EFiled: Dec 09 2013 04:24PM EST
Filing ID 54676272
Case Number 493,2013

IN THE
Supreme Court of the State of Delaware

LIBERTY MUTUAL INSURANCE COMPANY,
Insurer Below - Appellant,

v.

JESUS SILVA-GARCIA,
Claimant Below - Appellee,

and

CITY WINDOW CLEANING OF DELAWARE, INC.[1],
Employer Below - Appellee.

NO. 493, 2013

APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE IN AND FOR KENT COUNTY

C.A. NO. K13A-01-002 RBY

CITY WINDOW CLEANING INC. OF DELAWARE'S ANSWERING BRIEF TO APPELLANT LIBERTY MUTUAL INSURANCE COMPANY'S CORRECTED OPENING BRIEF

YOUNG CONAWAY STARGATT & TAYLOR, LLP

Anthony G. Flynn (No. 74)
William E. Gamgort (No. 5011)
Robert M. Vrana (No. 5666)
1000 N. King St.
Wilmington, DE 19801
(302) 576-3267

Attorneys for Employer Below – Appellee, City Window Cleaning Inc. of Delaware

DECEMBER 9, 2013

[1] The correct legal name of the Employer Below-Appellee is "City Window Cleaning Inc. of Delaware."

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

On February 22, 2010, Appellee Jesus Silva-Garcia ("Claimant") filed a Petition to Determine Compensation Due ("Petition") with the Industrial Accident Board ("IAB") seeking compensation for a catastrophic injury he suffered on January 15, 2010 ("Accident") at the Harrington Raceway and Casino ("Casino").[2]

The IAB held a routine bond hearing related to the Petition on March 31, 2010 at which City Window Cleaning Inc. of Delaware ("City Window"), Garcia's employer, was unable to demonstrate proof of workers compensation insurance because its insurer, Liberty Mutual Insurance Company ("Liberty"), had not yet responded to City Window's demand for coverage for the Accident.[3] The IAB ordered a bond to secure a source of compensation for the Claimant.[4]

Over a year later, the IAB held an evidentiary and legal hearing on August 17, 2011 ("Coverage Hearing") to determine whether City Window had insurance coverage from Liberty in place at the time of the Accident.[5] The IAB issued a "Decision on Insurance Coverage" ("Coverage Opinion," cited to herein as "Coverage Op.") on August 31, 2011, finding there was workers compensation insurance coverage in place from Liberty at the time of the Accident.

---

[2] Coverage Op. at 2.

[3] C3-14. In an effort to limit duplication in the parties' appendices, the references to (A***) herein are to the Appendix of Liberty's Opening Brief to this Court. The Appendix to this brief will be cited herein using the nomenclature (C***).

[4] A272.

[5] Prior to the Coverage Hearing, Liberty filed a Complaint for declaratory judgment in the Superior Court in and for New Castle County on October 8, 2010 (C.A. No. N10C-10-065 CLS) ("Declaratory Action") seeking a determination that there was no coverage in place on January 15, 2010. The Superior Court dismissed the Declaratory Action on May 26, 2011. The Superior Court's rulings in the Declaratory Action were not appealed to this Court.

Thereafter, Liberty appealed the Coverage Opinion to the Superior Court in and for New Castle County, Delaware (C.A. No. N12A-03-003 CLS) ("NCC Interlocutory Appeal") on March 5, 2012. Liberty also filed a parallel appeal of the Coverage Opinion to the Superior Court in and for Kent County, Delaware (K12A-03-003 RBY) ("Kent Interlocutory Appeal"). The Superior Court in and for New Castle County dismissed the NCC Coverage Appeal. On August 21, 2012, the Superior Court in and for Kent County dismissed the Kent Coverage Appeal. Liberty then petitioned for certification of interlocutory appeals of the NCC Interlocutory Appeal and Kent Interlocutory Appeal. The Superior Court denied the application for interlocutory review, this Court denied certification of the NCC Coverage Appeal, and Liberty voluntarily withdrew the Kent Interlocutory Appeal.

On July 9, 2012, approximately two and one half years after the Accident, the IAB issued its opinion on Claimant's Petition, finding that the Claimant's injuries were compensable ("Compensation Opinion").[6] Thereafter, Liberty filed an appeal to the Superior Court in and for Kent County, Delaware (C.A. No. K13A-01-002 RBY) challenging, exclusively, the Coverage Opinion. The Superior Court in and for Kent County, Delaware issued an Order, dated August 22, 2013, affirming the Coverage Opinion in all respects.[7] Thereafter, Liberty filed the instant appeal to this Court.

---

[6] A53-63.

[7] A copy of the Superior Court Opinion was attached at the back of Liberty's Opening Brief to this Court along with the Coverage Opinion and is cited to herein as "Super. Ct. Op."

COUNTER-SUMMARY OF ARGUMENT

1. **Denied**. The IAB did not err as a matter of law in issuing the Coverage Opinion after having previously ruled that City Window must post a bond. This issue was not raised before the IAB, and thus, was not properly preserved as required by Rule 8. Nonetheless, the doctrines of *res judicata* and collateral estoppel, which Liberty contends barred the IAB from issuing the Coverage Opinion, are inapplicable for several, independent reasons:

A. The doctrines only apply where the same parties are involved in more than one lawsuit. In the instant matter, the bond hearing and Coverage Hearing were held in the same matter. Additionally, Liberty was not a party to this action at the time of the bond hearing.

