IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RYAN TIBBITS,	)
	)
Employee/Appellant,	)
	)
v.	) C.A. No. N12A-03-006 WCC
	)
UNITED PARCEL SERVICE,	)
	)
Employer/Appellee.	)

Submitted: November 20, 2012
Decided: March 28, 2013

On Employee/Appellant's Appeal from the Industrial Accident Board
REVERSED

OPINION

Leroy A. Tice, Esquire. Leroy A. Tice, Esquire, P.A., 702 N. King Street, Suite 600, P.O. Box 1675, Wilmington, DE 19899. Attorney for Employee/Appellant.

Nancy Chrissinger Cobb, Esquire. Chrissinger & Baumberger, 3 Mill Road, Suite 301, Wilmington, DE 19806. Attorney for Employer/Appellee.

CARPENTER, J.

Ryan Tibbits ("Tibbits") seeks payment for a lower back injury he sustained while working for United Parcel Service ("UPS"). The Industrial Accident Board ("IAB") found that Tibbits failed to prove his work activities were a substantial cause of the onset of his lower back pain and, therefore, denied Tibbits' petition for payment. On appeal, Tibbits alleges the IAB erred as a matter of fact and law and exceeded the scope of its authority under 19 *Del. C.* § 2301A.

For the reasons discussed below, the decision of the IAB is hereby **REVERSED**.

FACTUAL AND PROCEDURAL BACKGROUND

Tibbits has been employed by UPS as a delivery driver since June of 1997. Specifically, Tibbits is responsible for unloading and driving the delivery trucks in order to deliver packages. Although Tibbits is not responsible for loading the trucks when he arrives to work in the morning, he is responsible for organizing, transporting, and delivering packages of varying weights.

On October 29, 2009, Tibbits arrived at work without any pain or discomfort in his lower back. After being assigned to the Middletown route, Tibbits left UPS's Newark facility to begin his overnight deliveries to addresses in Bear, which were en route to Middletown. Tibbits completed approximately ten (10) to fifteen (15) deliveries of overnight packages, which consisted of envelopes

and small packages ranging in weight from one half-pound to eleven pounds. Following these deliveries, Tibbits was crossing the St. George's Bridge on the way to Middletown when he experienced lower back pain "out of nowhere" around 10:15 or 10:20 a.m. Although Tibbits attempted to get his back to relax, he continued to experience a knotting pain. Tibbits called his boss at UPS, stating he was unsure he could complete the remaining deliveries on his route.

Although Tibbits' boss informed him that a relief worker would be sent, Tibbits continued to work until his replacement arrived but modified his behavior by attempting to minimize bending, tilting forward, or bending at the waist. At 4:30 p.m., nearly six (6) hours since notifying UPS of his situation, Tibbits' relief worker arrived. By that time, Tibbits had almost finished his route.

On October 30, 2009, Tibbits saw Dr. Langan, a physician affiliated with the same practice group as his primary care physician, Dr. Fletcher. Tibbits informed Dr. Langan that he was driving when he experienced a sudden onset of pain in his lower back. Although Tibbits did not reference any heavy lifting or other event that may have triggered the pain, he informed Dr. Langan that his lower back pain grew progressively worse throughout the day. On November 6, 2009, Tibbits saw Dr. Fletcher and, subsequently, went to the emergency room at Christiana Care Medical Center on two (2) separate occasions. Tibbits first went

to the emergency room on November 11, 2009 after having "spasms" in his lower back when getting out of the shower. On November 18, 2009, Tibbits returned to the emergency room after experiencing nighttime urinary incontinence, believing it was related to his lower back pain. After Tibbits was discharged from the emergency room, he later received physical therapy treatment at Omega Medical Center. On December 4, 2009, Tibbits was evaluated by Dr. Kennedy Yalamanchili, a neurosurgeon, upon the referral of Dr. Fletcher. Dr. Yalamanchili referred Tibbits to Pro Physical Therapy for additional treatment, and his condition did improve.

On April 4, 2011, Tibbits filed an initial Petition to Determine Compensation Due, alleging that he injured his lower back on October 29, 2009 while working for UPS. UPS denied that Tibbits' injury arose out of his employment and the IAB agreed; the IAB found that Tibbits failed to prove that his work activities were a substantial cause of the onset of his lower back pain on October 29, 2009. As a result, Tibbits timely appealed the IAB's decision.

