SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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May 12, 2015

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RE: *Hardy v. Eastern Quality Vending*
C.A. No. S14A-10-003 THG

Dear Counsel:

Before the Court is claimant Shawn Hardy's ("Claimant") appeal from the Industrial Accident Board ("IAB" or alternatively "Board"). Specifically, an IAB hearing officer determined Claimant did not carry his burden of proving a "work injury" while employed with Eastern Quality Vending, Inc. ("Employer"). The Court has reviewed the parties' briefs, the hearing officer's decision, and the record. For the following reasons, the decision of the IAB is **AFFIRMED**.

FACTS

Claimant is a 50 year-old man currently living in Harrington, Delaware, where he lives with his fiancée, her two children, and his mother. At the time of the injury, Claimant was a unit manager in Employer's Selbyville, Delaware facility ("Selbyville facility"). He began working for Employer

in November of 2012. As a unit manager, Claimant was "in charge of the scheduling, the hiring of the staff, training of the staff, quality of the food preparation, . . . inventory, [and] cost control."[1] His shifts were approximately ten to twelve hours long.

Claimant maintains that on February 14, 2013,[2] he suffered an injury while working at Employer's Millsboro, Delaware facility ("Millsboro facility").[3] Claimant described how his alleged work-accident occurred as follows:

> There's three separate rooms to the cafeteria. There's a back prep room, has some tables and some prep area and has a swinging door which leads you then to the work area or what we call the worker's line, the cooks line and you go through that. And there's another doorway which takes you to the serving line. I was in the back prep room putting desserts on trays, carrying the desserts so we can have them ready. And I would take the full tray from the prep room through to the other room, put it on a rack that was laid in the door between the serving line and the cafeteria.
>
> As I was going from the prep room walking through the service line I slipped and fell on the floor, dropped the tray, kind of landed in the doorway on my buttocks and my back[4] at an angle and the desserts went flying.[5]

Claimant believes he slipped on grease since he and his co-workers were changing the facility's fryer at the time. After his fall, Claimant got up on his own, noting that he was sore from the fall, but was

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[1] Hearing Tr. at 18.

[2] It is unclear from the record, which includes a recorded statement, Claimant's Petition to Determine Compensation Due ("Petition"), and the hearing transcript, what day the alleged injury occurred. This inconsistency was addressed thoroughly by the tribunal below and will be discussed in turn in this opinion. All Claimant seems to know definitively is that the injury occurred on a Thursday in February between 2:00 P.M. and 4:00 P.M. Though Claimant asserted both in his petition and during the hearing that the injury occurred on February 14, 2103, he is "not quite sure of it being before Valentine's" Day.

[3] Though Claimant was based at the Selbyville facility, Claimant did work from time-to-time at Employer's Millsboro facility. Apparently, Employer would bring employees based at other facilities to facilities that were having a party or event in order to make sure the event ran efficiently.

[4] Specifically, Claimant's lower back on his left side made contact with the doorway frame and floor.

[5] Hearing Tr. at 20–21.

more embarrassed than anything.

Claimant attested that several people witnessed, or were at least present, when the accident occurred. Specifically, Claimant asserts that Kelly Huff[6] and Darren Roe[7] witnessed the actual fall, or were in his immediate proximity when it occurred. Claimant also maintains John Speake, Linda Rogers,[8] and Dean Roe,[9] were in the cafeteria of the Millsboro facility, and that after the fall, he sat down with them and had a soda to "gather[] [his] wits."[10] Claimant stated he finished his shift at the Millsboro facility on February 14, 2013, despite being sore.

The next day, February 15, 2013, Claimant woke up sore but went to work anyway. He testified that Rogers came by that afternoon to check on him, telling him that if his pain got worse, to go to the emergency room ("ER"). Claimant finished his shift on February 15, 2013, but felt really sore. According to Claimant, Rogers did not ask Claimant to fill out documentation regarding his alleged February 14, 2013 slip and fall.

The following day, February 16, 2013, Claimant was so sore that he could not get out of bed. His fiancée helped him to the car and took him to the ER at Kent General Hospital. There, Claimant complained of bruising, with pain in his lower back and left hip. At this point, Claimant started what would become a litany of procedures, spanning over a year, that included treatment from several doctors.