B. The doctrines require that there be a previous final judgment on the merits as to the subject issue(s). In this case, the bond hearing was a statutorily prescribed, routine procedural matter focused on securing a source from which to compensate Garcia and was not a determination as to whether there was insurance coverage in place at the time of the Accident.

C. The coverage dispute was not ripe at the time of the bond hearing because Liberty was not yet a party to the case and because it had not yet responded to City Window's demand for coverage.

2. **Denied**. The IAB did not err as a matter of law in construing the Handbook (see p. 16-20, *infra*, for a description of the Handbook) as providing an appropriate basis/standard for determining the renewal date of the Policy. Regardless, this issue was not raised before the IAB, and thus, was not properly preserved

as required by Rule 8. In fact, Liberty argued before the IAB that the Handbook provided a means of calculating the renewal date of the Policy, and its contention that the Handbook does not provide such a basis for so calculating was first raised in the Opening Brief to this Court.

3-4. **Denied**. The IAB did not err as a matter of law in (i) concluding that a "meter mark" made by a private postage machine on license from the U.S.P.S. is a "U.S. postmark" as the term is used in the Handbook; or (ii) applying the basis/standard from the Handbook to the facts of this case and concluding that the Policy was renewed effective 12:01 a.m., January 13, 2010.

5. **Yes, there was substantial evidence supporting the IAB's finding**. The IAB's factual finding that Liberty more likely than not received the Premium Payment on January 15, 2010 after 2 p.m. was *dicta* from the Coverage Opinion and need not be parsed by this Court. This Court is tasked with determining whether the IAB's holding that there was insurance coverage in place at the time of the Accident was based on substantial evidence. The IAB's conclusion as to coverage turned on its findings regarding the date of the "meter mark" on the envelope containing the Premium Payment as prescribed by the Handbook and not the date of Liberty's "receipt" of the Premium Payment. Nonetheless, there is substantial documentary and testimonial evidence supporting the IAB's factual finding as to Liberty's receipt of the Premium Payment.

6. **Denied**. The IAB appropriately cited to *Levan* as additional support for, or as an alternative basis for, its conclusion that there was insurance coverage in place at the time of the Accident.

COUNTER-STATEMENT OF FACTS

I. GENESIS OF THE COVERAGE DISPUTE.

Garcia was working as an employee of City Window on a "high dusting" job at the Harrington Raceway and Casino in Harrington, Delaware on January 15, 2010 when he was struck by the wheels of a scissor "boom" lift being used to reach the ceiling of the building, resulting in the need for a partial amputation of his left leg.[8] City Window immediately notified Liberty of the Accident and Liberty began investigating.[9] It was not until April 27, 2010, over three months after the Accident, that Liberty informed Claimant and City Window that it was denying coverage for the Accident.[10] Liberty took the position that coverage was not renewed until January 20, 2010 when City Window's premium payment was honored by City Window's bank after processing.[11]

City Window and Liberty disagree as to whether the Policy was renewed on or before January 15, 2010. The IAB resolved the coverage dispute in City Window's favor and issued the Coverage Opinion finding that the subject policy was renewed and effective on January 13, 2010.

II. IAB'S FINDINGS REGARDING RENEWAL OF THE POLICY.

A. IAB's factual findings regarding the date the premium payment was cut and mailed by City Window.

City Window's owner, Howard "Herb" Hirzel, and City Window's office manager, Pam Heron, testified in great detail at the Coverage Hearing where the

---

[8] A55.

[9] A103-104; C126-176.

[10] C77-80.

[11] C79.

IAB was tasked with determining the renewal date of City Window's workers compensation policy ("Policy"). The IAB found the testimony of Mr. Hirzel and Ms. Heron, whereby they described in detail the mailing of the premium payment to Liberty to renew the Policy ("Premium Payment") to be "credible" and "brief and to the point, vivid and very credible," respectively.[12]

Mr. Hirzel and Ms. Heron testified that City Window cut and mailed to Liberty a check in the amount of $11,869.00 representing the Premium Payment necessary to renew the Policy on January 12, 2010 – three days before the Accident.[13] They further testified that the Premium Payment was made using the self-addressed payment coupon and envelope provided by Liberty that contained a destination address for a lockbox in Philadelphia.[14] They also testified that City Window paid the postage for the envelope containing the Premium Payment and marked the envelope containing the Premium Payment with "meter mark" containing a date indicia of January 12, 2010 using a Pitney Bowes postage meter machine licensed from the United States Postal Service ("U.S.P.S.").[15]

Specifically, Mr. Hirzel testified that he directed Ms. Heron to cut the check constituting the Premium Payment on January 12, 2010 and to mail it that day to Liberty.[16] Ms. Heron testified that she received a call from Mr. Hirzel on January 12, 2010, following an email from him, impressing upon her the importance that

---

[12] Coverage Op. at 15-16.

[13] A91-97; A183-191.

[14] Liberty has conceded that it had control over the Philadelphia lockbox to which it directed the Premium Payment be mailed. A77.

[15] A93-95; 174-191; C179.