STANDARD OF REVIEW

On appeal, the Court's review of the IAB's decision is limited to determining whether the IAB's findings and conclusions are supported by

substantial evidence and free of legal error.[1] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] Specifically, "[i]t is more than a scintilla of evidence, but less than a preponderance."[3] The Court "must give deference to 'the experience and specialized competence of the Board,' and must take into account the purposes of the Worker's Compensation Act."[4] Therefore, if substantial evidence exists and there is no error of law, the Court must affirm the IAB's decision.[5]

DISCUSSION

Although Tibbits and the IAB agreed that Tibbits' lower back pain occurred in the course of his employment with UPS, the issue on appeal is whether Tibbits' lower back pain also arose out of his employment with UPS. Tibbits' argument is two-fold. First, Tibbits alleges the IAB committed reversible error by classifying his lower back pain as an ordinary stress and strain that would have occurred regardless of his employment. Second, Tibbits contends the factual record does not support the IAB's conclusion, which held that Tibbits' lower back pain did not result from an identifiable and specific work event. Although Tibbits attempts to

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[1] *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).
[2] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[3] *Id.*
[4] *Del. Transit Corp. v. Hamilton*, No. 01A-03-003HD, 2001 WL 1448239 (Del. Super. Oct. 31, 2001) (citing *Histed*, 621 A.2d at 342 (Del 1965)).
[5] *Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002).

subdivide the issue, the Court will address his arguments as one.

To compensate a worker for an alleged injury under the Workers' Compensation Code 19 *Del. C.* § 2301 et. seq., the worker must have sustained the injury "by accident *arising out of* and *in the course of* employment."[6] Delaware, like most jurisdictions, has "divided 'arising out of' and 'in the course of' employment into two elements."[7] Therefore, "[t]he two elements are not synonymous, but distinct, and both must be shown to exist and conjoin in a given case."[8]

A. "In the Course of" Employment

"The requirement that an injury occur 'in the course of his employment' relates to the time, place and circumstances of the accident."[9] Specifically, "[i]t covers those things that an employee may reasonably do or be expected do to within a time during which he is employed, and at a place where he may reasonably be during that time."[10] Therefore, "in order to be compensable, the injury must first have been caused in a time and place where it would be reasonable for the employee to be under the circumstances."[11]

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[6] 19 *Del. C.* § 2304 (emphasis added).
[7] *Del. Transit Corp.*, 2001 WL 1448239, at *2 (Del. Super. Oct. 31, 2001) (citing *Children's Bureau v. Nissen*, 29 A.2d 603, 607 (Del. Super. 1942)).
[8] *Id.* (citations omitted).
[9] *Dravo Corp. v. Strosnider*, 45 A.2d 542, 543 (Del. Super. 1945).
[10] *Id.* at 543-44.
[11] *Rose v. Cadillac Fairview Shopping Ctr. Properties (Del.) Inc.*, 668 A.2d 782, 786 (Del. Super. 1995).

At the IAB hearing, the parties did not dispute that the onset of Tibbits' lower back pain occurred while he was driving across the St. Georges' bridge on his way to Middletown after having made approximately ten (10) to fifteen (15) deliveries on his assigned delivery route. The IAB, therefore, reasoned that "[t]he time, place, and circumstances were such that . . . [Tibbits] . . . was undeniably 'in the course of employment' at the time his back became symptomatic."[12] On appeal, neither party challenges the IAB's finding that this requirement was satisfied and, therefore, no further discussion is necessary.

B. "Arising Out of" Employment

"The requirement that an injury must "arise out of' employment is . . . generally held to refer to the origin of the accident and its cause, and relates to the character and quality of the accident with reference to the employment."[13] Specifically, "[t]here clearly must be shown a causal relation between the injury and the employment, and that the injury arose out of the nature, conditions, obligations or incidents of the employment, or that a connection exists between the employment and the injury, by which the employment was a substantially contributing, but not necessarily the sole or proximate, cause of the injury."[14] Put

[12] *Tibbits v. United Parcel Serv.*, No. 1346171, at * 11 (Del. I.A.B. Feb. 17, 2012).
[13] *Del. Transit Corp.*, 2001 WL 1448239, at *2 (Del. Super. Oct. 31, 2001) (citing *Dravo*, 45 A.2d at 544).
[14] *Dravo*, 45 A.2d at 544.

simply, "there must be a reasonable causal connection between the injury and the employment."[15]

1. Causation Standard

Provided a causal connection exists, the compensability of the injury is evaluated under either the "but for" standard of causation or the "usual exertion rule." Generally, "when there is an identifiable industrial accident, the compensability of any resultant injury must be determined *exclusively* by an application of the "but for" standard of proximate cause."[16] However, "[w]here there is no specific accident causing an injury, compensation is determined by the 'usual exertion rule.'"[17] "Under the 'usual exertion rule,' a claimant may recover workers' compensation benefits 'as long as the ordinary stress and strain of employment is a substantial factor in proximately causing the injury.'"[18] Further, "the claimant has the burden of demonstrating through expert testimony that his employment was 'a material element and a substantial factor in bringing it about[,]' even if the claimant had a pre-existing injury."[19] "Conversely, if the employer can demonstrate through expert medical testimony that the employee

