SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Docket No. A-001212-23

RICHARD H. LAMBDON, *Claimant-Appellant*, *v.* **BOARD OF REVIEW, DEPARTMENT OF LABOR, MONARCH BOILER CONSTRUCTION CO., INC.** *Respondent-Appellee.*	*ON APPEAL FROM:* Final Agency Decision Board of Review, Department of Labor Agency Docket No: DKT00273555 CIVIL ACTION *SAT BELOW:* Nancy Hunt, William Scaglione, and Lisa Hart, Members, Board of Review, Department of Labor

BRIEF IN SUPPORT OF CLAIMANT-APPELLANT RICHARD H. LAMBDON

FILING FEES WAIVED R. 1:13-2
SOUTH JERSEY LEGAL SERVICES, INC.
745 Market Street
Camden, New Jersey 08102
Phone: (856)964-2010, Ext. 6279
Fax: (856) 338-9227
Email: nkhan@lsnj.org
By: Noorzahan Khan, Esq.
Attorneys for Claimant-Appellant
Richard H. Lambdon

On the brief: Noorzahan Khan, Esq.
Robert J. Cooper, Esq.
Kenneth Goldman, Esq.

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PRELIMINARY STATEMENT

The Unemployment Compensation Law ("UCL") has a remedial purpose meant "to afford protection against the hazards of economic insecurity due to *involuntary* unemployment." Yardville Supply Co. v. Bd. of Review, 114 N.J. 371, 374 (1989) (emphasis added). As such, the UCL "must be construed liberally in favor of allowance of benefits." Haley v. Bd. of Review, 245 N.J. 511, 520 (2021). Plaintiff-Appellant, Richard H. Lambdon, requests that this court reverse the Board of Review's determination that he left his job voluntarily without good cause attributable to the work, and that he did not satisfy his burden under N.J.A.C. 12:17-9.3(b).

Mr. Lambdon was employed by Monarch Boiler Construction Co. as a Mechanical Helper to repair boilers from 1995 until he was forced to leave his job on June 4, 2021. During the 4-5 years leading up to that decision, Mr. Lambdon had started to notice that his job responsibilities were exacerbating the pain in his knees. Amid his final year with Monarch, the problem had reached a breaking point when he could no longer physically continue to work because the job demands had become too painful. Mr. Lambdon had spoken with his supervisor and his employer several times complaining about the pain in his knees, finally informing them that he would have to leave his job in six months if they could not provide him with any other type of employment. The continual

pain finally led Mr. Lambdon in January 2021 to seek medical attention for the osteoarthritis in both of his knees. Despite repeated declarations from Mr. Lambdon to his employer that the work was becoming difficult for him due to the pain in his knees, his employer did not make any accommodations for him, and finally, after six months of notice, on June 4, 2021, Mr. Lambdon had no choice but to leave his employment.

Because of the nature of the work done by Monarch, being a small family owned company focused solely on boiler repair and installation work, there were no other suitable positions for which Mr. Lambdon was qualified and that could be performed within the limits of his disability. There was no reasonable accommodation available. Upon leaving his employment, Mr. Lambdon filed for and was initially approved for unemployment benefits. The Deputy subsequently made a determination that Mr. Lambdon's decision to leave his job was voluntarily made and not for good cause attributable to the work, reversing his eligibility and disqualifying him for benefits. At both the Appeal Tribunal hearing and in the appeal to the Board of Review, Mr. Lambdon submitted medical certifications in support of his contention that the work aggravated his health conditions; however, both the Appeal Tribunal and the Board of Review rejected this evidence, and contrary to the regulation, further found that Mr. Lambdon did not notify his employer of his medical condition or seek an

accommodation, even though the employer testified that there were no suitable alternative positions available for Mr. Lambdon. As a result, Mr. Lambdon's separation from work was erroneously deemed to be voluntary, not for good cause attributable to the work, and for a personal reason, disqualifying him from benefits.

Because the Board of Review imposed an incorrect standard upon Mr. Lambdon, the Appellate Division should reverse the Board's denial of unemployment benefits to Mr. Lambdon.

PROCEDURAL HISTORY

Mr. Lambdon filed his claim for benefits on June 27, 2021 and was granted a Weekly Benefit Rate of $517.00. Pa4. On October 26, 2021, the Department of Labor ("Department") reviewed the assessment and determined that Mr. Lambdon was ineligible for benefits due to leaving work voluntarily. Pa3. The Department's determination resulted in a refund demand of $8,272.00. Ibid. Mr. Lambdon appealed the Department's determination on October 29, 2021 and the Appeal Tribunal hearing was held on May 16, 2022. Ibid. A final decision of the Appeal Tribunal affirming the denial of benefits was issued on May 17, 2022. Pa3 to Pa6.

Mr. Lambdon appealed to the Board of Review ("Board") on August 2, 2022, and subsequently filed an amended appeal with additional medical records on August 11, 2022. Based on the record below, the Board affirmed the denial of benefits on November 16, 2023. Pa1. Mr. Lambdon filed his Notice of Appeal to this court on December 21, 2023. Pa7.

STATEMENT OF FACTS

Mr. Lambdon was employed as a Mechanical Helper engaged in boiler repair work with Monarch Boiler Construction Co., Inc. from 1995 until on or about June 4, 2021. T7-7 to T7-15[2]. Monarch Boiler is a family-owned company in which Amy Tarvis is the owner and her son, Scott Tarvis, serves as a supervisor. T19-8 to T19-14. Mr. Lambdon worked full time, Monday through Friday, 7:00 a.m. to 3:30 p.m., and occasionally on weekends. T7-16 to T7-19.

Mr. Lambdon's job was physically demanding, and eventually, it became too painful and difficult for him to perform his work. T17-18 to T17-22. Boilers are typically located in the basement of a building and necessitate a lot of stairs and climbing. T13-20 to T13-21. Mr. Lambdon's work was physically intensive and required him to constantly be bending down, kneeling down, lifting, and

[2] The transcript does not have numbered lines; therefore, counsel cited lines by manually counting as one count per line of text.

carrying heavy materials. T16-9 to T16-10. Mr. Lambdon commonly had to carry boiler tubes that were 16 to 18 feet long and weighed 125 to 150 pounds. T14-3 to T14-6. He repaired boilers and the pipes inside the boilers, which required him to spend the whole day kneeling down in a space that was 2.5 feet high. T16-13 to T16-19. In addition to his boiler work, his position also often required him to work on an elevated platform on top of a roof and climb a ladder to drill holes inside a building. T14-20 to T15-16. For example, he had to shore up a sign for the Vineland Power Plant by putting up angles that were 20 feet long, one-quarter inch thick, and weighed about 200 pounds each, which had to be carried across the building. T15-21 to T16-6. Pa27. He did this same, physically demanding work for the entirety of his employment at Monarch Boiler. T17-1 to T17-7.