[16] A93-94.

that she immediately cut and mail a check to Liberty constituting the Premium Payment to ensure that workers compensation coverage was in place.[17] Ms. Heron vividly described her activities on January 12, 2010 in filling out the payment coupon provided by Liberty, placing the Premium Payment and completed payment coupon in the envelope provided by Liberty, running the envelope through the Pitney Bowes meter machine City Window licensed from the U.S.P.S., clocking out of work for the day at City Window at 4:42 p.m., and placing the envelope containing the Premium Payment in a U.S.P.S. drop box in Newport, Delaware between 4:30 p.m. and 4:45 p.m. that showed a pick up time for the day of 5:15 p.m.[18] Ms. Heron recalled the Premium Payment being the only piece of mail she prepared and placed into circulation on January 12, 2010 and explained that her routine for sending City Window's mail was to drive it to the same Newport, DE U.S.P.S. postbox she used to mail the Premium Payment.[19]

In concluding that the foregoing testimony was credible evidence that the Premium Payment was placed into mail circulation on January 12, 2010, the IAB specifically noted that:

- Mr. Hirzel testified that City Window filed an unrelated property liability claim (with an insurer other than Liberty) on January 11, 2010 because his employees struck and damaged a door at the Harrington Casino at the beginning of the job and before the Accident. The property liability claim was submitted through City Window's insurance broker, Lawrence "Buzz" Hen-

[17] A184-191.

[18] *Id.*

[19] *Id.* at 190.

nessey. The submission of the liability claim reminded Mr. Hirzel that City Window needed to mail the Premium Payment to Liberty;[20]

- Ms. Heron testified that she was familiar with using the meter machine City Window licensed from the U.S.P.S. and that the operator guide for the machine states that it is impossible to backdate a date indicia on a piece of mail and that she did not attempt to tamper with the machine to backdate the envelope containing the Premium Payment;[21] and
- Ms. Heron also testified that the U.S.P.S. Domestic Mail Manual ("DMM"), which guides and regulates domestic mail services in the United States,[22] provides that a piece of mail date-stamped by a meter machine must be deposited into circulation on the date shown on the indicia.[23]

In reaching the factual conclusion that the Premium Payment was cut by City Window and deposited in the mail on January 12, 2010, the IAB also considered the testimony of two bank employees. Michael Barone, an employee of Citibank, was called by Liberty because Citibank processed the Premium Payment for Liberty subject to the terms of an agreement dictated by Liberty ("Lockbox Agreement").[24] Mr. Barone testified that the Premium Payment was picked up by

---

[20] Coverage Op. at 6-8, 15; A91-93.

[21] A190-191. Liberty suggests that City Window may have predated the envelope and held onto it for use in defrauding Liberty once the Accident took place. Liberty's Opening Brief at 35 (hereinafter "Op. Br."). This suggestion is made without any support in the record and would require a surreal ability on City Windows' part to foresee the future.

[22] *Gelbfish v. United States Postal Serv.*, 51 F. Supp. 2d 252, 254 (E.D.N.Y. 1999). *See also Stevenson v. Swiggett*, 8 A.3d 1200, 1202-03 (Del. 2010).

[23] A194-196.

[24] C122-125.

a Citibank courier at the Philadelphia lockbox (the pre-printed address on the payment coupon used for the Premium Payment) and driven to Citibank's New Castle, Delaware facility for processing.[25] At Citibank's New Castle facility, the envelope containing the Premium Payment and the check constituting the Premium Payment were imaged and processed.[26] Mr. Barone further testified that once the Premium Payment was processed it was submitted for debit from City Window's account.[27] Mr. Barone explained that the Lockbox Agreement provided that if a premium payment was received and processed in the New Castle, Delaware facility after approximately Noon or 1 p.m. on a particular day that Citibank would stamp the payment as having been processed on the next business.[28] Mr. Barone explained that payment processing needed to be stopped an hour or two before the 2:00 p.m. cutoff in order for Citibank to transmit a daily activity log to Liberty.[29] Mr. Barone stated that the stamping on the back of the check constituting the Premium Payment indicated that Citibank processed the payment on Monday, January 18, 2010, a federal holiday (Dr. Martin Luther King, Jr. day).[30] Mr. Barone admitted that if the Premium Payment arrived for processing after Noon or 1 p.m. on January 15, 2010 -- the day of the Accident -- it would have been stamped as having been processed on January 18, 2010, as in fact was the case.[31] Mr. Barone readily admitted

---

[25] A146-148.

[26] A158-161; C177- C181.

[27] A154.

[28] *Id.* at 158-162.

[29] *Id.* at 152.

[30] *Id.* at 158-159.

[31] *Id.* at 155-160.

that he did not know when the Premium Payment arrived at the Philadelphia lock-box.[32] Liberty also called a witness at the Coverage Hearing from Wilmington Trust Co., City Window's bank from which the Premium Payment was debited. Melissa Bennett, from Wilmington Trust Co., testified that the Premium Payment was presented for deposit on January 18, 2010 and was honored on January 20, 2010.[33] Like Mr. Barone, Ms. Bennett testified that she did not know when the Premium Payment arrived in Philadelphia.[34]

B. IAB's inconsequential[35] factual finding regarding the date Liberty "received" the Premium Payment.

The IAB also found "it more likely than not" that Liberty received the Premium Payment on January 15, 2010 after 2:00 p.m. and stamped the Premium Payment check as being processed the next business day, January 18, 2010.[36]

Liberty also offered the testimony of its claims adjuster who processed City Window's coverage demand, Ms. Gail Kilpatrick.[37] Ms. Kilpatrick testified that she did not know when the Premium Payment arrived in Philadelphia.[38]

---

[32] *Id.* at 153.