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[6] Kelly Huff ("Huff") was a co-worker of Claimant. She was employed by Employer in February of 2013 as a cashier in the Millsboro facility, and allegedly witnessed Claimant's injury transpire.

[7] Darren Roe ("Darren") is the regional manager for Employer.

[8] Linda Rogers ("Rogers") was Claimant's immediate supervisor.

[9] Dean Roe ("Dean") is the General Manager and President of Employer.

[10] Hearing Tr. at 25.

At Kent General's ER, physicians took x-rays, prescribed Claimant crutches, and referred him to occupational health. Claimant attended occupational health on two occasions, February 18 and 26 of 2013. While there, occupational health examined Claimant and "tried to do some flexibility to see if [Claimant's] range of motion was coming back. . . ."[11]

Occupational health then referred Claimant to an orthopedic specialist, Dr. David Mattern ("Mattern"), whom Claimant had seen before for prior medical conditions. Claimant first saw Mattern in response to the injury in question on March 1, 2013, where he was treated by a physician's assistant. The physician's assistant did some initial tests regarding Claimant's range of motion, after which Mattern set up a series of magnetic resonance imaginings ("MRIs")[12] for Claimant. Mattern prescribed Claimant stretching exercises and pain medication. After Claimant's last MRI, which showed Claimant had developed a disc bulge at L4/5 and a small annular tear when compared with a lumbar MRI Claimant received in April of 2011,[13] Mattern referred Claimant to Dr. Lieberman ("Lieberman").

Claimant began seeing Lieberman on July 31, 2013. Lieberman looked at Claimant's MRIs, and determined that corticosteroid injections were appropriate to address Claimant's pain. Claimant received two such injections, one on August 1, 2013, and another on August 29, 2013, but testified the injections only provided temporary relief. In addition to corticosteroid injections, Leiberman

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[11] Hearing Tr. at 30–31.

[12] Claimant received one MRI of his left hip, and two MRIs of his low back. Claimant's low back MRIs were done on March 26, 2013 and June 12, 2013.

[13] The record and testimonies of several witnesses, including Claimant, acknowledge that Claimant had multiple prior injuries. These injuries were treated by Mattern and others in the past. There are two facts that are particularly noteworthy. First, there was a prior MRI taken in April 2011 in response to a work-related injury Claimant sustained in October of 2010 while employed by a different employer. Second, Claimant signed an agreement on December 20, 2013, agreeing that he had a five percent impairment to his low back due to the October 2010 accident.

preformed two nerve blocks on Claimant on October 22, 2013, and November 8, 2013. Claimant, likewise, testified that they provided no relief. Leiberman, upon being informed that the injections and nerve blocks had limited impact on Claimant's pain, recommended Claimant to Dr. Mills, a neurosurgeon.

Claimant first saw Dr. Mills on December 31, 2013, for a surgical consultation. Dr. Mills "show[ed] [Claimant] exactly where the discs we're [sic] having the issues, [and] suggested that [Claimant] have . . . lumbar fusion surgery."[14] Dr. Mills also showed Claimant "that [he] was going to need the laminectomy to stop the pain from going down the legs," which Claimant received on January 27, 2014.[15] Approximately two weeks after the surgeries, Claimant suffered a cerebral spinal fluid leak, and was taken to the ER twice, once on February 4, 2014, and another time on February 19, 2014. Despite his setbacks, Claimant noted he did receive some relief from his January 2014 surgeries.

Claimant subsequently filed the Petition with the IAB. An IAB hearing was held September 19, 2014. There, the ultimate issue resolving the dispute between Claimant and Employer specifically involved whether a work-related accident occurred on February 14, 2014. According to Claimant's and Employer's joint stipulation of facts, Claimant alleged he injured his low back, buttocks, and left hip on February 12, 2013.[16] Claimant's Recorded Statement regarding the injury and accident to Employer's insurance carrier, indicates Claimant sustained his injury on February

[14] Hearing Tr. at pg. 34.

[15] Hearing Tr. at 34–35.

[16] Appellee's Exh. A, pg. 1.

13, 2013.[17] During the IAB hearing, Claimant admitted during cross-examination that he may have confused the date of his injury, and that it may have occurred on February 14, 15, or 16.[18] Claimant also asserted that all of his supervisors were present at the time he was injured. Claimant conceded he was familiar with Employer's injury reporting policy, and as a unit manager had filled out injury reports for those working under him.