For the last couple of years at his job, it had become more and more difficult for Mr. Lambdon to perform this work because he had difficulty bending his knees; once he kneeled down, it would take him 5 to 10 minutes to get up and then another 5 to 10 minutes before he felt strong enough to walk. He had pain in both of his knees and up and down his legs. T17-18 to T18-11. Mr. Lambdon verbally informed his employer that he was in pain. He had complained to Scott Tarvis, his immediate boss, two to three times per week, and he had even mentioned to the owner, Amy Tarvis, that his knees weren't

working. T8-13 to T9-6, T11-18 to T12-7, T19-1 to T19-6. His employer's only response was to shake their head, T19-15 to T19-18, saying it will be alright, T19-19 to T19-22, or to make comments like, "That's what an old person does, they start aching." T20-3 to T20-4.

After seeking medical attention, Mr. Lambdon began treatment with Dr. Kleiner on January 22, 2021 and returned for appointments once every three months. Pa31. Mr. Lambdon had two appointments with Dr. Kleiner, on January 22, 2021 and April 23, 2021, right before he was finally forced to leave his job. His supervisor, Scott, was aware that Mr. Lambdon was receiving injections in his knees. T9-9 to T9-10. Dr. Kleiner treated Mr. Lambdon for osteoarthritis of bilateral knees and recommended that Mr. Lambdon seek other work because this job was aggravating Mr. Lambdon's condition; specifically, Mr. Lambdon was "unable to do any kind of boiler work without it causing increased pain in both knees". Pa37. As his condition deteriorated, Mr. Lambdon reluctantly notified his employer in January or February 2021 that he would have to leave in six months if there were no other positions for him. T9-15 to T9-19.

Unfortunately, Monarch Boiler did not have other work available that did not require strenuous physical activity, climbing ladders, or kneeling. T17-15 to T17-17. There were no office jobs available. The owner, Amy Tarvis, handled the paperwork, and her son, Scott, ordered parts. T17-13 to T17-14. Having

worked at the same company for 25 years, Mr. Lambdon was aware that his employer was a small family business, and he was familiar with the types of positions available. At the Appeal Tribunal hearing, Amy confirmed that there were no jobs that were not labor intensive for which Mr. Lambdon was qualified, T32-10 to T32-13, that all boiler work was labor intensive, T31-15 to T32-6, and that there were no other options for a mechanic laborer with Monarch Boiler. T33-21. Left without any other available options and unable to deal with the pain caused by his working conditions, Mr. Lambdon's health forced him to resign from his job on June 4, 2021.

Dr. Kleiner referred Mr. Lambdon to physical therapy, which he began on March 14, 2022. Mr. Lambdon's physical therapist, Sheri Dempsey, commented that Mr. Lambdon has difficulty with squatting and transferring from a sitting to a standing position, especially after prolonged sitting and driving. Pa34. In an addendum to the evaluation, Mr. Lambdon's physical therapist indicated that his diagnosis of osteoarthritis of bilateral knees has been exacerbated and "had been getting progressively worse over the last few years." Pa38.

On January 22, 2021, on the date of his first visit with Dr. Kleiner, x-rays were taken of Mr. Lambdon's knees. The x-ray report indicates that Mr. Lambdon has "moderate to severe left knee arthritis with significant medial joint space narrowing and osteophyte formation. Moderate right knee arthritis as

well." Pa42. The assessment and diagnosis both indicate, "Primary osteoarthritis of both knees." Pa42 to Pa43. The orthopaedic procedure note indicates that the procedure which Mr. Lambdon received on August 5, 2022 was an injection in the knee joint space. Pa40. [3] Dr. Kleiner further indicated that, despite receiving physical therapy and injections, Mr. Lambdon continues to have knee pain, and "he has difficulty with bending, kneeling, climbing stairs, heavy lifting, as well as driving long periods." Pa39.

Mr. Lambdon was ready, willing, and able to work but could not continue performing his job because it aggravated his osteoarthritis of bilateral knees. He was forced to leave his employment at Monarch Boiler because the company did not have other positions available to him, and he could not continue to work in pain. After leaving Monarch, he did apply for several jobs with other companies, establishing that he was able, available, and actively seeking more accommodating employment. T25-19 to T27-1.

After hearing the testimony of both Mr. Lambdon and his employer, Amy Tarvis, and notwithstanding Mr. Lambdon's medical documentation, the Appeal Tribunal and the Board of Review both erroneously found that Mr. Lambdon had not met his burden to establish that he had left his employment for good

[3] Please note that Pa40 correctly references the date of the x-rays as January of 2021; however, page Pa42 incorrectly notes the x-rays as having been taken on January 22, 2022. The correct date of the x-rays is January 22, 2021. See Pa47.

cause related to the work. As a result, they disqualified him from receiving benefits, and issued a refund demand in the amount of $8,272.00.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW REGARDING AGENCY FINAL DECISIONS.

Rule 2:2-3(a)(2) permits a party to appeal a final decision of an administrative agency. Appellate courts have a "'limited role' in the review" of administrative agency decisions. In re Stallworth, 208 N.J. 182, 194 (2011) (citation omitted). Although the "final determination of an administrative agency . . . is entitled to substantial deference," the Appellate Division will reverse if the decision of the administrative agency is "'arbitrary, capricious, or unreasonable,' the determination 'violate[s] express or implied legislative policies,' the agency's action offends the United States Constitution or the State Constitution, or 'the findings on which [the decision] was based were not supported by substantial, credible evidence in the record.'" In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 541 (2016) (quoting Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dep't of Env't Prot., 191 N.J. 38, 48 (2007)). "Unless a Court finds that the agency's action was arbitrary, capricious, or

unreasonable, the agency's ruling should not be disturbed." Brady v. Bd. of Review, 152 N.J. 197, 210 (1997).