[33] *Id.* at 144-145.

[34] *Id.* at 145.

[35] The IAB's factual finding regarding the date the Premium Payment was "received" by Liberty is inconsequential because the finding is dicta from the Coverage Opinion and has no bearing on the IAB's determination that there was insurance coverage in place at the time of the Accident. The IAB determined that the appropriate basis for establishing the renewal date of the Policy was not the date Liberty "received" the Premium Payment, but was instead 12:01 a.m. the day after "the date of the U.S. Postmark appearing on the envelope containing the item correcting the default...." Coverage Op. at 16. *See, infra*, Argument Section IV.

[36] Coverage Op. at 14.

[37] In addition to her live testimony, the deposition transcript of Ms. Kilpatrick, which was taken in the Declaratory Action, was introduced into evidence at the Coverage Hearing by the IAB. (Coverage Op. at 11 n.31). A copy of Ms. Kilpatrick's deposition transcript is included in the Appendix to this Brief at C17-188.

III. IAB'S INTERPRETATION OF THE HANDBOOK TO DETERMINE THE RENEWAL DATE OF THE POLICY.

The Delaware Workers Compensation Insurance Plan Handbook ("Handbook") is a set of administrative rules and/or regulations drafted by the Delaware Compensation Rating Bureau Inc., which the IAB interprets and applies to workers compensation claims and coverage disputes.[39] Pursuant to 19 *Del. C.* § 2301 *et seq.* ("Workers Compensation Statute"), the IAB is tasked with overseeing and processing workers compensation claims in Delaware. Section 2348(b) of the Workers Compensation Statute also tasks the IAB with resolving "...a controversy as to the responsibility of an employer or the employer's insurance carrier for the payment of compensation and other benefits ...."

A. IAB's determination that the Handbook provided a basis to establish the renewal date of the Policy.

The IAB concluded that Section III of the Handbook provides the standard for determining the renewal date of the Policy and that the period of lapse is: "from and inclusive of the date of cancellation through the date of the U.S. Postmark appearing on the envelope containing the item correcting the default...."[40] Per the foregoing, the IAB concluded that the Policy lapsed on January 1, 2010 and was subsequently renewed effective 12:01 a.m., January 13, 2010.[41]

---

[38] Coverage Op. at 11-12; A227-228.

[39] Handbook at 2. *See B & B Maintenance Serv. v. CNC Ins. Assocs.*, 1996 Del. Super. LEXIS 533, at *4 (Del. Super. July 19, 1996).

[40] Coverage Op. at 17 (citing Handbook at 13). Ms. Kilpatrick agreed that the Handbook provided the means of calculating the renewal date of the Policy in her deposition testimony. C48-51.

[41] Coverage Op. at 17.

B. Evidence supporting the IAB's determination that a "meter mark" is a U.S. postmark for the purpose of the Handbook.

The term "U.S. postmark" is not defined in the Handbook and is susceptible to more than one reasonable meaning as evidenced by the number of cases from different jurisdictions addressing the issue that are discussed in Argument Section II(C)(2) below. Accordingly, in order to construe the meaning of "U.S. postmark" as used in the Handbook, the IAB properly considered that: (i) the Pitney Bowes postage meter machine City Window used to mail the Premium Payment was on license from the U.S.P.S.; (ii) a dictionary defined a "postage meter" as a machine that imprints a piece of mail with a "postmark;" and (iii) the DMM provides that meter marks are official postmarks imprinted under license from the U.S.P.S. and requires that a piece of "metered" mail contain an date indicia matching the date it is placed into circulation.[42] The terms of the DMM have the force of law by virtue of their incorporation into the Federal Regulations, and accordingly, privately metered mail is entitled to all privileges.[43] Further, users of meter machines are subject to criminal penalties of if they attempt to place a piece of mail into circulation on a date different from the date indica. Further, the IAB acknowledged that Delaware courts have not opined as to whether a meter mark is a U.S. postmark, and considered case law from other jurisdictions, finding it persuasive that the majority of jurisdictions have concluded that they are equivalent.[44]

---

[42] *Id.* at 14-16.

[43] *Gelbfish*, 51 Supp. 2d at 252. *See also* C.F.R. §§ 111.1 through 111.4 (2012).

[44] Coverage Op. at 16.

ARGUMENT

I. *RES JUDICIATA* AND COLLATERAL ESTOPPEL DID NOT PROHIBIT THE IAB FROM ISSUING THE COVERAGE OPINION.

A. Question Presented

Did the doctrines of *res judiciata* and collateral estoppel prohibit the IAB from issuing the Coverage Opinion given its prior ruling that City Window was required to post a bond?