Huff testified for Claimant, declaring she had witnessed his slip and fall at the Millsboro facility. Huff stated that she, Dean, Darren, and Rogers were all present on February 14, 2013, and that she saw Claimant fall. However, Huff testified on cross-examination that she was not sure if Claimant fell in February of 2013, or at a December 2012 Christmas event, two months prior to the injury Claimant alleged.

Dean testified for Employer, denying Claimant had a work-accident in February 2013. Dean recalled Claimant slipping and falling while working at a Christmas event at the Millsboro facility in December 2012. Dean stated that after the fall, Claimant jumped right back up and asserted he was fine and not injured. Dean further testified as to Claimant's familiarity with Employer's injury reporting policy. Dean confirmed Claimant went out of work in February 2013, and that he only saw Claimant after that when he dropped off some forms regarding an injury in October 2010, long before Claimant worked for Employer. Dean stated he had not notified his insurance carrier upon receipt of the forms because of their deficiencies. Dean maintained Employer had no documentation regarding Claimant's alleged February 2013 injury. He found Claimant's allegations further suspect since Employer's records reflected that Claimant was working at the Selbyville facility on the date

[17] Appellee's Exh. B, pg. 1.

[18] Hearing Tr. at 48.

of the alleged accident, and there were no events scheduled at the Millsboro facility in February 2013. On cross-examination, Dean admitted he did receive a facsimile of a letter from Claimant's counsel on April 19, 2013, regarding the alleged February 2013 injury.

Darren also testified on Employer's behalf. Darren maintained that Claimant never reported the alleged injury to Employer, despite his familiarity with Employer's injury reporting process as a unit manager. Darren stated that there was no accident in February 2013, but that there was a similar incident in December 2012, which he was present for.

Rogers testified on Employer's behalf. Rogers stated she was working with Claimant on February 14, 2013, but that they were working at a dinner at the Selbyville facility. Rogers testified Darren stopped by the dinner in Selbyville briefly, but that Dean was not present at all. Rogers indicated that Huff was not working at the Selbyville facility on February 14, 2013. She explained that though the staff was busy at the Selbyville facility on the night of February 14, 2013, she never witnessed Claimant slip and fall. Rogers did testify that Claimant, before the end of his shift, came to her and requested to leave early due to pain in his hip, but that he insinuated the pain was due to the slip and fall he suffered in December 2012.[19] Rogers declared Claimant never told her he was injured on February 14, never completed paperwork with regard to that alleged injury, and never reported his injury to her or anyone else.

Lastly, Dr. David Stephens ("Stephens") testified on Employer's behalf, and Matterns testified for Claimant, both via deposition. Stephens, a board certified orthopedic surgeon, examined

[19] The December 2012 slip and fall accident that is referred to so frequently above occurred at a Christmas dinner in the Millsboro facility. Rogers, Dean, Darren, and Huff all seem to have some recollection of the incident. The accident occurred under similar circumstances as the alleged February 2013 accident, so much so that the two accidents may in fact be the same with confusion as to the date.

Claimant on June 4, 2014, regarding the February 14, 2013 accident. Matterns opined that the June 2013 MRI, which showed a change in condition compared to the April 2011 MRI, demonstrated Claimant underwent a traumatic event, but conceded his opinion as to causation of the injury would change if it was revealed Claimant's recitation of events was found to be false. Stephens, however, after reviewing the MRI results from April 2011, March 2013, and June 2013, determined there was virtually no difference between the April 2011 and the March 2013 MRIs. Stephens asserted the change from the April 2011 MRI to the June 2013 MRI, when taking the March 2013 MRI into consideration, showed Claimant's injury was normal wear and tear of the region, and was the result of Claimant never fully healing from his October 2010 injury.

PROCEDURAL HISTORY

On March 19, 2014,[20] Claimant filed the Petition with the IAB.[21] The Petition sought an acknowledgment from the IAB as to Claimant's "injuries, payment of medical expenses, and total disability benefits from March 4, 2013 and ongoing."[22] Employer denied the occurrence of any work- accident occurring on February 14, 2013 date.[23] As a result, "[t]he parties stipulated that the case would be heard and decided by a Workers' Compensation Hearing Officer, in accordance with" 19 *Del. C.* §2301 B (a)(4).[24]

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[20] There seems to be some discrepancy as to when Claimant file the Petition. Both Claimant's and Employer's briefs indicate the Petition was filed on March 19, 2014. However, the Board's Decision indicates that Claimant filed it on March 21, 2014.