In reviewing "the decision of an administrative agency", appellate courts "must give deference to the agency's findings of facts, and some deference to its 'interpretation of statutes and regulations within its implementing and enforcing responsibility'"; however, appellate courts are "'in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.'" Utley v. Bd. of Review, 194 N.J. 534, 551 (2008) (citations omitted). Appellate courts "'defer to an agency's interpretation of both a statute and implementing regulation, within the sphere of the agency's authority, unless the interpretation is plainly unreasonable.'" Ardan v. Bd. of Review, 231 N.J. 589, 604 (2018) (citations omitted). Appellate courts are "not bound by an unreasonable or mistaken interpretation of [a statutory] scheme, particularly one that is contrary to legislative objectives." McClain v. Bd. of Review, 237 N.J. 445, 456 (2019).

As argued below, the Appeal Tribunal, and subsequently the Board of Review, interpreted the relevant regulations in a plainly unreasonable manner. They did not consider the substantial, credible evidence in the record, and their decision violated legislative policy, specifically, the remedial nature of the law, as intended by the Legislature. Despite testimony from the employer indicating

that no other positions were available for Mr. Lambdon and after receiving medical documentation from Mr. Lambdon's treating physician in which his physician recommended he seek other work to reduce his symptoms, the Board was unreasonable in their interpretation and application of the regulations by finding that Mr. Lambdon voluntarily left his employment for a personal reason, thereby disqualifying him from benefits. The Board's finding should be overturned. Mr. Lambdon should be found eligible for benefits, and the demand for a refund rescinded.

II. THE BOARD OF REVIEW ("BOARD") ERRED AS A MATTER OF LAW IN DENYING MR. LAMBDON'S UNEMPLOYMENT BENEFITS BECAUSE THE BOARD'S DECISION IS BASED ON A PLAINLY UNREASONABLE APPLICATION OF THE REGULATION. (Pa1; Pa3)

The Unemployment Compensation Law, N.J.S.A. 43:21-1 et seq., was enacted "to further an important public policy: alleviating the burden of involuntary unemployment, a burden that 'now so often falls with crushing force upon the unemployed worker and his family.'" Ardan v. Bd. of Review, 231 N.J. 589, 601 (2018) (quoting N.J.S.A. 43:21–2). "'The purpose of the act is to provide some income for the worker earning nothing, because he is out of work *through no fault or act of his own* . . . .'" Yardville Supply Co. v. Bd. of Review, 114 N.J. 371, 375 (1989) (quoting Schock v. Board of Review, Division

of Employment Sec., Dept. of Labor and Industry, 89 N.J.Super. 118, 125 (App. Div. 1965)) (emphasis in original). "In order to further its remedial and beneficial purposes, the law is to be construed liberally in favor of allowance of benefits." Yardville, 114 N.J. at 374. See also McClain, 237 N.J. at 461-62.

An individual who "has left work voluntarily without good cause attributable to such work" is "disqualified for benefits" unless certain conditions are met. N.J.S.A. 43:21-5(a). "Good cause attributable to such work" is defined as "a reason related directly to the individual's employment, which was so compelling as to give the individual no choice but to leave the employment." N.J.A.C. 12:17–9.1(b). Good cause means "real, substantial and reasonable circumstances not imaginary, trifling and whimsical ones." Domenico v. Bd. of Review, 192 N.J. Super. 284, 287 (App. Div. 1983). Whether an employee's decision to leave work constitutes good cause must be determined using "the test of 'ordinary common sense and prudence.'" Brady v. Bd. of Review, 152 N.J. 197, 214 (1997) (citations omitted). The Supreme Court held that, where there is a voluntarily leaving of work issue, the analysis requires review for both voluntary leaving and good cause attributable to the work. Haley v. Bd. of Review, 245 N.J. 511 (2021). "[A] court must 'differentiate between (1) a voluntary quit with good cause attributable to the work and (2) a voluntary quit without good cause attributable to the work.'" Brady v. Bd. of Review, 152 N.J.

at 213–14 (quoting Self v. Bd. of Review, 91 N.J. 453, 457 (1982)). It is the claimant's burden "to establish good cause attributable to such work for leaving." N.J.A.C. 12:17–9.1(c).

Claimants who have left work due to a work condition that exacerbates their medical condition may be exempt from disqualification under N.J.S.A. 43:21-5(a). As outlined in N.J.A.C. 12:17–9.3(b),

> [a]n individual who leaves a job due to a physical and/or mental condition or state of health which does not have a work-connected origin but is aggravated by working conditions will not be disqualified for benefits for voluntarily leaving work without good cause 'attributable to such work,' provided there was no other suitable work available which the individual could have performed within the limits of the disability.

The regulation, however, does not outline the type of proof that a claimant must present to demonstrate that there was no suitable work available. Prior to Ardan, neither the Supreme Court nor the Appellate Division had enumerated the proofs required to demonstrate the lack of suitable work.

Addressing this question, the Supreme Court found that the regulation, by its plain terms, "defines what the claimant must prove: that there was 'no other suitable work available which the individual could have performed within the limits of the disability.'" Ardan, 231 N.J. at 605 (quoting N.J.A.C. 12:17–9.3(b)). The Court concluded that N.J.A.C. 12:17–9.3(b) does not impose a "notice-and-inquiry" requirement on every claimant. "Applied to a vast range of

workplace settings, *that standard calls for an individualized determination; it does not mandate in every case that the claimant demonstrate that she notified the employer of the medical condition and sought an alternative position that would accommodate that condition*." Id. (emphasis added).

Similar to the Board in Ardan, both the Appeal Tribunal and the Board erroneously required Mr. Lambdon to substantiate the fact that the work was aggravating his injury by providing medical documentation to his employer and seeking an accommodation from his employer. The Appeal Tribunal improperly relied on N.J.A.C. 12:17–9.3(d) in finding that Mr. Lambdon was required to present his employer with medical documentation. Contrary to the Appeal Tribunal's finding, the regulation requires an individual who "leaves work for health or medical reasons" to provide a "medical certification . . . to support a *finding* of good cause attributable to work." N.J.A.C. 12:17-9.3(d) (Emphasis added). Clearly, an employer cannot make a finding; only the administrative agency can make a finding after conducting a hearing. The regulation does "not require an employee to give such documentation to his employer" and "merely direct[s] a claimant to submit this supporting documentation in connection with an application for benefits." Holland v. Bd. of Review, No. A-0214-16T1, 2018

WL 3421444, *2-3 (App. Div. July 16, 2018) (slip op.). [4] Pa59 to Pa60. Mr. Lambdon complied with the regulation by submitting medical documentation to the Appeal Tribunal and the Board in support of his contention that the work aggravated his medical condition.