B. Standard Of Review

In reviewing an appeal from an administrative agency this Court must determine whether the agency's decision is supported by substantial evidence and free from legal error.[45] The applicability of the doctrines of *res judiciata* and collateral estoppel is a legal question and this Court's review of the same is de novo.[46]

C. Merits Of The Argument

First, the applicability of *res judiciata* and collateral estoppel was not raised before the IAB, and thus, was not preserved for the purpose of this appeal. Accordingly, City Window respectfully asserts that this Court should decline to consider Liberty's Question Presented #1.[47]

Setting aside the absence of preservation, Liberty argues that the bond hearing held by the IAB on March 31, 2010, shortly after Garcia filed his Petition, constituted a decision on the merits as to whether there was coverage at the time of the

---

[45] *Stoltz Mgmt. Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992).

[46] *Bd. of Adjustment of Sussex Cnty. v. Verleysen*, 36 A.2d 326, 329 (Del. 2012).

[47] In order to raise an issue on appeal from an administrative body, an appellant must have preserved the issue by raising and developing it on the record before the administrative agency. *See Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976).

Accident.[48] Liberty posits that if the bond hearing constituted a hearing on the merits as to the availability of insurance coverage, the doctrines of *res judicata* and collateral estoppel prohibited the IAB from later issuing the Coverage Opinion.[49] Liberty's position is flawed in several respects.

Res judicata bars a second suit on an identical cause of action where there was a final judgment on the merits in a prior suit involving the same parties.[50] Collateral estoppel applies in a situation in which "a question of fact essential to the judgment is litigated and determined by a valid and final judgment," and prescribes that the determination is conclusive between the same parties in a subsequent case.[51]

As illustrated by the highlighted text in the foregoing paragraph, the doctrines only apply in instances where the same parties are involved in more than one suit. The only parties to the matter at the time of the bond hearing were Garcia and City Window. In fact, an attorney attending the bond hearing expressly stated that she was not appearing on behalf of Liberty and was only attending the hearing to "monitor."[52] Given that Liberty was not a party to the litigation at the time of the bond hearing, the "same parties" requirement of the doctrines was not met. Additionally, there must be two separate causes of action for the doctrines to apply. The bond hearing and Coverage Hearing did not constitute separate suits -- they

---

[48] Op. Br. at 10-12.

[49] *Id.*

[50] *Smith v. Guest*, 16 A.3d 920, 934 (Del. 2011).

[51] *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 (Del. 1991).

[52] C11-12.

were separate hearings held in the same action as evidenced by the same case number (C.A. No. 1348611) on both hearing transcripts, the order entered at the bond hearing and the Coverage Opinion.[53] Accordingly, Liberty has also failed to demonstrate that the "separate actions" requirement of the doctrines was met.

Further, in order for the doctrines of *res judicata* and collateral estoppel to apply there must be a final judgment after a hearing on the merits. The bond hearing did not constitute a merits-based determination as to whether there was insurance coverage at the time of the Accident. For one, the bond hearing was a matter of routine procedure and no witnesses were called.[54] Further, the hearing did not determine coverage because as the Superior Court below noted in its opinion, the IAB has the statutory power to demand that an employer post a bond to secure compensation for a claimant irrespective of whether proof of insurance is produced at the bond hearing.[55] Additionally, the doctrines are inapplicable because at the time of the bond hearing there was not a ripe dispute regarding coverage given that Liberty had yet to issue its coverage determination.[56]

---

[53] A64; C3; A274-275; Coverage Op. at 1.

[54] As further evidence of the routine nature of the bond hearing, the form of Order used by the IAB contained boilerplate language with a blank space for the IAB to handwrite the amount of the required bond. A274-275.

[55] Super. Ct. Op. at 13-14. *See* 19 *Del. C.* § 2372(b) (In any case [i.e. in spite of the requirement to carry insurance per § 2372(a)], the Department or Board may require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred.") (emphasis added).

[56] Liberty makes the strained that there was a ripe coverage dispute at the time of the bond hearing because City Window was "aware that Liberty Mutual had renewed CW's policy with a lapse that included the date of the accident." (Op. Br. at 11). Liberty's extensive delay in responding to its demand, and any suspicion it caused on City Window's part, did not create an actual dispute ripe for adjudication. *See Tenneco Auto, Inc. v. El Paso Corp.*, 2001 Del. Ch. LEXIS 147, at *26-27 (Del. Ch. Nov. 29, 2001) (holding that

II. THE IAB PROPERLY INTERPRETED AND APPLIED THE HANDBOOK TO DETERMINE THE RENEWAL DATE OF THE POLICY

A. Questions Presented

1. Whether the IAB erred in interpreting the Handbook and finding that it provided a basis for calculating the renewal date of the Policy?

2. Whether the IAB erred in concluding that a meter mark made by a postage machine on license from the U.S.P.S. constitutes a U.S. postmark for the purpose of establishing the renewal date of a policy pursuant to the Handbook?

B. Standard Of Review

In reviewing an appeal from an administrative agency this Court must determine whether the agency's decision is free from legal error.[57] This Court is to defer to an administrative agency's interpretation of its "own" rules unless its interpretation is clearly erroneous.[58] Stated another way, an administrative agency's interpretations of its own rules are presumptively correct.[59]

The Handbook is a set of administrative rules and/or regulations that govern the issuance and renewal of "involuntary" market workers compensation policies issued in Delaware.[60] As the administrative body in Delaware tasked with resolving coverage disputes, pursuant to 19 *Del. C.* § 2348(b), the IAB is required to interpret and apply the Handbook and its application and construction of the same is entitled defer-

---

"an allegation of a breach of an insurance policy, such as a refusal by the carrier to pay for a covered loss, is a necessary predicate for a suit on an insurance policy.").