[21] Appellant's Opening Brief (hereinafter "OB") at 3; Appellee's Answering Brief (hereinafter "AB") at 1.

[22] OB at 3.

[23] AB at 1.

[24] IAB Decision at 2.

As stated above, a hearing was held on September 19, 2014. The hearing officer heard testimony from Claimant, Dean, Darren, Rogers, and Huff at the hearing, and considered testimony from Matterns and Stephens via deposition transcripts. On October, 14, 2014, the IAB issued a decision denying Claimant benefits. The Board found that Claimant, as the petitioner, had failed to sustain his burden of proof demonstrating that he sustained a work-related injury on the alleged date in question.[25]

Claimant has timely appealed this matter to Superior Court pursuant to 19 *Del. C.* § 2350 (a). The Court has since read all briefs and reviewed the record, and is now ready to render its opinion.

STANDARD OF REVIEW

This Court has limited appellate review of the factual findings of an administrative agency, such as the IAB.[26] On review, Superior Court merely determines whether the Board's decision is supported by substantial evidence.[27] When reviewing the record for substantial evidence, the Court considers it in the light most favorable to the party that prevailed below.[28] "Substantial evidence is more than a scintilla and less than a preponderance."[29] It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[30] In short, the Court is merely determining

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[25] *Id.* at 19.

[26] *Goicuria v. Kauffman's Furniture*, 1997 WL 817889, *1 (Del. Super. Oct. 30, 1997).

[27] *Id.* (citing *Oceanport Indus. v. Wilm. Stevedores*, 636 A.2d 892, 899 (Del. 1994)).

[28] *Id.* (citing *State v. Langenstein*, 1995 WL 339030 (Del. Super. Jan. 3, 1995)).

[29] *Glasgow Thriftway v. Donovan*, 1991 WL 269888, *1 (Del. Super. Nov. 14, 1991) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[30] *Henson v. Ken-Crest Services*, 2003 WL 23274844, *3 (Del. Super. Dec. 8, 2003) (citing *Olney*, 425 A.2d at 614).

if the evidence is legally adequate to support the IAB's conclusion.[31] "If there is substantial evidence to support the Board's conclusions, and no error of law is found, the decision must be affirmed,"[32] even if the reviewing court itself would have reached a different outcome.[33] However, the Court reviews questions of law *de novo*.[34]

This Court "does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[35] These issues are in the sole purview of the IAB.[36] The Court will not second guess the factual findings of the Board[37] or its determination as to witness credibility[38] unless clearly unsupported by the record.[39]

DISCUSSION

Delaware Workers' Compensation Law and the Industrial Accident Board

In Delaware, "[e]very employer and employee . . . shall be bound . . . to pay [or] accept

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[31] *Goicuria*, 1997 WL 817889 at *1.

[32] *General Motors Corp. v. Ciccaglione*, 1991 WL 269935, *2 (Del. Super. Dec. 10, 1991) (citing *Windsor v. Bell Shades and Floor Coverings*, 517 A.2d 1127, 1129 (Del. 1979)).

[33] *Henson*, 2003 WL 23274844 at *3 (citing *Del. Alcoholic Beverage Control Comm'n v. Alfred I. DuPont Sch. Dist.*, 385 A.2d 1123, 1125 (Del. 1978)).

[34] *Bernhard v. Phoenix Mental Health*, 2004 WL 304358, *1 (Del. Super. Jan. 30, 2004) (citing *Coward v. Modern Maturity Center, Inc.*, 2003 WL 21001031, *3 (Del. Super. Del. Super. Mar. 13, 2003), *appeal dismissed*, 825 A.2d 239 (Del. 2003)).

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

[36] *Henson*, 2003 WL 23274844 at *3 (citing *Keeler v. Metal Masters Foodservice Equip. Co.*, 712 A.2d 1004, 1006 (Del. 1981)).

[37] *Donovan*, 1991 WL 269888 at *1 (citing *Johnson*, 213 A.2d 64).