Likewise, Mr. Lambdon also complied with the requirement to show that no other accommodation was available. In certain situations, when conducting an individualized determination, "the claimant's medical proofs, combined with evidence of the physical demands of the former employment, the small size of the workplace, or other relevant factors, will be sufficient to satisfy the claimant's burden to demonstrate the unavailability of alternative 'suitable work.' Ardan, 231 N.J. at 605. "In other circumstances, a claimant will not be in a position to meet that burden absent proof that she notified the employer and sought an accommodation prior to resigning from the job." Id. Under Ardan, to prevail under N.J.A.C. 12:17-9.3(b), a claimant must show that "the employer had no position available that would accommodate the claimant's condition or the claimant would not have been assigned to any such position." Id. at 607.

The employee in Ardan failed to meet her burden to establish there was

[4] A copy of the unpublished decision is attached in Appellant's Appendix, Pa58. Appellant is unaware of any contrary decisions.

no other suitable work because she was employed at a medical and surgical hospital that employed hundreds of employees, and nothing in the record supported her "conclusory assertion that any effort to secure . . .'suitable work'. . . would have been futile." Id. Barney v. Bd. of Review, No. A-3221-19, 2021 WL 1904561, *3 (App. Div. May 12, 2021) (slip op.).[5] Pa51. Conversely, Mr. Lambdon did not need to expressly inquire about alternative positions because he had been employed with this employer for 26 years and was aware that his employer was a small, family-owned business with limited, very specific positions available. He knew that only the owner and her son handled the paperwork, that there were no desk jobs available, and that the only available positions were just as labor-intensive as his position. "Even if a petitioner need not prove notice to the employer and a request for accommodation, a petitioner must 'still show[ ] that, at the time of the claimant's departure, either the employer had no position available that would accommodate the claimant's condition or the claimant would not have been assigned to any such position.'" de la Cruz v. Bd. of Review, No. A-3333-19, 2022 WL 1406379 (App. Div. May 4, 2022) (slip op.) at *4 (quoting Ardan, 231 N.J. at 607).[6] Pa56. The owner,

[5] A copy of the unpublished decision is attached in Appellant's Appendix, Pa49. Appellant is unaware of any contrary decisions.

[6] A copy of the unpublished decision is attached in Appellant's Appendix, Pa53. Appellant is unaware of any contrary decisions.

Amy Tarvis, confirmed that there were no jobs that were not labor intensive for which Mr. Lambdon was qualified, that all boiler work is labor intensive, and that there were no other options for a mechanic laborer with Monarch Boiler. Mr. Lambdon even provided his employer an opportunity to give him other work by notifying his employer in January or February 2021 that he would have to leave his employment in June because of the pain that he was experiencing, but his employer could not and did not offer him other options or accommodations. Based on an individualized assessment of Mr. Lambdon's specific situation, he met his burden of showing that Monarch Boiler did not have alternative positions available to him that would not aggravate his knee pain and limited mobility.

The Appeal Tribunal erred in mischaracterizing the employer's testimony. The Appeal Tribunal decision acknowledges that the employer admitted that there was no other work that Mr. Lambdon could have performed; yet, the Appeal Tribunal mused that, "had he discussed his circumstances, the employer could have presented him with other options." Pa5. The "options" his employer testified that she would have discussed with Mr. Lambdon were to apply for disability benefits or to consider what to pursue for the future without clarifying what that actually would entail. T29-7 to T29-22. What was clear was that the "options" would not and could not include other work at Monarch Boiler. The

employer clearly acknowledged that (1) the only work available at Monarch Boiler was boiler work, (2) all boiler work is labor intensive, (3) there was no other work available at the company, (4) there were no positions that were not labor intensive for which Mr. Lambdon was qualified, and (5) there were no other options for a mechanic laborer with Monarch Boiler. At no time did the employer state that there were alternative positions that Mr. Lambdon could have performed within the company. In fact, the employer specifically stated the opposite: that there were no other positions available for Mr. Lambdon. The only "other options" would have involved the same type of work that was already aggravating his condition. It is readily apparent and clearly undisputed that based on the small size of the workplace and the limited positions available, that there were no alternative positions that could have accommodated Mr. Lambdon's medical condition.

The Board further mischaracterized the employer's testimony by finding that Mr. Lambdon would have been provided with additional help, had he sought an accommodation, by way of additional workers being sent to the worksite. The Board failed to recognize that additional workers would not have alleviated the work that Mr. Lambdon still had to do; specifically, his job required him to bend, squat, and kneel, all of which exacerbated his condition. This "accommodation" would only have provided relief to Mr. Lambdon if by providing the additional

workers that meant that Mr. Lambdon no longer had to do his job, and if he no longer had to do his job, then clearly this "accommodation" would merely have resulted in Mr. Lambdon being terminated for failure to do the work for which he was hired. Essentially, it would not have been an accommodation at all, but rather would have likely resulted in his termination. As established above, based on an individualized determination of Mr. Lambdon's specific situation, he should not have been required to expressly seek an accommodation, a requirement that the Board erroneously imposed upon him.

III. THE BOARD OF REVIEW'S DECISION DENYING BENEFITS IS NOT SUPPORTED BY THE WEIGHT OF THE SUBSTANTIAL CREDIBLE EVIDENCE BECAUSE THE BOARD FAILED TO GIVE PROPER WEIGHT TO MR. LAMBDON'S MEDICAL DOCUMENTATION SUBMITTED IN SUPPORT OF HIS LEAVING WORK FOR GOOD CAUSE RELATED TO THE EMPLOYMENT. (Pa1; Pa3)

Pursuant to N.J.A.C. 12:17–9.3(d), "[w]hen an individual leaves work for health or medical reasons, medical certification shall be required to support a finding of good cause attributable to work." Just as the regulation does not outline how a claimant can prove that there was no suitable work available, it similarly does not outline the specifics of the medical documentation to be submitted in support of a finding of good cause attributable to work. Here, Mr.

Lambdon has demonstrated "through uncontroverted medical evidence, that [his] disease has been and will be aggravated by the [work] environment," and this clearly "constitutes 'good cause.'" Israel v. Bally's Park Place, Inc., 283 N.J. Super. 1, 5 (App Div. 1995). He provided the Appeal Tribunal with four pieces of medical documentation, and supplemented the record by submitting an addition three pieces of medical documentation to the Board of Review.