[57] *Stoltz Mgmt. Co.*, 616 A.2d at 1208.

[58] *State Farm Mut. Auto Ins. Co. v. Mundorf*, 659 A.2d 215, 220 (Del. 1995).

[59] *Div. of Social Serv. v. Burns*, 438 A.2d 1227, 1229 (Del. 1981).

[60] Handbook at 2.

ence. Liberty argues in *ipse dixit* fashion that the IAB's interpretation of the Handbook is entitled to no deference apparently on the basis that the Handbook was not drafted by the IAB.[61] While it is true that the Handbook was not drafted by the IAB, it need not be authored by the IAB in order for their interpretations of the same to be entitled to deference. In fact, this Court has held that "a reviewing court may be expected to defer to the construction placed by an administrative agency on regulations promulgated or enforced by it, unless shown to be clearly erroneous." [62] (emphasis added). Nonetheless, given the IAB's statutorily prescribed task of interpreting and applying the Handbook, for all intents and purposes the Handbook is the IAB's "own." This Court has explained that an administrative agency's construction of its own rules are entitled to deference "in recognition of its expertise in a given field."[63] Even if this Court were to find that the IAB's interpretation of the Handbook is not entitled to deference, its interpretations are at a minimum entitled to "substantial weight."[64]

C. Merits Of The Argument

1. The IAB did not clearly err in interpreting the Handbook and applying its terms.

The IAB concluded that the Handbook provided the basis for determining the renewal date of the Policy. Specifically, the IAB held that the period of lapse of the Policy ran "from and inclusive of the date of cancellation through the date of the U.S. postmark appearing on the envelope containing the item correcting the de-

---

[61] Op. Br. at 17.

[62] *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 n.9 (Del. 1999).

[63] *Division of Social Services, etc. v. Burns*, 438 A.2d 1227, 1229 (Del. 1981).

[64] *Id.* at 382 n.8.

fault...."[65] In this appeal, Liberty seeks to create ambiguity in the Handbook through its contention that the Handbook is silent as to how to calculate the period of lapse of the Policy.[66] There is no such ambiguity in the Handbook. Liberty's contention is based upon the faulty premise that for the purposes of the Handbook there is a distinction between policies that are renewed after being "cancelled" and those that have lapsed on account of "non-renewal." The Handbook does not draw a distinction between "cancelled" and "non-renewed" policies with respect to calculating the period of lapse.

The Handbook uses the terms "cancelled" and "non-renewed" interchangeably throughout Section III, captioned "Renewal, Cancellation and Reinstatement Procedures," including in both the subsection titled "Renewal Procedure" and the subsection titled "Cancellation Procedure." Additionally, as the Superior Court reasoned below, there is no practical distinction for the purposes of determining the effective renewal date of a policy that was terminated through cancellation and one terminated on account of non-renewal – in each instance coverage has lapsed.[67] The IAB did not clearly err in failing to find material the distinction Liberty seeks to make, and accordingly, did not need to look outside the four corners of the Handbook for a basis for determining the renewal date of the Policy.

Arguing that there is a distinction between a workers compensation policy that is terminated through cancellation and one terminated on account of non-

---

[65] Coverage Op. at 17.

[66] Op. Br. at 13. Liberty's position that the Handbook is silent as to how to determine the renewal date of the Policy is the opposite position it took before the IAB where it argued that the Handbook provided clear guidance for establishing the renewal date. A238-241. In fact, in its letter denying coverage for the Accident, Liberty stated that Section III of the Handbook applied for the purpose of determining the renewal date of the Policy. C79-80. This issue was not properly preserved for this appeal and this Court should decline to consider Liberty's Question Presented #2.

[67] Super. Ct Op. at 17-18.

renewal, Liberty cites to two cases involving casualty insurance policies, *Moore v. Travelers Indem. Ins. Co.*, 408 A.2d 298 (Del. Super. 1979) and *Colonial Ins. Co. of California v. Wilson*, 1991 Del. Super. LEXIS 257 (Del. Super. July 15, 1991).[68] The foregoing cases are irrelevant for several reasons. First, the renewal of the automobile casualty insurance policies at issue in *Moore* and *Wilson* are governed by Delaware statutory law, 18 *Del. C.* § 3901 *et seq.*, as opposed to the Policy in the instant matter that is governed by the Handbook.[69] They are distinct statutory and regulatory schemes that are unhelpful to compare. Second, the factual scenarios in *Moore* and *Wilson* are distinguishable from the instant matter because in those cases the insureds tendered checks that were dishonored on multiple occasions for insufficient funds during which time the accidents at issue occurred. In the instant matter, the Premium Payment was honored upon presentment to City Window's bank. The factual distinction is critical because the courts in *Moore* and *Wilson* ruled that the policies were not renewed upon the insurer's receipt of the premium checks because they were dishonored. In fact, the court in *Moore* goes on to reason that had the premium check been honored the coverage would have been retroactively renewed as of the date the insurer physically received the premium payment into its possession.[70] The foregoing reasoning from *Moore* undercuts Liberty's position that the Premium Payment was "received" by Liberty on the date it was honored, January 20, 2010 – *see* Argument Section IV, *infra*. The *Moore* and *Wilson* cases are inapplicable to the instant appeal for the foregoing reasons, and

---

[68] Op. Br. at 21, 24.