[38] *Flowers v. Daimler Chrysler*, 2005 WL 2303811, *5 (Del. Super. Sept. 20, 2005) (citing *Johnson*, 213 A.2d 64).

[39] *Dye v. Merrit-Sparks*, 2009 WL 3334908, *4 (Del. Super. Aug. 31, 2009); *Rivera v. Arthur Jackson Co.*, 2009 WL 418303, *3 (Del. Super. Jan. 30, 2009).

compensation for personal injury[40] or death by accident arising out of and in the course of employment,[41] regardless of the question of negligence and to the exclusion of all other rights or remedies."[42] This means, in short, that workers' compensation law supplants tort law with regard to torts occurring in the course and scope of employment. To facilitate this, the General Assembly created the IAB to hear disputes between injured employees and their employers with regard to compensation owed or to be paid.[43] With that said, a hearing officer may hear disputes in the IAB's stead provided both parties to the case consent.[44] If the parties have consented to use a hearing officer in lieu of the Board, the hearing officer is clothed in the same powers and duties as the Board, which include the ability to conduct hearings and issue a final decision.[45] Pursuant to 19 *Del. C.* §2350, this Court has jurisdiction to hear and determine all appeals from the IAB.[46] Superior Court makes its determination on the record.[47] The Court has the power to affirm, reverse, or modify the

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[40] The Code defines "injury" and "personal injury" as "violence to the physical structure of the body . . . arising out of and in the course of employment." 19 *Del. C.* § 2301 (15).

[41] The Code states "personal injury sustained by accident arising out of and in the course of employment" does not refer to "an employee except while the employee is engaged in, on or about the premises where the employee's services are being performed, which are occupied by, or under the control of, the employer. . . ." 19 *Del. C.* §2301 (18)(a).

[42] 19 *Del. C.* §2304.

[43] *See* 19 *Del. C.* §2301A (i).

[44] 19 *Del. C.* §2301B (3), (4).

[45] 19 *Del. C.* §2301B (4).

[46] 19 *Del. C.* §2350 (a).

[47] 19 *Del. C.* §2350 (b).

decision of the Board, and will issue its decision in writing.[48]

In filing a petition with the IAB to determine what compensation he is due, a claimant has the burden of proof.[49] The claimant is required to establish: (1) that an injury occurred within the course of employment; and (2) that it occurred within the scope of employment.[50] Further, the claimant must demonstrate that a work-accident occurred, establishing one "with a definite referral to time, place and circumstance."[51] Establishing both an injury and the occurrence of a work-accident is, alone, not sufficient; the claimant must also show a causal link between the accident that occurred and the injuries that he sustained.[52] All this must be established by a preponderance of the evidence.[53] The employer in such a proceeding has no burden, and thus does not need to prove alternate theories of causation for the injury; it merely needs to rebut the claimant's assertion that the injury is due to an accident occurring in the course of employment.[54]

"Whether the injury [claimant sustained] arose out of and in the course of employment is

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[48] 19 *Del. C.* §2350 (b), (c).

[49] 29 *Del. C.* §10125(c); *Strawbridge & Clothier v. Campbell*, 492 A.2d 853,854 (Del. 1985) (citing *Johnson*, 213 A.2d at 64).

[50] *Bernhard*, 2004 WL 304358 at *2 (citing *Coward*, 2003 WL 21001031 at *10-11.

[51] *Johnson*, 213 A.2d at 66 (citing *Faline v. Guido & Francis DeAscanis & Sons*, 192 A.2d 921 (Del. 1963); *Belber Trunk & Bag Co. v. Menesy*, 96 A.2d 341 (Del. 1953)); *Ciccaglione*, 1991 WL 269935 at *3–4 (citing *Chicago Bridge & Iron Co. v. Walker*, 372 A.2d 185, 187 (Del. 1977)).

[52] *See Amalfitano v. Baker* , 794 A.2d 575, 577 (Del. 2001) (citing *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997)).

[53] *Buchler v. State*, 1990 WL 74294, *1 (Del. Super. May 23, 1990) (citing *GMC v. Freeman*, 157 A.2d 889, *aff'd* 164 A.2d 686 (Del. 1960)).