As discussed above, Mr. Lambdon began treatment with Dr. Kleiner on January 22, 2021 and returned for follow up appointments once every three months. In fact, Mr. Lambdon had two appointments with Dr. Kleiner prior to leaving his job. Pa32 to Pa33. Similar to the employee in Israel who submitted "letters from alcoholism counselors opining that it would be deleterious to her recovery to work in the casino environment", Israel, 283 N.J. Super. at 4, Dr. Kleiner recommended that Mr. Lambdon seek other work because this job was aggravating Mr. Lambdon's health; specifically, he stated that Mr. Lambdon was "unable to do any kind of boiler work without it causing increased pain in both knees". Pa37.

Dr. Kleiner referred Mr. Lambdon to physical therapy, and Mr. Lambdon's physical therapist, Sheri Dempsey, commented that Mr. Lambdon has difficulty with squatting and transferring from a sitting to a standing position, especially after prolonged sitting and driving. Pa35. In an addendum

to the evaluation, Mr. Lambdon's physical therapist indicated that his diagnosis of osteoarthritis of bilateral knees has been exacerbated and "had been getting progressively worse over the last few years." Pa38. Dr. Kleiner further indicated that, despite receiving physical therapy and injections, Mr. Lambdon continued to have knee pain, and "he has difficulty with bending, kneeling, climbing stairs, heavy lifting, as well as driving long periods." Pa39.

Mr. Lambdon testified credibly and thoroughly about how the act of repeatedly carrying materials that were several hundred pounds, kneeling, squatting, and climbing ladders for eight hours per day would aggravate his condition. Specifically, Mr. Lambdon testified that although he has had this condition for the last three to four years prior to the hearing, it had not been quite as bad, but that the job had since put a toll on his knees. He also testified that as time went on it had become more difficult for him to do his job because he could not bend his knees. It would take him 5 to 10 minutes to get up when he kneeled down, and then he could not walk again for another 5 to 10 minutes. It is therefore obvious that having to climb a ladder, kneel, and squat for most of the workday would aggravate the osteoarthritis in his bilateral knees.

Both the Appeal Tribunal and the Board of Review erroneously found that no medical assessment was conducted in order to determine that Mr. Lambdon's work aggravated his medical condition. Contrary to this finding, Mr. Lambdon

submitted medical proof demonstrating that his health condition was aggravated by his work. His uncontroverted medical evidence objectively indicates how his job aggravated his osteoarthritis of bilateral knees; specifically, that the requirements of his job, (kneeling, bending down, and squatting), were difficult for him to do, that his condition has been getting progressively worse in the last few years, and that doing boiler work caused increased pain in his knees. Notably, Dr. Kleiner is specifically treating Mr. Lambdon for osteoarthritis of bilateral knees. Further, Dr. Kleiner is treating Mr. Lambdon with injections and also recommended physical therapy. This protocol was determined through a medical examination in which Dr. Kleiner determined these forms of treatment were necessary. Mr. Lambdon notified his supervisors in January or February of 2021 about the treatment he was receiving and his need for alternative employment. His condition had been aggravated for some time before his separation and his report of his level of pain to his doctor readily supports Dr. Kleiner's diagnosis and treatment of Mr. Lambdon's medical condition.

Clearly "[m]ere dissatisfaction with working conditions which are not shown to be abnormal or do not affect health, does not constitute good cause for leaving work voluntarily." Medwick v. Board of Review, Division of Employment Sec., Dept. of Labor and Industry, 69 N.J. Super. 338, 345 (App. Div. 1961). This case involves more than mere dissatisfaction with working

conditions. "An individual shall not be disqualified for benefits for voluntarily leaving work if he or she can establish that working conditions are so unsafe, unhealthful, or dangerous as to constitute good cause attributable to such work." N.J.A.C. 12:17-9.4. Mr. Lambdon worked for years through pain until it was no longer possible. The nature of his job, and of all of the positions available to him at Monarch Boiler, was detrimental to his health. Mr. Lambdon has established "real, substantial and reasonable circumstances" to support his claim that good cause forced his decision to leave his job because his work environment aggravated his medical condition and there were no accommodating alternative positions with Monarch Boiler. Domenico v. Bd. of Review, 192 N.J. Super. 284, 288 (App. Div. 1983). The record supports Mr. Lambdon's assertion that any attempt to be reassigned to a position with Monarch Boiler that would not aggravate his medical condition would have been futile.

CONCLUSION

For the reasons set forth above, Mr. Lambdon respectfully requests that the Appellate Division reverse the decision of the Board of Review and find him eligible for benefits without disqualification. Mr. Lambdon is eligible for benefits because his leaving was for good cause related to the work, given that

his injury was aggravated by working conditions, the employer did not have any suitable accommodating work that could have been performed within the limits of the disability, and the employer should bear the burden of such given the Unemployment Compensation Law's remedial purpose.

Dated: May 10, 2024

SOUTH JERSEY LEGAL SERVICES, INC.
Attorneys for Claimant-Appellant
Richard H. Lambdon

By: */s/ Noorzahan Khan*
NOORZAHAN KHAN, ESQ.

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

MICHAEL T.G. LONG
Director

June 5, 2024

VIA ECOURTS
Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
25 Market Street
P.O. Box 006
Trenton, New Jersey 08625

Re: Richard H. Lambdon v. Board of Review, Department of Labor and Monarch Boiler Construction Co., Inc.
Docket No.: A-001212-23T4
Civil Action: On Appeal from a Final Decision of the Board of Review

Letter Brief of Respondent, Board of Review

Dear Mr. Orlando:

Please accept this letter brief pursuant to Rule 2:6-2(b) on behalf of Respondent Board of Review.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

Appellant, Richard Lambdon, was employed by Monarch Boiler Construction Co. ("Monarch") as a Mechanical Helper from 1995 until June 4, 2021, when he voluntarily left his job.[2] (Pa1; Pa3). Lambdon's job duties included repairing boilers and the pipes inside the boilers. (T16). Amy Tarvis is the owner of Monarch while her son, Scott Tarvis, serves as a supervisor. (T19). Lambdon filed his claim for benefits on June 27, 2021, and was granted a weekly benefit rate of $517. (Pa1).

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[1] The Procedural History and Counterstatement of Facts have been combined to avoid repetition and for the court's convenience.

[2] "Pa" refers to appellant's appendix; "Ab" refers to his brief. "T" refers to the transcript of the May 16, 2022 Appeal Tribunal hearing.

On October 26, 2021, the Department of Labor ("Department") reviewed the assessment and determined that Lambdon was ineligible for benefits due to leaving work voluntarily. (Pa1). The Department's determination resulted in a refund demand of $8,272. Ibid.

Lambdon appealed the Department's determination on October 29, 2021, to the Appeal Tribunal ("Tribunal"), and a hearing was held on May 16, 2022, during which Lambdon testified on his own behalf and Tarvis testified for the employer. Ibid.

Lambdon testified that he resigned because of osteoarthritis of bilateral knees, which Lambdon claimed was aggravated by kneeling, bending down, and squatting at work. (T9 - T10). Lambdon acknowledged that he never asked his employer for an accommodation or another position as he believed there were no other positions available. (T8-10; T17; T20). He also never submitted any medical documentation that stated that he required accommodations or that he was incapable of performing his job. (Pa1). He simply complained about his knees to his employer, providing them verbal notice that he may resign in June 2021. (T8-9).

Tarvis testified that she had no knowledge of her son, Scott, telling Lambdon that he could be replaced. (T30). She claimed that Lambdon gave only her son, Scott, verbal notice that he was retiring on June 4, 2021, and Scott

relayed that information to Tarvis. (T34). According to Tarvis, there were no further discussions or meetings regarding Lambdon's decision to retire. (T32). She testified that had Lambdon approached her to discuss the issues with his knees, shoulders, and legs, Tarvis would have explored different types of work options for him that may have been easier. (T33).

The Tribunal affirmed the denial of benefits on May 17, 2022, finding that Lambdon left work voluntarily without good cause attributable to the work, and was therefore liable for a refund of $8,272 for the weeks ending July 3, 2021, through October 16, 2021. (Pa3). Lambdon appealed the Tribunal's decision to the Board of Review ("Board") on August 2, 2022, and filed an amended appeal on August 11, 2022. (Pa1).

In a decision dated November 16, 2023, the Board affirmed the Tribunal's decision. (Pa1). The Board found that the medical documentation provided by Lambdon was dated in 2022, which was after Lambdon's last day of work on June 4, 2021. (Pa1). Additionally, the Board held that the medical note, dated in 2022, verified that Lambdon had osteoarthritis of bilateral knees, but it did not establish that the job caused or aggravated his medical condition. (Pa1; Pa39). Further, the Board found that even if no other positions were available to Lambdon, he never sought an accommodation from his employer due to his health condition. (Pa1).

This appeal followed.

ARGUMENT

THE BOARD OF REVIEW CORRECTLY DETERMINED THAT LAMBDON WAS DISQUALIFIED FOR UNEMPLOYMENT BENEFITS PURSUANT TO N.J.S.A. 43:21-5(a) BECAUSE HE LEFT WORK VOLUNTARILY WITHOUT GOOD CAUSE ATTRIBUTABLE TO THE WORK.

The judicial capacity to review administrative agency decisions is limited. Brady v. Bd. Of Rev., 152 N.J. 197, 210 (1997); Pub. Serv. Elec. v. N.J. Dep't of Env't Protec., 101 N.J. 95, 103 (1985). Unless a court finds that the agency's action was arbitrary, capricious, or unreasonable, the agency's ruling should not be disturbed. Brady, 152 N.J. at 210; In re Warren, 117 N.J. 295, 296 (1989).

The record in this case contains substantial credible evidence supporting the determination of the Board of Review that Lambdon voluntarily quit without good cause attributable to the work, and therefore is disqualified for benefits pursuant to N.J.S.A. 43:21-5(a).

The burden of proof rests upon Lambdon to establish his right to unemployment compensation. Brady, 152 N.J. at 218. The New Jersey Unemployment Compensation Law provides in pertinent part that an individual shall be disqualified for benefits:

> For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works eight weeks in employment. . . .
>
> [N.J.S.A. 43:21-5(a).]

An employee who has left work voluntarily has the burden of proving that he did so with good cause attributable to the work. Brady, 152 N.J. at 213; Self v. Bd. of Rev., 91 N.J. 453, 457 (1982); Domenico v. Bd. of Rev., 192 N.J. Super. 284, 287 (App. Div. 1983). "Good cause" is not defined, but the term has been construed to mean "cause sufficient to justify an employee's voluntarily leaving the ranks of the employed and joining the ranks of unemployed." Domenico, 192 N.J. Super. at 287 (citations omitted). The court in Domenico set forth the factors to be considered in determining the existence of good cause in a given matter:

> In scrutinizing an employee's reason for leaving, the test is one of ordinary common sense and prudence. "Mere dissatisfaction with working conditions which are not shown to be abnormal or do not affect health, does not constitute good cause for leaving work voluntarily." The decision to leave employment must be compelled by real, substantial and reasonable circumstances not imaginary, trifling and whimsical ones. . . . [I]t is the employee's responsibility to do what is necessary and reasonable in order to remain employed.
>
> [Id. at 288 (internal citations omitted).]

Here, Lambdon claims that he resigned due to his job exacerbating the

pain in his knees and shoulder, thus meeting the requirement under N.J.A.C. 12:17-9.3(b). (Ab1; T8-10; T18). That regulation states:

> An individual who leaves a job due to a physical and/or mental condition or state of health which does not have a work-connected origin but is aggravated by working conditions will not be disqualified for benefits for voluntarily leaving work without good cause "attributable to such work," provided there was no other suitable work available which the individual could have performed within the limits of the disability. When a non-work connected physical and/or mental condition makes it necessary for an individual to leave work due to an inability to perform the job, the individual shall be disqualified for benefits for voluntarily leaving work.

Application of this exception requires a showing that, at the time of the claimant's departure, an employer had no positions available that would accommodate the claimant's condition or that the claimant would not have been assigned to any such position. Ardan v. Bd. of Rev., 231 N.J. 589, 607 (2018). In other words, conclusory assertions that no other positions would be available, without confirmation, is not enough to satisfy N.J.A.C. 12:17-9.3(b). Ibid.

Here, Lambdon has failed to meet the requirements set forth in N.J.A.C. 12:17-9.3(b). In Ardan, the Court found that the claimant who departed her work because that work aggravated a medical condition, failed to meet the burden imposed by N.J.A.C.12:17-9.3(b) because she did not investigate less physically demanding nursing opportunities but instead surmised that her employer would not provide them. Ardan, 231 N.J. at 609. Similarly here,

Lambdon claims that Monarch was a small, family-owned business with limited positions available so he "knew" that no alternative positions would be offered. (Ab16-17). Lambdon, however, never inquired into alternative positions or possible accommodations at Monarch. (T8-10; T17; T20). Lambdon conceded that he did not "sit down" with his employer and explain that the job was aggravating his medical problem. (T11). Lambdon admits that he only mentioned his condition to his bosses but never asked for an alternative assignment. (T9). Although Tarvis testified Lambdon never told her directly about his condition, she confirmed that there were no discussions regarding his position at Monarch. (T32; T34). Thus, Lambdon's conclusory assumption that no alternative positions existed fails to meet the burden set forth in Ardan.

Lambdon also fails to demonstrate that his position at Monarch aggravated or caused his medical condition. This court has held that an individual must demonstrate, "through uncontroverted medical evidence" that their medical condition will be "aggravated" by the conditions of their work to satisfy N.J.A.C. 12:17-9.3(b). Israel v. Bally's Park Place, Inc., 283 N.J. Super. 1, 5 (App. Div. 1995); N.J.A.C. 12:17-9.3(d).

Here, Lambdon offered no proof that the work environment aggravated any medical condition, either before the Board or to Monarch when he resigned. (T9-11). It should be noted that all medical notes in the record here are from

2022, which is after his resignation on June 4, 2021. (Pa1). As such, there is no evidence in the record to support Lambdon's claim that he brought his concerns to the employer's attention before resigning. (Ab17). Additionally, although the notes demonstrate that Lambdon suffered from osteoarthritis in his knees, they do not demonstrate that the job caused or aggravated his medical condition. (Pa38; Pa39). The medical note dated April 11, 2022, explicitly indicates that it was Lambdon's opinion that the job aggravated his medical condition, not the doctor's prognosis. (Pa37).

Lambdon presented no further medical certifications or opinions from a physician attesting that the work environment aggravated his medical condition, nor was there a medical recommendation that Lambdon resign from his position. Indeed, Lambdon conceded that his decision was based upon his assumption that an alternative position would not be provided and not on the recommendation of any medical professional. (T10-12).

Thus, in the absence of medical evidence demonstrating that the work caused or aggravated Lambdon's condition, there is no credible proof in the record that he left work because of factors related to the work. This court should therefore affirm the Board's decision.

CONCLUSION

For these reasons, the Board's decision should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Eric A. Zimmerman
Eric A. Zimmerman
Deputy Attorney General
Eric.Zimmerman@law.njoag.gov
NJ Attorney ID: 364992021

Janet Greenberg Cohen
Assistant Attorney General
Of Counsel

cc: Noozahan B. Khan, Esq. (via regular and certified mail)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-001212-23

RICHARD H. LAMBDON, *Claimant-Appellant*, *v.* **BOARD OF REVIEW, DEPARTMENT OF LABOR, MONARCH BOILER CONSTRUCTION CO., INC.** *Respondent-Appellee.*	*ON APPEAL FROM:* Final Agency Decision Board of Review, Department of Labor Agency Docket No: DKT00273555 CIVIL ACTION *SAT BELOW:* Nancy Hunt, William Scaglione, and Lisa Hart, Members, Board of Review, Department of Labor

REPLY BRIEF OF CLAIMANT-APPELLANT RICHARD H. LAMBDON

FILING FEES WAIVED R. 1:13-2
SOUTH JERSEY LEGAL SERVICES, INC.
745 Market Street
Camden, New Jersey 08102
Phone: (856)964-2010, Ext. 6279
Fax: (856) 338-9227
Email: nkhan@lsnj.org
By: Noorzahan Khan, Esq.
Attorneys for Claimant-Appellant
Richard H. Lambdon

On the brief: Noorzahan Khan, Esq.
Robert J. Cooper, Esq.
Kenneth Goldman, Esq.

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Cases

Regulations

PRELIMINARY STATEMENT

In addition to omitting or mischaracterizing the relevant facts specific to this case, Respondent Board of Review ("Board") fails to apply the correct standard when evaluating whether Mr. Lambdon met his burden in establishing good cause attributable to the work as the reason for his separation. The Board improperly imposes a notice-and-inquiry requirement on Mr. Lambdon for leaving his position because his job responsibilities aggravated his health. A fact sensitive analysis clearly indicates that there were no positions which would accommodate Mr. Lambdon's condition, thereby removing any requirement that he inquire about alternative positions.

The Board seeks to further hold Mr. Lambdon responsible for providing medical documentation to his employer prior to his separation. Mr. Lambdon provided medical documentation to the Appeal Tribunal and Board of Review, including correspondence from his treating physician, his physical therapy notes, and notes detailing his x-ray results. It is not necessary that supporting medical documentation be dated prior to the date of separation or that it be provided to the employer; it must merely be presented to the fact finder to consider in determining whether the employment duties aggravated a medical condition.

Moreover, the Board argues that the medical documentation does not substantiate Mr. Lambdon's position that the work aggravated his medical condition. Contrary to the Board's position, Mr. Lambdon's treating physician expressly recommended that he seek other work because his employment duties aggravated his medical condition. His doctor's letter, despite being dated after the date of separation, was based on a review of contemporaneous notes taken while treating Mr. Lambdon prior to his separation.

Because Mr. Lambdon has established that his health was aggravated by his working conditions and there were no other suitable positions available to him, the Appellate Division should reverse the Board's denial of unemployment benefits to Mr. Lambdon.

ARGUMENT

I. THE BOARD'S APPLICATION OF N.J.A.C. 12:17–9.3(b) TO IMPOSE A NOTICE-AND-INQUIRY REQUIREMENT UPON EVERY EMPLOYEE WHO IS SEPARATED FROM EMPLOYMENT DUE TO A HEALTH CONDITION IS A PLAINLY UNREASONABLE INTERPRETATION OF THE REGULATION. (Pa1; Pa3)

The Board contends that Mr. Lambdon should be held ineligible for unemployment benefits because he "never inquired into alternative positions or possible accommodations at Monarch" and he failed to explain to his employer "that the job was aggravating his medical problem" as required by N.J.A.C.

12:17–9.3(b). (Db8). The Board mistakenly focuses on a perceived requirement that Mr. Lambdon "sit down" with his employer and explain his situation prior to leaving his position. (Db8). The Court, unconvinced by this exact argument in Ardan v. Bd. of Review, 231 N.J. 589 (2018), explained that a notice-and-inquiry requirement in N.J.A.C. 12:17–9.3(b) "may be generally imposed *only by* rulemaking pursuant to the APA." Id. at 606. (emphasis added).