[69] The Superior Court below noted that while there is legislative history evidencing the intent of the General Assembly with respect to the statutory scheme applicable to automobile casualty contracts, 18 *Del. C.* § 3901 *et seq.*, there is no such legislative history that provides insight into the Handbook. Super. Ct. Op. at 15. The absence of legislative history for the Handbook provides further support for appellate courts deferring to the expertise of the IAB in interpreting and applying its terms.

[70] *Moore*, 408 A.2d at 301.

nonetheless, are unsupportive of Liberty's position that "receipt" must mean the date the Premium Payment was honored.

Finally, in focusing on the distinction between "cancelled" and "non-renewal," Liberty misses (or intentionally glosses over) the basis of the IAB's conclusion as to the applicability of the Handbook for determining the renewal date of the Policy. The IAB ruled that "the period of lapse was from January 1, 2010, the date of cancellation, to January 12, 2010...." (emphasis added).[71] In other words, the IAB concluded that the Policy was cancelled and subsequently renewed with an effective date of January 13, 2010. In fact, Liberty's counsel at the Coverage Hearing asked City Window's owner if the Policy was "cancelled" and subsequently renewed, which he confirmed.[72] The IAB's finding is supported by the terms of the Handbook which expressly provide that a policy may be "cancelled" for non-payment.[73] Liberty offers no argument as to whether the IAB erred in determining that the Policy was "cancelled" and begins its argument under the assumption that the Policy was "non-renewed." This logical leap in Liberty's argument cannot be ignored. Before Liberty can argue the IAB misapplied the Handbook it first must establish that the IAB erred in concluding that the Policy was "cancelled," a subject Liberty has not addressed and has now waived.

The IAB carefully considered the terms of the Handbook before concluding that it provided a basis for determining the renewal date of the Policy. The IAB's interpretation of the Handbook is entitled to deference and was not clearly in error.

---

[71] Coverage Op. at 17.

[72] A113.

[73] C93 (subsection titled "Cancellation Not Requiring Approval").

2. The IAB did not clearly err in concluding that a meter mark is a U.S. postmark for the purposes of establishing the renewal date of the Policy.

Liberty also maintains that if the Handbook applies to set forth the renewal date of the Policy then the IAB nonetheless erred in determining that a private meter mark is equivalent to a U.S. postmark for the purposes of the Handbook.[74] The IAB did not err in construing the term "U.S. postmark" as it is used in the following section from the Handbook setting forth the basis for establishing the renewal date of the Policy: "The lapse shall be for the time period from and inclusive of the date of cancellation through the date of the U.S. postmark appearing on the envelope containing the item correcting the default or, if received by other means, consistent with the postmark binding rule." The term "U.S. postmark" is not defined in the Handbook and is reasonably susceptible to more than one meaning as evidenced by the volume of case law having considered its meaning.[75] Accordingly, the IAB acted appropriately in reviewing the dictionary definition of "postmark," the DMM that guides domestic mail service (including mail processed by

---

[74] Op. Br. at 21.

[75] *See Lozier Corp. v. Douglas Co. Bd. Of Equalization*, 829 N.W.2d 652 (Neb. 2013) (reviewing various sources in seeking to define "postmark" and concluding that definitions for the term "abound."); *Machadeo v. Florida Unemployment Appeals Comm'n*, 48 So.3d 1004 (Fla. Dist. Ct. App. 2010); *Smith v. Idaho Dep't. of Labor*, 218 P.3d 1133 (Idaho 2009); *Chevron U.S.A. Inc. v. Dep't of Revenue*, 154 P.3d 331 (Wyo. 2007); *Headrick v. Jackes-Evans Mfg. Co.*, 108 S.W. 3d. 114 (M.O. Ct. App. 2003); *Corona v. Boeing Co.*, 46 P.3d 253 (Wash. Ct. App. 2002); *Lin v. Unemployment Comp. Bd. of Review*, 735 A.2d 697 (Pa. 1999); *In re Appeal of Bass Income Fund*, 446 S.E.2d 594 (N.C. Ct. App. 1994); *Abrams v. Ohio Pacific Exp.*, 819 S.W. 2d 338 (Mo. 1991); *Haynes v. Hechler*, 392 S.E. 2d 697 (W.Va 1990); *Gutierrez v. Industrial Claim App. Off.*, 841 P.2d 407 (Colo. App. 1992); *Frandrup v. Pine Bend Warehouse*, 531 N.W2d 886 (Minn. App. 1995); *Bowman v. Ohio Bur. of Emp. Serv.*, 507 N.E. 2d 342 (Ohio 1987); *Albaugh v. State Bank of LaVernia*, 586 S.W.2d 137 (Tex. App. 1979); *Severs v. Abrahamson*, 124 N.W.2d 150 (Iowa 1963).

meter machines)[76] and case law from other jurisdictions before determining that the a "meter mark" made by a postage machine on license from the U.S.P.S. is a "U.S. postmark" as the term is used in the Handbook for the purpose of determining the renewal date of a policy.[77]

The IAB took note of the fact that the *Webster's College Dictionary* defined "postage meter," such as the Pitney Bowes machine utilized by City Window, as machine capable of imprinting a postmark.[78] The IAB also reviewed the terms of the DMM, which provides that meter machines used by private parties are strictly controlled and used under license from the U.S.P.S.[79] The DMM ensures accuracy of date indicia on envelopes marked using postage machines by requiring that metered mail be deposited for mailing on the date indicated on the meter stamp.[80] A mailer that attempts to deposit a piece of metered mail into circulation with an inaccurate date is subject to penalties, including criminal charges.[81] It was reasonable for the IAB to rely upon the date on the envelope containing the Premium Payment as strong evidence of the date the envelope was placed into circulation.