[54] *Strawbridge*, 492 A.2d at 853.

essentially a finding of fact."[55] In many cases, this factual finding is controlled by the credibility of witnesses testifying before the Board.[56] The IAB has discretion to disbelieve a witness's testimony based on other evidence in the record and his demeanor.[57] As stated above,"[i]t is the exclusive function of the Board to address credibility of witnesses. This Court cannot overturn the Board's ruling as to credibility."[58] Further, an expert witness's testimony may be rejected by the IAB if his opinion is based on facts given him by another witness the Board has found incredible.[59]

Application

Claimant appears to be arguing that the hearing officer's determination that Claimant "failed to prove that he sustained a work injury . . ."[60] means Claimant suffered no injury, and thus is unsubstantiated. This understanding is evidenced by his cites to *Henson v. Ken-Crest Services* and *Maier v. Santucci*. Claimant cites *Henson* for the proposition that objectives signs of injury must be addressed by the IAB regardless of its findings regarding a decision on the injury,[61] and cites

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[55] *Buchler*, 1990 WL 74294 at *1 (citing *Davis v. Univ. of Del.*, 233 A.2d 159 (Del. Super. 1967), *rev'd on other grnds*, 240 A.2d 583 (Del. 1968)).

[56] *See, e.g.*, *Dye*, 2009 WL 3334908 at *2 ("The Board noted that there were no witnesses to the alleged work incident. Therefore, the Board focused primarily on Claimant's testimony and her credibility was of particular importance."); *Rivera*, 2009 WL 418303 at *1 ("The Board noted that because there were no witnesses to the alleged accident in this case, the Appellant's testimony and credibility were of particular importance."); *Flowers*, 2005 WL 2303811 at *4 (Del. Super. Sept. 20, 2005) ("The Board's decision to deny Claimant's Petition for Compensation Due turns on Claimant's credibility.").

[57] *Buchler*, 1990 WL at *4 (citing *Boyd v. Chrysler Corp.*, 1988 WL 102856 (Del. Super. Sept. 21, 1988)).

[58] *Flowers*, 2005 WL 2303811 at *5 (citing *Johnson*, 213 A.2d at 64).

[59] *Id.* (citing *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988)) ("The Board may reject a medical expert's opinion when the Board finds that the opinion is based in large part on what the Claimant has told the doctor and the Board finds the underlying facts to be different.").

[60] IAB Decision at 19.

[61] *Henson*, 2003 WL 23274844 at *4.

Maier for the rule that the Board "cannot totally ignore facts which are uncontroverted and against which no inference lies."[62] Claimant is correct as to both issues. The Board must address objective signs of an injury in its opinion, especially if the Board is determining a claimant suffered no injury. Likewise, the IAB should not, except in rare circumstances, ignore evidence that is uncontested and unrebutted, because to do so would be against the weight of the evidence, and would, in effect, be unsubstantiated by the record. However, both rules are inapplicable under the facts.

What seems to be of particular import for purposes of this appeal is the distinction between "accident" and "injury." Though each is clearly a necessary fact a claimant must prove, the two words are often times used interchangeably by the courts in this area of the law.[63] Despite using the word "injury" in her opinion, the hearing officer, based on the Court's reading of the entire decision, meant that Claimant had not established a *work-accident* occurred on February 14, 2013. It appears to be undisputed that Claimant sustained an injury. He underwent several procedures in an attempt to alleviate back pain. The MRI results from March 2013 to June 2013 demonstrate some physical changes that may be causing Claimant's back pain. In fact, both Matterns and Stephens opined that Claimant sustained some sort of injury sometime between April 2011 and June 2013. However, what is disputed, and what has been rebutted, is whether Claimant's injury is causally related to an

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[62] *Maier*, 272 A.2d at 110; *Amalfitano*, 794 A.2d 579.

[63] *See, e.g., Strawbridge*, 492 A.2d at 854 ("where Claimant is the party who seeks action from the Board by filing a Petition for disability benefits, it is settled that the claimant bears the burden of proving the *injury* was work-related."); *Rivera*, 2009 WL 418303 at *1 ("The question before the Court is whether the Board had substantial evidence to find that no work-related *accident* occurred."); *Bernhard*, 2004 WL 304358 at *2 ("[I]n order for the *injury* to meet the Delaware compensation requirements, the injury in question must meet a two prong test: First, that the *injury* occurred within the course of employment; and second, that the *injury* occurred within the scope of employment.
The first prong, course of employment, was agreed to by both parties because the *accident* occurred while the Claimant was on her way to . . . accomplish her work duties.") (emphasis added) (Citations omitted).

accident he sustained while working on February 14, 2013.