In order to determine whether the imposition of a notice-and-inquiry requirement would be an "agency action [which] must be rendered through rule-making or adjudication", the Court analyzed the factors in Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, at 331-32 (1984) and found that "imposition of a general requirement that a claimant prove notice to the employer and a request for an accommodation in order to satisfy the burden imposed by N.J.A.C. 12:17–9.3(b)—meets the Metromedia test." Ardan, 231 N.J. at 606. Specifically, such a requirement "would establish a 'legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization' [and] [i]t would state an administrative policy that was not previously expressed in 'any official and explicit agency determination, adjudication or rule.'" Id. at 606-607 (quoting Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 331 (1984)). As a result, the Court found the Board's policy cannot be implemented by adjudication, and

instead, requires rulemaking, thereby finding the Board's interpretation to be plainly unreasonable.

The Court recognized that in some cases a "claimant's medical proofs, combined with evidence of the physical demands of the former employment, [and] the small size of the workplace" would be sufficient to meet a claimant's burden. Ardan, 231 N.J. at 605. Applying the same rationale to this case, Mr. Lambdon was clearly not required to notify his employer of his medical condition or to inquire about alternative positions or accommodations, and therefore cannot be found ineligible for benefits by not taking action that he is not required to take.

II. MR. LAMBDON MET HIS BURDEN UNDER N.J.A.C. 12:17–9.3(b) BY SHOWING THAT NO OTHER SUITABLE ACCOMODATIONS WERE AVAILABLE TO HIM. (Pa1; Pa3)

The plain language of N.J.A.C. 12:17–9.3(b) "compels a showing that, at the time of the claimant's departure, either the employer had no position available that would accommodate the claimant's condition or the claimant would not have been assigned to any such position." Ardan v. Bd. of Review, 231 N.J. 589, 607 (2018). "Applied to a vast range of workplace settings, that standard calls for an individualized determination." Id. at 605.

Mr. Lambdon credibly testified that he did repeatedly approach and inform his employer of the pain that he was experiencing while he was attempting to continue to do his job. Notwithstanding this testimony, the Board incorrectly alleges that had Mr. Lambdon approached his employer, his employer "would have explored different types of work options for him that may have been *easier*. (T33)." (Db4). (emphasis added). Not only did his employer never state that they would have found "easier" options for him, she actually specifically stated that, "There are no other options for a mechanic laborer with Monarch Boiler." (T33-21[1]). When asked if the employer had available positions which were not so labor intensive, the employer responded, "No. Not - not in the categories that Mr. Lambdon is qualified." (T32-13). Accepting the employer's own testimony, Mr. Lambdon has clearly successfully met his burden under N.J.A.C. 12:17-9.3(b) by showing both that the employer had no positions to accommodate his condition and also that he could not have been assigned to any other positions. The employer's testimony, combined with Mr. Lambdon's knowledge that the employer was a small, family-owned business with limited, very specific positions available, is sufficient to overcome the Board's assertion that Mr.

[1] The transcript does not have numbered lines; therefore, counsel cited lines by manually counting as one count per line of text.

Lambdon made a conclusory assumption regarding the existence of alternative positions.

III. MR. LAMBDON SUBMITTED UNCONTROVERTED MEDICAL DOCUMENTATION PURSUANT TO N.J.A.C. 12:17–9.3(d) IN SUPPORT OF HIS LEAVING WORK FOR GOOD CAUSE RELATED TO THE EMPLOYMENT. (Pa1; Pa3)

"When an individual leaves work for health or medical reasons, medical certification shall be required to support a finding of good cause attributable to work." N.J.A.C. 12:17–9.3(d). Although the regulation does not outline the specifics of the medical documentation to be submitted in support of a finding of good cause attributable to work, the Court has found that a claimant must demonstrate "through uncontroverted medical evidence, that [his] disease has been and will be aggravated by the [work] environment," and this clearly "constitutes 'good cause.'" Israel v. Bally's Park Place, Inc., 283 N.J. Super. 1, 5 (App Div. 1995).

The Board has taken the position that Mr. Lambdon provided no proof of his medical condition to the Board or to the employer. As argued above, Mr. Lambdon was not required to provide any medical documentation to his employer. Further, and in contradiction to the Board's contention, Mr. Lambdon did in fact provide the Appeal Tribunal with four pieces of medical

documentation, and supplemented the record by submitting an additional three pieces of medical documentation to the Board.

Mr. Lambdon's treating physician, Dr. Kleiner, with whom Mr. Lambdon began treatment on or about January 2021, approximately five months prior to his separation from employment, recommended that Mr. Lambdon "seek other work in order to reduce his symptoms and improve his condition." (Pa39). Dr. Kleiner's recommendation was based on his treatment of Mr. Lambdon, including injections and physical therapy. Although the letter is dated after Mr. Lambdon's separation from employment, it is based on contemporaneous records from the time of Mr. Lambdon's treatment, which began prior to Mr. Lambdon's separation from employment.

The documentation provided establishes not only the existence of Mr. Lambdon's condition, osteoarthritis of bilateral knees, but also that the demands of his job clearly aggravated his health as both stated by Mr. Lambdon and recognized by Dr. Kleiner. The case law requires only that the medical documentation be uncontroverted. There is no record of anything disputing or denying the validity of any of the seven pieces of medical documentation submitted by Mr. Lambdon in establishing how his job duties aggravated his osteoarthritis of bilateral knees. Rather, all of the documentation only lends additional layers of support to Mr. Lambdon's position by emphasizing the

difficulty he had in kneeling, bending down, and squatting, all of which were requirements of his job. Dr. Kleiner's examination, treatment, and recommendations all conclusively show that Mr. Lambdon's health affected his ability to do his job and that those job demands exacerbated the severity of his condition. Mr. Lambdon credibly established that his work duties aggravated the pain in his knees, making it impossible for him to continue working there, which constitutes good cause for his separation from employment and entitles him to unemployment benefits.

CONCLUSION

For the reasons set forth above, Mr. Lambdon respectfully requests that this Court reverse the decision of the Board of Review and find him eligible for benefits without disqualification.

Dated: June 25, 2024

SOUTH JERSEY LEGAL SERVICES, INC.
Attorneys for Claimant-Appellant
Richard H. Lambdon

By: */s/ Noorzahan Khan*
NOORZAHAN KHAN, ESQ.