[15] *Rose*, 668 A.2d at 786.
[16] *State v. Steen*, 719 A.2d 930, 932 (Del. 1998) (citing *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del.1992)).
[17] *San Juan*, 2007 WL 2759490, at *3 (Del. Super. Sept. 18, 2007) (citing *Steen*, A.2d at 932)).
[18] *Id.* at *3 (citing *Steen*, A.2d at 933)).
[19] *Id.* at *3 (citing *Steen*, A.2d at 935)).

would have sustained the injury regardless of the usual stress and strain of employment, the employee's injury is not compensable."[20]

At the IAB hearing, the IAB found "there was certainly no identifiable, specific work event that gave rise to [Tibbits'] back pain" because the factual record and expert testimony lacked a "definite referral to time, place, or circumstance."[21] The IAB noted that Tibbits' own testimony supported this finding, stating that Tibbits "denied any certain event or scenario—whether it be lifting a package, twisting in his seat, hitting a bump in the road or anything which would point to a specific incident or action that gave rise to his pain."[22] Moreover, the IAB highlighted that Tibbits was "quite clear that his back pain came out of 'nowhere.'"[23] Because a specific and identifiable work activity could not be pinpointed either by Tibbits or his expert as triggering Tibbits' lower back pain, the IAB reasoned that the "but for" standard of causation was inapplicable.[24]

The Court finds the factual record supports the IAB's conclusion that Tibbits' lower back pain did not result from an identifiable and specific work

[20] *Id.*
[21] *Tibbits v. United Parcel Serv.*, No. 1346171, at *11, 12 (Del. I.A.B. Feb. 17, 2012).
[22] *Id.* at *12.
[23] *Id.*
[24] The fact that Tibbits did not attempt to suggest that a specific event led to his back pain speaks volumes as to his credibility and honesty. This would have been a much more difficult case for UPS to support if he had done so. While the Court appreciates UPS's sensitivity due to the line of work they are in and that those types of events may frequently be alleged, it is clear to the Court this is not an employee fabricating an alleged injury in an attempt to obtain unjustified benefits.

event. The mere fact of driving the truck when the event occurred or that activities associated with his employment would fairly imply that it is likely that an undetected event by Tibbits caused the injury is simply insufficient. As a result, the Court finds there was substantial evidence to support the IAB's decision to evaluate whether Tibbits had a compensable ordinary stress and strain claim under the "usual exertion rule."

2. Usual Exertion Rule

Under this rule an injured claimant can recover workers' compensation benefits when there is no specific identifiable physical industrial accident, as long as the ordinary stress and strain of employment is a substantial factor in proximately causing the injury. In ruling against Tibbits, the IAB came to several conclusions.

> "As discussed in detail previously, this is not indicative of a specific, identifiable accident or event; rather, it suggests a cumulative injury related to Claimant's work activities. However, Claimant's expert medical witness, Dr. Yalamanchili, did not testify that Claimant's work activities were a substantial cause of the onset of his condition. Dr. Yalamanchili did testify that the onset of pain happened while Claimant was at work, and that even if this was due to an aggravation of Claimant's pre-existing degenerative condition, the onset of back pain was due to Claimant's work functions of "driving and lifting." However, Dr. Yalamanchili did not testify that these functions were a substantial cause of this onset."

Later in the opinion the IAB stated:

> "Without expert testimony that Claimant's work activities were a substantial cause of the onset of his low back condition on October 29, 2009, the Board was not satisfied that Claimant met his burden in this case."

What is disturbing to the Court is that it appears that the IAB's decision is premised on the fact that Tibbits' doctor did not use the precise words "substantial factor" in giving his opinion. In the Court's view, this is not only a gross distortion of Tibbits' treating physician's opinions but is simply unfair to Tibbits. The IAB is obligated to do more than search the record for key phrases and, in their absence, find Tibbits has failed to meet his burden. Any reasonable reading of Dr. Yalamanchili's testimony would suggest that not only was Tibbits' employment a substantial factor in causing the injury, it was, in the doctor's opinion, the only factor to cause the injury that formed the basis of the claim. Dr. Yalamanchili's testimony clearly met the substantial factor requirement, even if he did not precisely articulate the required words.

Unfortunately, counsel for Tibbits was transfixed on his theory of an actual event that caused the injury instead of developing the more reasonable substantial factor theory. This led to unclear questioning of the doctor during the deposition and the failure to ask the specific question whether or not it was a substantial

factor. However, this lack of clear questioning by counsel does not undercut what the Court believes is the unequivocal opinion of the doctor—that the injury was related to and caused by Tibbit's employment.