Whether an accident occurred is a finding of fact. Such factual findings are not for this Court to decided, but instead fall within the purview of the Board. The IAB hearing officer considered the evidence presented and observed the demeanor of those who testified. By and large, this case's factual findings turned on witness credibility, which again is for the IAB to assess. Based on the Court's review of the record, there was substantial evidence to support the Board's determination that no work-place accident caused Claimant's injuries. Thus, the hearing officer's findings are not unsubstantiated and will not be overturned.

First, there was confusion as to the date of the accident. The record shows Claimant does not recall specifically what date he sustained his injuries, whether it be February 12, 13, 14, 15, or 16. Though the Court understands how someone may forget the exact date he sustained injury, the fact that Claimant asserts he sustained a life-alternating injury on a widely celebrated holiday leaves the Court wondering how Claimant could have confused the date. Huff, Claimant's eye witness, likewise was unsure when she observed Claimant slip and fall, be it February 14, 2013, or December 2012. However, all of Employer's witnesses specifically remember Claimant slipping and falling under facts similar to what Claimant asserts, but in December 2012. Further, all of Employer's records are devoid of Claimant slipping and falling and injuring himself on February 14, 2013 at the Millsboro facility, and are also devoid of an event at the Millsboro facility in February 2013. Lastly, Mattern's opinion was negatively affected due to problems with Claimant's credibility, and thus was not used by the hearing officer regarding the issue of causation. As such, Claimant failed to establish a definite "time, place and circumstance," as required, regarding his alleged work-accident.

Second, Claimant did not report his injury to Employer, which seems to have impacted his

credibility. Though he argues that this is an erroneous fact, there is substantial evidence in the record to reach the opposite conclusion. At the earliest Claimant reported his injury on April 19, 2013, when Employer received a facsimile of a letter from Claimant's counsel regarding an injury occurring in February 2013. However, despite this notice, Claimant did not comply with Employer's injury reporting policy despite holding a position as a unit manager and filling out such forms for his subordinates. Claimant asserts he provided notice of his injuries to Employer prior to the April 19, 2013, by dropping off forms for Employer to fill out regarding his alleged injury. However, those forms stated an injury date of October 16, 2010, which was long before Claimant worked for Employer. Claimant appears to be arguing that Employer was to somehow divine that Claimant was injured in February 2013 based on this form.

Claimant places the duty of filing the First Injury Report on Employer, citing 19 *Del. C.* §2313. He argues public policy prohibits an employer from hiding his head in the sand to avoid compensating a employee. He implies that his credibility should not have been affected for his failure to report his injury properly since 19 *Del. C.* §2313 places the duty of filing a First Injury Report on employers. However, the Court finds this circular. True, an employer cannot ignore an injury that has been reported by an employee stemming from a work-accident it witnessed or was made aware of. However, the mere occurrence of an accident does not necessitate that an injury resulted. 19 *Del. C.* §2313 (a) specifically states "[e]very employer to whom this chapter applies shall keep a record of all *injuries* received by employees in the course of employment." It goes on to state "[w]ithin 10 days after *knowledge* of the occurrence of an accident *resulting in personal injury*, a report thereof shall be made in writing by the employer." This wording indicates that the employer only has the duty to report upon knowledge of an injury. Thus, without notice from an

employee as to an injury, it would appear an employer is unable to comply with 19 *Del. C.* §2313. If in actuality Employer's agents did witness Claimant's alleged slip and fall, they were under no duty to file a First Injury Report until Claimant notified them that he was in fact injured from the February 14, 2013 accident. Again, Claimant did not provide them with such information until, at earliest, April 19, 2013. Claimant cannot turn his shortcoming on Employer for his failure to report that he was injured.

CONCLUSION

The Court finds there is substantial evidence in the record to support the IAB hearing officer's factual finding that no accident occurred during the course of employment on February 14, 2013. This finding prevents Claimant from receiving workers' compensation. The decision of the IAB is **AFFIRMED**.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves