IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EUGENE WATSON,	:	
Appellant,	:	**C.A. No: 09A-06-002 (RBY)**
v.	:	
WAL-MART ASSOCIATES, a Delaware corporation,	:	
Appellee.	:	

Submitted: March 24, 2010
Decided: June 16, 2010

Upon Consideration of Appellant's Appeal of the Decision of the Industrial Accident Board
AFFIRMED

OPINION AND ORDER

Bayard J. Snyder, Esq. Snyder & Associates, P.A., Wilmington, Delaware for Appellant.

Christine P. O'Connor, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware for Appellee.

Young, J.

Watson v. Wal-Mart Associates
C.A. No: 09A-11-001 (RBY)

I. SUMMARY

Eugene Watson ("Appellant") appeals from a decision of the Industrial Accident Board ("Board") that granted Appellee Wal-Mart's petition to terminate Appellant's total disability benefits. In particular, Appellant takes issue with the Board's findings that: one, he was not a *prima facie* displaced worker; and two, he failed to show that he conducted a reasonable job search which was unsuccessful because of his injury. The Board's finding that Appellant was not a *prima facie* displaced worker was supported by substantial evidence. The Board's finding regarding Appellant's job search was tainted by some legal error. The Board's error, however, was limited enough so as not to require reversal. Accordingly, the Board's decision is **AFFIRMED**.

II. FACTS

A. Background

Appellant was employed at Wal-Mart's Smyrna distribution center as a laborer performing medium to heavy duty work. In May 2007, he injured his back processing goods at that facility. Despite the injury, Appellant was able to return to full time work with limited restrictions and on-going conservative medical treatment. Appellant was placed on temporary alternative duty at the distribution center. Once that period lapsed, he was placed on total disability and stopped working.

In August 2008, Appellant sought surgery in hopes of alleviating his back pain. Unfortunately, the surgery increased his pain. After physical therapy failed to reduce the pain or solve his complications, Appellant's doctor limited him to sedentary or light duty with a twenty pound lifting restriction.

In December 2008, Wal-Mart filed a petition for review of Appellant's benefits. Wal-Mart requested the termination of Appellant's total disability benefits, because it believed Appellant was physically able to work. The Board held a hearing on July 15, 2009. In a written decision issued October 13, 2009, the Board granted Wal-Mart's petition, terminated Appellant's total disability benefits, and granted Appellant partial disability benefits.

B. The Board Hearing

At the hearing, both parties, represented by counsel, put forth testimonial and documentary evidence supporting their respective positions. The evidence presented at the hearing focused on three main issues: Appellant's physical condition and work restrictions; Appellant's employment history, qualifications, and skills; and Appellant's job search.

The parties presented evidence regarding Appellant's level of disability. There was no real dispute about this issue. After Appellant's surgery, his treating doctor had placed him on restrictions that limited him to sedentary or light duty work, subject to a twenty pound lifting restriction. Wal-Mart's medical expert testified that, while Appellant was not totally disabled, his ability to work was restricted. Wal-Mart's expert agreed that Appellant's restrictions were reasonable. Both parties' doctors, therefore, agreed that Appellant was not totally disabled, but he could only work with the aforementioned restrictions.

Appellant testified about his employment history. He graduated from Smyrna High School in 1973 and served honorably in the United States Army from 1973-75. After finishing military service, Appellant was employed in a wide variety of jobs,

including the following (in rough chronological order): an unspecified position at a Milford cannery; a janitor at the Delaware Home for the Chronically Ill; a security guard at the Milford Hospital; a refinery worker for Allen Tech; an assembly line worker at Leer Corporation; back to the Delaware Home for the Chronically Ill, this time as a janitorial supervisor; and, finally, he worked for Wal-Mart. Appellant spent a total of thirteen years working at the Delaware Home for the Chronically Ill, and he described the rest of his jobs as short-term.

Both parties presented evidence regarding Appellant's qualifications and skills. Appellant is an African-American male who, at the time of the hearing, was fifty-four years old. Appellant testified that he is a high school graduate, is able to drive, and has some limited computer skills. Appellant further noted that he did not receive any formal vocational training while serving in the Army. Wal-Mart presented evidence through Jessica Reno, a vocational case manager retained for this case. Ms. Reno testified that, based on Appellant's employment history and vocational background, Appellant is "able to take instructions, work with other employees and basically he is able to follow instructions from a supervisor. He has an extensive employment history so he is able to hold a position."[1] Ultimately, Ms. Reno concluded that Appellant's qualifications and skills could "be put to use even in this economy."[2]

The final issue, Appellant's job search, received most of the parties' attention.

[1] Hr'g Tr. at 14. Unfortunately, the record on appeal was not marked with continuous numbering. The Court must therefore refer to the record piecemeal, using document-specific citations.

[2] *Id.* at 15.

The record contains lengthy testimony and significant documentary evidence regarding the issue. In an effort to clarify the record, the Court will first cover the Appellant's testimony, then move on to Ms. Reno's testimony.

Appellant testified about how he conducted his job search. He began his job search after receiving Wal-Mart's petition. He recorded details about his search, including the position, employer, when he applied, how he applied, and what feedback he received.[3] Appellant applied to twenty-eight jobs, some online and some in-person. He found most of the job openings online or in the newspaper. Appellant believed that he was physically capable of performing all of the applied-for positions. He testified that all of the applications, whether done online or in-person, included sections that asked whether he had any physical restrictions. Appellant testified that he stated in those sections that he was restricted to sedentary or light duty subject to a twenty pound lifting restriction. He only received feedback from two of the prospective employers. Both employers wrote to him and stated that his twenty pound lifting restriction prevented them from pursuing his application further.

Appellant made a number of concessions during cross-examination. Wal-Mart questioned Appellant about the two employers who had contacted him. Appellant admitted that both positions - carpet cleaner and janitor - were outside his work restrictions. When asked why he had applied to those two positions, Appellant said, "I had to try to get work."[4] Similarly, Appellant admitted that another position he applied for, TV deliveryman, was outside his restrictions. When asked whether he

[3] Claimant's Ex. 1 ("Eugene Watson's Work Searches").

[4] Hr'g Tr. at 45.

knew that position would require him to be able to move TVs, Appellant responded, "I don't know I went for work. I was there doing what I was supposed to do."[5] Appellant was also questioned about the thoroughness of his search. He did not recall the names of the people with whom he spoke, he did not observe any of the potential jobs being performed in order to determine whether he could do them, and he did not inquire about training requirements or pay.

Ms. Reno's testimony was primarily focused on the labor market survey she conducted. Ms. Reno conducted the survey by looking for positions within thirty miles of Dover that were compatible with Appellant's skill set and work restrictions. She looked for open positions in newspapers and online. She visited each prospective employer, discussed the availability of the position with a knowledgeable person, observed the job to ensure it complied with Appellant's restrictions, and confirmed that the potential employer would hire someone with Appellant's restrictions. She did not ask the employers whether they would consider the Appellant himself as a prospective employee. Based on her survey, Ms. Reno identified nine available jobs that she believed were compatible with Appellant's skills and restrictions: collections agent, valet parking cashier, ticket representative, restaurant manager, surveillance officer, customer service representative, call center representative, supermarket cashier, and hardware store sales associate.[6]

In addition, Ms. Reno commented on Appellant's job search. She was aware that Appellant had conducted his own job search and she had been given a copy of

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[5] *Id.* at 54.

[6] Employer Ex. 2 ("Labor Market Summary Sheet").

Appellant's job search log. Based upon the information in that log, Ms. Reno concluded that twelve of the twenty-eight positions Appellant applied for were outside his restrictions, because those positions required lifting over twenty pounds. She further stated that, of the sixteen other applied-for positions that were within Appellant's restrictions, three were no longer available when Appellant had applied.