While Dr. Yalamanchili admitted that he could not point to a specific acute event that caused the injury, his examination and the testing that was performed were all consistent with the type of injury that could develop from the physical demands of Tibbit's employment. In describing the lumbar study, Dr. Yalamanchili stated:

> A. We found evidence of disc protrusions involving the lumbar spine. There were multiple levels that were involved. More significantly the L3-4 and L4-5 segments in the lumbar spine. In the thoracic spine we saw disc protrusions at two levels, T7-8, T8-9. All of these appeared to be lateralized to the left consistent with the patient's symptoms.
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> Q. And the objective findings from that MRI, are those degenerative changes or acute trauma in your mind?
>
> A. In this particular case the films demonstrate evidence of both disc protrusions and annular tearing, typically these are more associated with acute injuries rather than the chronic changes. When the disc tends to evolve if we see chronic changes that often take months or years to develop, we'll often see signs of bone spur formation is a common evolving process. Spinal stenosis is the ligaments and bone tend to thicken and cause compression. But those weren't really the

impressive changes that we saw in this particular gentleman's films.

When testifying concerning the thoracic MRI, Dr. Yalamanchili testified:

A. We felt that there were multiple levels of disc involvement, however, we felt the most significant levels were T7-8, T8-9. And I'm sorry, T11-T12.

Q. T7-T8, was there a disc protrusion?

A. That's correct.

Q. Was there also objective finding of compression on the anterior thecal sac at the T7-T8 level?

A. That's correct.

Q. And at the T11-12 level was there also a disc protrusion compressing the thecal sac?

A. Compressing the thecal sac as well as they indicated what is called the left neuro fraying where the nerve exits the spine.

Q. Would that result in radicular symptoms that Mr. Tibbets complained about?

A. Can result in radicular symptoms, that's correct.

Q. In your medical opinion would that be a result of an acute injury or degenerative changes?

A. These imaging study findings seem to indicate more of an acute injury rather than a chronic process.

> Q. And to be specific with regard to the thoracic MRI, those objective findings correlate with the mechanism of injury that Mr. Tibbets reported?
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> A. That's correct.
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> Q. More specifically the lifting and the driving?
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> A. That's correct.

The Court finds that a reasonable reading of Dr. Yalamanchili's testimony would lead the IAB to find that Tibbits had met his burden of establishing that his employment was a substantial factor in causing his injury. To find otherwise is unsupported by the record.

Having met the substantial factor standard through expert testimony, the burden then shifts to the employer to present contrary expert testimony. Here, UPS did so using a physician who had never seen or examined Tibbits, only reviewed records and studies of Tibbits' injuries, and whose whole deposition testimony is twenty (20) pages in length. Further, the majority of the deposition questions centered around whether there was a single triggering episode that caused the event which, in spite of counsel's argument, was, clearly no longer a disputed issue by the time this deposition occurred. At best, Dr. Mathis believed Tibbits had degenerative changes to his spine, which would pre-dispose Tibbits to

episodic back pain that would occur without any particular triggering event. To say that this testimony was convincing would be an extreme exaggeration, and while the Court recognizes the long litany of cases that calls for the Court to give deference to the credibility findings of the IAB, it must find the record simply does not support the IAB's analysis of the evidence in this case.

The Court does not make this finding lightly. As the trier of fact, the IAB has a unique and important responsibility to assess the credibility of all the witnesses who appear before them and seldom is their assessment overturned. The Court also notes that they perform this responsibility under very difficult circumstances. The expert testimony is almost always provided in a written deposition, which is then summarized by counsel during the hearing. While the Court appreciates it would be nearly impossible and quite costly for the physicians to physically appear before the IAB in order to truly assess their credibility, technology today certainly would seem to suggest that the way hearings have been done since administrative boards were created decades ago is no longer reasonable or appropriate. Videotaping of depositions have now become the norm, and new technology allows for other alternatives in the less formal evidentiary proceedings of an administrative board. Assessing credibility is a human art that is best done when one can view and hear the expert. While deposition testimony can be

persuasive, it simply does not carry the same deference that live, videotaped evidence does.[25] With the tools available to counsel today, in this Judge's opinion, providing more than a written transcript of an expert's deposition should be the norm, and the IAB should demand such of counsel. Counsel should also not minimize the importance of these hearings before the IAB. Their decisions are seldom overturned, and it is the responsibility of counsel to provide the IAB the best evidence available that will likely result in a favorable ruling for their client.

Now, in fairness to the IAB in this particular matter, the disjointed and somewhat inconsistent way this claim was presented by Tibbits was not helpful, nor was the procedural abnormality of taking UPS's expert deposition after the hearing conducive to a logical decision-making process. However, the Court believes the IAB has misinterpreted the opinions of the treating physician, and it simply must find the IAB's opinion is not supported by the record and must be overturned. As a result, the IAB's decision is hereby REVERSED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[25] *Estate of Mitchell v. Allen*, 2012 WL 6846555, at *3 (Del. Super. Nov. 28, 2012) (citations omitted).