813). Additionally, the record reflects Argos was taking necessary precautions at that time for employees to safely return to work. (V2-352).

The Employer/Insurer offered a job to the Claimant that he was irrefutably physically capable and able to perform. The Claimant admitted he had performed

the work previously and would have no problem doing so again. (V2-819). The reason the Claimant did not return to work for Argos when light-duty was made available has nothing to do with his work injury, physical capacity, or ability to do the job.

On the one hand, there is evidence (at least proffered by his former attorney) to support the argument that it was the Claimant's "fear" of COVID-19 which formed the basis of his refusal of the light-duty job. Regardless of the Claimant's comorbidities, "being scared" of COVID-19 does not constitute a justifiable reason for refusing work that then entitles the Claimant to ongoing indemnity benefits if there is no connection to his ability to perform the work. What would happen if in a case where the claimant was released to light duty for a lumbar spine injury but the claimant refused to return to the light work because of a fear of reinjury to his back? If the Claimant's argument in the instant claim that a return to light duty work is justified due to the fear of COVID-19 is accepted by this Honorable Court, it would render the light duty return to work procedure meaningless.

By way of example, in Herrington v. Liberty Mut. Ins. Co., the claimant developed an allergy traced to chemical fumes at work. 140 Ga. App. 319, 319, 231 S.E.2d 99, 100 (1976). She was reassigned, laid off a year later due to economic slowdown and unable to obtain other work. Id. at 319. She claimed she was not reassigned because of her allergies. Id. There was evidence her allergies

were seasonal and she could work if allergenic substances were removed. Id. The Court of Appeals denied her claim, holding "the propensity to another allergic attack if the employee resumes her old job does not ipso facto entitle her to compensation." Id.

Georgia law is clear that a justified refusal must in some way relate to the claimant's physical capacity or ability to do the job. The evidentiary record reflects the Claimant had no reservations about his physical capacity or ability to perform the job. Whether he was scared of contracting COVID-19 has no connection with his light duty work, notwithstanding the fact that there is conflicting evidence as to whether the Claimant himself was even aware of the job that was communicated to his attorney.

As such, the Superior Court, in affirming the Appellate Division, did not err in finding the Claimant's refusal of light duty work for entirely personal reasons was unjustified as the record evidence clearly establishes there was nothing related to the Claimant's physical capacity or his ability to perform the job, and this Court should deny the Claimant's request for ongoing entitlement to TTD benefits.

III. The Employer/Insurer's suspension of indemnity benefits was not improper as Claimant's refusal of light-duty work barred him from receipt of TTD benefits pursuant to O.C.G.A. § 34-9-240.

a. Arms Wide Open's closure was representative of a general layoff unrelated to the Claimant's work injury.

Notwithstanding the evidence in the record that the Claimant testified he stopped working in March 2020 because he was quarantining, which he later denied at the hearing, the record shows that the Employer/Insurer continued to pay the Claimant TPD benefits after Arms Wide Open closed due to the pandemic on March 15, 2020. By order of the Appellate Division, the Employer/Insurer later issued payment for TTD benefits between March 16, 2020 and May 19, 2020 based on the Appellate Division's finding that TTD benefits were owed after Arms Wide Open shut down. There is no further justiciable issue here as the benefits in question have been paid.

It is well understood in Georgia workers' compensation that a general layoff of a workforce, including a claimant, does not necessitate the commencement of TTD benefits when the layoff was for reasons unrelated to the claimant's injury. At that time, in order to establish entitlement to indemnity benefits following what amounted to a general layoff by his assigned employer, the Claimant would have been required to meet his burden of proof and demonstrate that he made a diligent but unsuccessful effort to secure suitable employment following termination. Maloney v. Gordon County Farms, 265 Ga. 825, 462 S.E.2d 606 (1995). It is undisputed that the Claimant has never looked for work. Further, the Employer/Insurer continued to pay the Claimant TPD benefits, later making up the

difference to full TTD benefits after ordered by the Appellate Division, but there is no evidence the Claimant took any affirmative steps on his own to find other work.

Only a few weeks later, the Employer/Insurer was able, in midst of COVID-19, to offer suitable light-duty work to the Claimant. The Claimant refused the work, either because he was unaware it was offered or because his prior attorney communicated that the Claimant was fearful of COVID-19 and would not to return to any work, regardless of light duty. The Claimant never returned to work for Argos, and he was later terminated for cause for the failure to report, not a failure to accept light-duty work.

b. The Claimant is not entitled to indemnity benefits because he unjustifiably refused suitable light-duty work per O.C.G.A. § 34-9-240(a).

The Claimant contends that the Employer/Insurer failed to utilize the process outlined in O.C.G.A. § 34-9-240 and Rule 240 in offering him a light-duty job. First, while the statute provides a method for offering light duty work, there is nothing in the statute or the rule obligating its use. Moreover, the Claimant does not consider the impact of the record evidence of his own failure to return to suitable light-duty work or that of O.C.G.A. § 34-9-240(a), which provides:

> If an injured employee refuses employment secured for him or her and suitable to his or her capacity, such employee shall not be entitled to any compensation, except benefits pursuant to Code Section 34-9-263, at any time during the continuance of such refusal unless in the opinion of the board such refusal was justified.

The Claimant cannot require the Employer/Insurer to utilize the process in O.C.G.A. § 34-9-240 to suspend his benefits, but also ignore what the statute requires of him. The Employer/Insurer offered the Claimant a suitable light-duty job three times, on April 14, April 16, and May 19, 2020. Before that time, between March 16, 2020 and April 14, 2020, a period in which every employer in the state was dealing with the onset of COVID-19, the Claimant continued to receive TPD benefits despite being a part of what amounted to a general layoff by his assigned employer at Arms Wide Open.

Although Argos was able to offer suitable light-duty work to the Claimant only weeks into the pandemic, his prior attorney stated that the Claimant was not coming back to work "regardless" of the light-duty and that he was "really scared" of COVID-19. The ALJ found that these job offers were properly communicated to him pursuant to O.C.G.A. § 34-9-240, despite the Claimant's denial at the hearing that the job offers were relayed to him by his attorney. (V2-138, 813, 817). The Claimant would later unequivocally testify that he would have returned to the job if he had known about it as it was the same job he had performed before. (V2-819). Of course, by the time the Claimant stated in his deposition he would go back to Argos, he had been terminated for cause and the Employer/Insurer were not required to then continually offer him work. Rather, the Claimant bore the

burden of proof following his termination for cause to establish entitlement to indemnity benefits.

Regardless of whether TTD benefits were commenced immediately after Arms Wide Open closed, the fact that he refused suitable employment a month later disqualifies him from receiving TTD benefits during the period of his refusal unless it was found to be justified. The Appellate Division, later affirmed by the Superior Court, correctly determined based on the record evidence that Claimant refused to return to work for entirely personal reasons that had nothing to do with his work injury or ability to perform the job. As such, there is no legal issue here to be determined but a fact issue, and the evidentiary record shows that the Employer/Insurer offered the Claimant a suitable job and he refused it due to fear of COVID-19, which was not a justified reason in line with the precedent established by Georgia courts.

Alternatively, should this Court somehow determine the Claimant is entitled to indemnity benefits from March 16, 2020 and continuing despite the overwhelming evidence to the contrary, the Employer/Insurer contend that the Claimant's entitlement to those benefits then ends with the June 12, 2023 Appellate Division Award. O.C.G.A. § 34-9-240 provides that the Claimant shall not be entitled to "any compensation . . . at any time during the continuance of such refusal unless, in the opinion of the Board, the refusal was justified."

(emphasis added). Therefore, the Appellate Division Award, an opinion of the Board, denying the Claimant income benefits by finding his refusal of light-duty work was not justified, cuts off his entitlement to those benefits as of June 12, 2023.

IV. The Superior Court, in affirming the Appellate Division, did not err in failing to award TTD benefits after the Claimant stated he was willing return to light-duty work as he had been terminated for cause and he bore the burden of proof to establish an inability to secure suitable employment due to his work injuries.

The Superior Court, in affirming the Appellate Division, did not commit reversible error in failing to award the Claimant TTD benefits after he notified the Employer/Insurer during his deposition that he was willing to return to work because following his termination for cause on May 21, 2023, the Claimant bore the burden of proof to demonstrate by a preponderance of the evidence that his loss of earning capacity was related to a compensable workplace injury, that he continued to suffer physical limitations attributable to that injury, and that he made a diligent but unsuccessful effort to secure suitable employment following termination. Maloney v. Gordon County Farms, 265 Ga. 825, 462 S.E.2d 606 (1995). To find otherwise would place an unworkable and onerous burden on an employer's business operation by requiring them to provide light-duty work at the whim of an employee who was terminated for cause unrelated to any work injury.

The Claimant's argument completely ignores his own testimony that he would have returned to work for Argos had he known about the light duty job offer. The simple fact is that Argos did convey the availability of light-duty work to the Claimant via his prior attorney, who evidently never told the Claimant about the job or declined it due to COVID-19 concerns that the Claimant also testified he never discussed with her. What else is an employer supposed to do who properly offers suitable work, which the employee either refuses due to COVID-19 concerns or because he never knew about it, terminates the employee for failing to ever show back up to work, and is then faced with giving that employee a job six months later because the employee asked for it? In actual practice, this a preposterous requirement of any employer.

Mr. McMichael's unimpeached testimony in the record reflects that the Claimant was terminated for the failure to report.[4] (V2-788). After his termination for such misconduct, Argos was under no responsibility to continually offer the Claimant work and the Claimant bore the burden of proof under Maloney to establish entitlement to indemnity benefits. There is undisputed evidence in the record to support the Superior Court's determination that the Claimant could not carry that burden of proof to establish entitlement to ongoing indemnity benefits.

[4] Although the Claimant contends he "simply wanted more information before returning to the light-duty job," the undisputed evidence shows that the Claimant would not be returning to any work "regardless" of light-duty or because he did not know about the job offer.

The Claimant admitted to not working anywhere else since Arms Wide Open in March 2020 and he denied looking for work anywhere as well. (V2-819). Both the Administrative Law Judge and Appellate Division stated that it was "undisputed that [the Claimant] has not made any effort to secure other employment." (V2-185). As such, the Appellate Division and Superior Court, by operation of law, did not err by failing to award TTD benefits after the Claimant testified that he wanted to return to work because the burden of proof had shifted to the Claimant, he could not meet that burden, and the Employer/Insurer was under no obligation to continue to provide light-duty work to an employee who was terminated for cause six months prior.

The inarguable fact is that the Claimant has made no effort at all to find another suitable job. He has not completed a single application or inquired with any other employer about work. The legal mechanism available to the Claimant is not that the Employer/Insurer should forever hold open a job for him despite his termination for cause for failing to report to work, but rather the Claimant must meet his burden of proof outlined in the Maloney case and provide evidence of a diligent but unsuccessful job search, which would entitle him to indemnity benefits. However, the undisputed evidence shows that Claimant never even took the slightest initiative in that direction. The evidentiary record supports the finding of the Appellate Division and Superior Court that the Claimant failed to meet his

Maloney burden, and this Court should affirm the Superior Court Order denying the Claimant ongoing TTD benefits.

CONCLUSION

For the foregoing reasons, the Appellees respectfully request this Honorable Court affirm the decision of the DeKalb County Superior Court, affirming Appellate Division of the State Board of Workers' Compensation, and deny the Claimant's request for TTD benefits.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 13th day of May, 2024.

Respectfully submitted,

SWIFT, CURRIE, MCGHEE & HIERS, LLP

Mark J. Goodman
State Bar of Georgia No. 301180

G. Scott Hoffman, Jr.
State Bar of Georgia No. 380309
Attorneys for Appellees

Swift, Currie, McGhee & Hiers, LLP
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309
404-874-8800

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **APPELLEE'S BRIEF TO THE COURT OF APPEALS** upon all parties to this matter by e-filing with the Court of Appeal's EFast system and depositing a true copy of same via U.S. Mail, proper postage prepaid, and via electronic mail addressed to counsel of record as follows:

Veronica Richardson
Richardson Law, LLC
1000 Parkwood Circle, SE, Suite 350
Atlanta, GA 30339
VRichardson@RichardsonLaw-LLC.com

This 13th day of May, 2024.

SWIFT, CURRIE, MCGHEE & HIERS, LLP

Mark J. Goodman
State Bar of Georgia No. 301180

G. Scott Hoffman, Jr.
State Bar of Georgia No. 380309
Attorneys for Appellees

Swift, Currie, McGhee & Hiers, LLP
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309
404-874-8800
4856-2217-7726, v. 2
4856-2217-7726, v. 2