Appellant's counsel questioned Ms. Reno. She agreed that there were other positions at Wal-Mart that Appellant could perform, but she did not approach any of the many local Wal-Mart stores to inquire whether there were any openings. Ms. Reno explained that she did not look into Wal-Mart positions, because she confined her search to newspapers and online postings. When Appellant's counsel presented statistics that showed it was particularly difficult for individuals like Appellant – specifically African-Americans over fifty-five – to find employment, Ms. Reno stated she was not aware of those statistics, but they sounded correct. She agreed that sixteen of the twenty-eight positions Appellant applied for were within his restrictions. Furthermore, she agreed with Appellant's counsel's statement that employers "run the risk of violating Federal law" if they state that they won't consider a prospective employee because of a disability.[7] Finally, Ms. Reno was asked how Appellant's disclosure of his work restrictions impacted his job search. She responded that "there is a possibility [that prospective employers] might not call [Appellant] back if they see restrictions immediately."[8]

C. The Board's Decision

[7] Hr'g Tr. at 26.

[8] *Id.* at 27.

The Board issued a written decision on October 13, 2009, wherein it made factual findings and conclusions of law. The Board accepted the doctors' opinions that Appellant was not totally disabled physically, and instead could work subject to certain restrictions. The Board then moved on to the more critical issue: whether Appellant was a displaced worker.

The Board found that Appellant was not *prima facie* a displaced worker.[9] The Board noted that it had to consider Appellant's age, physical limitations, education, mental capacity, and training. The Board reached its conclusion by reasoning that Appellant was "only fifty-five years old, has a high school degree, and transferable skills based on his education and work experience. He is able to take instructions and work with other employees, as well as read, communicate and do mathematics. [Appellant] is able to function as an adult in today's society . . . ."[10]

The Board then found that Appellant failed to meet his burden regarding his job search. Before addressing the evidence, the Board noted that Appellant had the burden to show that he had "made a reasonable effort to locate employment, but was unable to do so due to his disability."[11] First, the Board found that Appellant had "not conducted an adequate job search even though he applied for about twenty-eight jobs."[12] Next, the Board found that Appellant failed to prove that he was denied

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[9] The meaning of the phrase "*prima facie* displaced worker" is discussed later in this Opinion.

[10] Bd. Decision at 6-7.

[11] Bd. Decision at 7.

[12] *Id.*

employment because of his restrictions. The Board supported both of those findings by stating, "[Appellant] has not heard back from most of the jobs on his log, some jobs were not hiring, and other jobs were beyond his restrictions."[13] Next, the Board stated that it accepted Ms. Reno's testimony that her labor market survey showed that there were available jobs compatible with Appellant's skills and restrictions. Finally, the Board found "that the survey and Ms. Reno's testimony are sufficient to prove that [Appellant] is employable and not a displaced worker."[14]

Based on those findings, the Board concluded that Appellant was not a displaced worker. Accordingly, the Board found that Appellant was no longer totally disabled.[15]

III. STANDARD OF REVIEW

"On appeal, this Court reviews a decision of the Industrial Accident board to determine whether the Board's decision was supported by substantial evidence and free from legal error."[16] Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."[17] That is a lower requirement standard

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[13] *Id.*

[14] *Id.*

[15] Bd. Decision at 8. Some of the Board's findings and conclusions address issues that are not discussed in this Opinion because they are irrelevant to this appeal.

[16] *Freebairn v. Voshell Builders*, 2006 WL 2906142, at * 3 (Del. Super. Sept. 7, 2006).

[17] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

than a preponderance of the evidence.[18] This Court is limited to consideration of the record presented to the Board.[19]

IV. ANALYSIS

An individual may be entitled to total disability benefits even if he is physically capable of performing some work. This is because, while a person may not be totally disabled *physically*, he may be totally disabled *economically*.[20] This interpretation of Delaware's Workers' Compensation law has developed into what was formerly known as the "odd-lot" doctrine, which now goes by the more tactful term, "displaced worker."[21] The Delaware Supreme Court has explained that the term refers to "a worker who, while not completely incapacitated for work, is so handicapped by a compensable injury that he will no longer be employed regularly in any well known branch of the competitive labor market and will require a specially-created job if he is to be steadily employed."[22]

In order to determine whether an individual is a "displaced worker," an analytical framework full of shifting burdens is applied. The former employer has the

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[18] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) (citing *DiFilippo v. Beck*, 567 F. Supp. 110 (D. Del. 1983)).

[19] *Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976).

[20] *Chubb v. State*, 961 A.2d 530, 536 (Del. 2008).

[21] *Ham v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967) (noting the Court's choice of terminology).

[22] *Id.*

initial burden to prove that the employee is no longer totally incapacitated from working.[23] If the former employer satisfies this requirement, the burden then shifts to the employee to show that he is a displaced worker.[24] There are two ways for the employee to demonstrate that he is displaced: one, show that he is a *prima facie* displaced worker; or two, demonstrate that he "has made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury."[25] The employee may choose to pursue one or both of those options.[26] If the employee has met his burden, the burden shifts once again, giving the former employer the last word.[27] In order to prevail, the former employer must "show the availability of work within the employee's capabilities."[28] Notably, the former employer "need not show

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[23] *Torres v. Allen Family Foods*, 672 A.2d 26, 30 (Del. 1995).

[24] *Id.*

[25] *Id.* (quoting *Franklin Fabricators v. Irwin*, 306 A.2d 734, 737 (Del. 1973)); *see Lee v. UE&C Catalytic, Inc.*, 1999 WL 459257, at *2 (Del. Super. Mar. 31, 1999) ("[T]here are two ways an injured employee initially can be deemed a displaced worker. First, the worker's unemployability may be readily apparent. Second, if unemployability is not apparent, the employee may undertake to show the he sought work but was unsuccessful because of his injury.").

[26] *Chubb*, 961 A.2d at 536 n.16 ("If the employee shows that he is a *prima facie* displaced worker *or* that he made reasonable efforts to secure suitable employment which have been unsuccessful because of the injury, the burden shifts back to the employer . . . .") (emphasis added and internal quotations omitted).

[27] *Torres*, 672 A.2d at 30.

[28] *Id.*; *see Ham*, 231 A.2d at 262 (remanding the case to the Board, after holding that the employee was displaced, to allow the former employer to present evidence showing the availability of employment within the employee's capabilities).

that someone has actually agreed to hire the employee."[29]

In this case, evidence was presented to address all of the applicable burdens. Because it was undisputed that Appellant was only partially, not totally, physically disabled, Wal-Mart met its initial burden to show that Appellant was not totally incapacitated. Appellant attempted to meet both tests that would satisfy his burden to demonstrate that he was displaced. For its part, Wal-Mart attempted to show that there was available work within Appellant's capabilities. The Court begins with Appellant's effort to show that he was a *prima facie* displaced worker.

A. The *Prima Facie* Test

An employee is a *prima facie* displaced worker if certain characteristics of the person make it clear that he can no longer be regularly employed in the competitive labor market without a specially created job.[30] In making this determination, the employee's "obvious physical impairment, coupled with other factors such as [his] mental capacity, education, training, or age" should be considered.[31] In addition, the employee's ability to obtain employment in the past, when he had the same limited education and training, is another factor to consider.[32] "No one factor is necessarily decisive."[33] Classification as a *prima facie* displaced worker is most often reserved

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[29] *Rittenour v. Astropower, Inc.*, 2005 WL 4051539, at *2 (Del. Super. Dec. 29, 2005) (quoting *Miranda v. E.I. DuPont*, 2000 WL 303317, at *2 (Del. Super. Feb. 29, 2000)).

[30] *See Ham*, 231 A.2d at 261.

[31] *Id.*

[32] *Rittenour*, 2005 WL 4051539, at *3.

[33] *Chubb*, 961 A.2d at 537.

for situations when the individual can be characterized only as a general laborer.[34]

The Board's finding that Appellant was not a *prima facie* displaced worker was supported by substantial evidence. The Board properly considered Appellant's work restrictions, age, education, training, and employment history. It concluded that Appellant was not too advanced in age. The Board further concluded that, because Appellant had a high school degree as well as transferable skills gained from an extensive work history, he was not clearly unable to participate in the workforce. Appellant points out that most of his jobs could be characterized as involving general labor. Appellant's work as a security guard and aspects of his job as a janitorial supervisor, however, called for skills beyond that of a general laborer, and did not involve medium or heavy duty work. Consequently, the Board's finding that Appellant was not a *prima facie* displaced worker must stand.

B. Job Search Test

An employee demonstrates that he is a displaced worker by showing that he: one, made reasonable efforts to find suitable employment; *and* two, those efforts were

[34] *See Ham*, 231 A.2d at 262 (holding that employee was a displaced worker because he had "no education, training, experience, or skills to qualify him for any kind of work except that of general labor"); *Nanticoke Mem'l Hosp. v. Roach*, 2004 WL 2050513, at *4 (Del. Super. Sep. 8, 2004) ("[A] worker is *prima facie* displaced if she does not have the education, training, experience or skills to qualify her for work other than as a general laborer who is able to do only light or sedentary work."); *Lister v. Flour-Daniel Constr. Co.*, 1992 WL 91122, at *4 (Del. Super. April 13, 1992) (holding that employee - who could not write, had an eight grade education, and had no office skills or experience with office machinery - had to be classified as a displaced worker because he was an "unskilled worker unable to perform at a level beyond that of a general laborer.").

unsuccessful because of his work injury.[35] The Board's determination of the reasonableness of a job search involves a factual inquiry into whether the search was a "diligent, good faith effort to locate suitable employment in the vicinity."[36] Additionally, "[t]he employee's motive in finding a job can be helpful in determining whether her efforts were reasonable and can shed light on [his] sincerity and credibility."[37] Regarding the question of whether an employee's efforts were unsuccessful because of his injury, the employee may make this showing in two ways.[38] First, the employee may use direct evidence showing that prospective employers would not hire him because of his injury.[39] Second, if the employee provides evidence that "he informed prospective employers of his physical impairment and was unsuccessful in obtaining employment," an inference arises that is sufficient to satisfy his burden of proof.[40]

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[35] *Torres*, 672 A.2d at 30.

[36] *Am. Original Corp. v. Bailey*, 1992 WL 179405, at *3-4 (Del. Super. June 19, 1992).

[37] *Miranda*, 2000 WL 303317, at *4. The *Miranda* court continued, "The test of [the employee's] good faith effort to find employment involves an evaluation of [his] sincerity and credibility, and the Board's judgment is entitled to deference." *Id.* (internal quotation marks omitted).

[38] *Adams v. Shore Disposal, Inc.*, 1997 WL 718651, at *5 (Del. Super. July 29, 1997).

[39] *Id.*

[40] *Id* (citing *Schmitt v. Cecil Vault & Mem'l Co. New Castle County*, 1983 WL 413313, at *2 (Del. Super. Aug. 17, 1983)); *see Keeler v. Metal Master Inc.*, 1997 WL 855721, at *5 (Del. Super. Aug. 17, 1983) ("Therefore, if a claimant [performs a job search] and informs prospective employers of his physical impairment and is unsuccessful, it is reasonable to infer from these facts that there is no reasonably stable market for his services which are limited because of his injury. Such a showing would be sufficient to satisfy the claimant's burden of proof."); *cf.*

Before considering the Board's determination on this issue, the Court pauses to address a concern. The Board's explanation of its decision on this issue is lacking. The Board's holding is stated in rather conclusory terms, with little reasoning included in support. Such summary decision-making is troubling, because it makes the reviewing court's job quite difficult.[41] Nonetheless, this Court need not reverse if "the Board fails to make its findings in expansive terms. If appropriate, reviewing courts can look at subordinate facts underlying the Board's conclusions when those facts can be determined, by implication, from the ultimate conclusion."[42]

The Board's finding that Appellant's job search was not reasonable was supported by substantial evidence. It appears from the Board's decision that this finding was based, in part, on the fact that twelve of the twenty-eight jobs Appellant applied for were clearly beyond his restrictions. Moreover, there was record evidence which suggested that Appellant's search was not very thorough; he did not observe any of the potential jobs and he did not inquire about training requirements or pay. Furthermore, some of Appellant's testimony could be interpreted as showing his search was insincere.[43] While considering the motive behind the job search should

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Torres, 672 A.2d at 31 (noting that employee's failure to inform prospective employers of her disability made it less likely they had refused to hire her due to her disability).

[41] *See Atlantis Commc'n v. Webb*, 2004 WL 1284213 (Del. Super. May 28, 2004).

[42] *Haveg Indus., Inc. v. Humphrey*, 456 A.2d 1220, 1222 (Del. 1983).

[43] In particular, the fact that Appellant only began his search after receiving Wal-Mart's petition, as well the following statements, "I had to try to get work," and "I was there doing what I was supposed to do." Hr'g. Tr. at 45, 54.

be done with caution, it is relevant to the question of reasonableness.[44] This evidence provides a factual basis that a reasonable person might accept as adequate to support the Board's conclusion.

Appellant argues that he presented sufficient evidence to show that his search was reasonable. In particular, he points to the evidence that he applied to sixteen jobs within his restrictions that were in or near Dover. That evidence does support Appellant's position; however, "[t]he court does not make factual findings, weigh the evidence, or resolve conflicts in the evidence - that is solely the province of the Board."[45] In short, this finding will not be upset on appeal, "even [though] the Court might have, in the first instance, reached an opposite conclusion."[46]

In contrast, the standard of review does not save the Board's finding that Appellant failed to show that his search was unsuccessful because of his injury. Appellant presented uncontradicted evidence that he informed all of the prospective employers about his specific work restrictions. Only two of the twenty-eight prospective employers – and none of the sixteen prospective employers that Wal-Mart conceded offered positions within Appellant's restrictions – ever responded

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[44] *Schmitt*, 1983 WL 413313, at *2 ("Although motivation may be relevant in determining the sincerity of the effort . . . [t]he fact that he had to make such efforts in order to obtain employment benefits is irrelevant. Otherwise, the Board would require two separate job searches to qualify . . . and that would be absurd.").

[45] *Wesley Coll. v. Unemployment Ins. Appeal Bd.*, 2009 WL 5191831, at *7 (Del. Super. Dec. 31, 2009).

[46] *Diamond Materials v. Manganaro*, 1999 WL 1611274, at *2 (Del. Super. April 8, 1999).

to Appellant's inquiries.[47] Thus, an inference arose that satisfied the "because of" prong of the job search test. The Board's failure to recognize this inference was legal error.

The Board's error, however, was harmless. Appellant needed to prove two things: that his search was reasonable and that it was unsuccessful because of his injury. As previously stated, the Board's finding that Appellant's search was not reasonable was supported by substantial evidence. Appellant's failure to show that his search was reasonable renders moot the question of whether he showed that his search was unsuccessful because of his injury. Accordingly, the end result reached by the Board – that Appellant failed to demonstrate that he was a displaced worker under the job search test – must be affirmed despite the legal error.

C. Outcome

Appellant had two opportunities to shift the burden back to Wal-Mart. The Board found that Appellant did not meet his burden under either the *prima facie* test or the job search test. For the aforementioned reasons, the Board's findings must be affirmed. Thus, the burden never shifted to Wal-Mart to demonstrate the availability of work within Appellant's capabilities. Accordingly, the Board's ultimate conclusion that Appellant was no longer totally disabled must be affirmed as well.

CONCLUSION

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[47] In the only two instances where Appellant received a response to his application, the prospective employers stated that they could not hire Appellant because of his restrictions. That is the sort of direct evidence that could be sufficient to meet Appellant's burden. The Board's rejection of this evidence, however, is arguably excusable because both positions were clearly outside of Appellant's restrictions.

For the foregoing reasons, the Board's decision is **AFFIRMED.**

SO ORDERED this 16th day of June, 2010.

J.

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