The IAB also noted that under Federal Regulations, private postage meter marks are official postmarks imprinted under license from the U.S.P.S.[82] In fact,

---

[76] *See Gelbfish*, 51 F. Supp. 2d at 254.

[77] Coverage Op. at 21-28. *See Williams v. State*, 962 A.2d 210, 218 (Del. 2008) (citing to the opinion of a "majority of jurisdictions" considering an issue as persuasive and/or additional authority).

[78] Coverage Op. at 16.

[79] *Id.* at 16-17.

[80] C209-210 (Section 4.5.3.).

[81] *See Lozier Corp.*, 285 Neb. at 715.

[82] Coverage Op. at 16. *See Gutierrez v. Industrial Claim Appeals Office*, 841 P.2d 407, 408 (Colo. Ct. App. 1992) (citing 39 C.F.R. §§ 111.1-111.5 (1991)).

Ms. Heron, City Window's office manager, testified at the Coverage Hearing to having communicated with the U.S.P.S. and they confirmed that a meter mark is equivalent to a postmark.[83]

The IAB also considered case law from other jurisdictions, the majority of which have held that postage machines are capable of imprinting an envelope with a U.S. postmark and are reliable evidence as to when a piece of mail entered the mail stream.[84] The cases cited by Liberty actually support the IAB's decision. [85]

Liberty's attempt to distinguish certain cases noted by the IAB is unavailing. Liberty offers no reason why cases that consider the use of postmarks for the running of appeal periods and for review periods are distinguishable from this case. To the contrary, cases that consider the use of the undefined term "postmark" in an

---

[83] A194.

[84] *See Lozier Corp.*; *Chevron U.S.A. Inc.*; *Headrick*; *Abrams*; *Haynes*; *Bowman*; *Severs*; *Frandrup*; *Gutierrez, supra*, n.75.

[85] *See Chevron,* 154 P.3d at 335-38 (finding that a meter mark is a U.S. postmark for purposes of a statutory deadline to appeal a Department of Revenue determination of a property's assessed value, where the statute in question did not define the term "postmark," the Court determined that the term was ambiguous, and the court found persuasive the U.S.P.S.'s authorization of both private meter marks and U.S.P.S. cancellation marks and the legislature's presumptive awareness of meter marks); *Bowman,* 507 N.E.2d at 346-44 (finding that a meter mark is a U.S. postmark for purposes of timely filing an appeal from an administrative decision, where the administrative agency did not define "postmark" in its rules); *Headrick,* 108 S.W.3d at 118-19 (holding a meter mark may be sufficient to satisfy a statutory deadline to appeal from an administrative agency); *Frandrup*, 531 N.W.2d at 890 (reasoning a meter mark is proof of timely filing of an appeal from an administrative agency because it "does not comport with common sense that private postal meters are not acceptable alternatives when the USPS authorizes and closely regulates the private meters to insure integrity in the mail system"); *Abrams*, 819 S.W.2d at 343 (finding statutory language requiring mail to be "endorsed by" the U.S.P.S. ambiguous because it was susceptible to several meanings and concluding that a private postage meter stamp is sufficient); *Severs v. Abrahamson*, 124 N.W.2d 150 (Iowa 1963) (concluding the legislature intended "postmark" to include both U.S.P.S. and private meter marks).

administrative agency's rules, regulations or an enabling statute are precisely on point.

Cases that Liberty argues support its contentions are unpersuasive. Many of these cases cited by Liberty do not discuss the U.S.P.S. regulations and fail to discuss the legislative intent behind their adoption. These cases simply state that meter marks are unreliable, a statement that is tangential to the fundamental question of whether a "postmark" includes a meter mark. In *Minnick v. State Farm Mut. Auto. Ins. Co.*, 174 A.2d 706 (Del. 1961), the Delaware Supreme Court took "judicial notice of the fact that the day of postmark almost invariably reflects the date of mailing...."[86] Liberty appears to cite to Justice Storey's remark that a postmark is "merely prima facie evidence" of the date of mailing.[87] Yet, Justice Storey went on to reiterate that a postmark "will almost invariably be a correct ascertainment" of the date of mailing.[88] Further, here the IAB considered evidence of the date of mailing (other than the date indicia on the envelope containing the Premium Payment), which it found credible.[89]

The *Wagshal*, *Idaho Dep't of Labor*, *Lin*, and *Corona* cases cited by Liberty are arguably somewhat analogous to the instant matter, but the holdings of these cases put them within the minority of jurisdictions having considered the issue.[90] Further, both *Wagshal v. D.C.*, 430 A.2d 524, 526 (D.C. 1981) and *Corona v. Boe-*

[86] *Minnick,* 174 A.2d at 712.

[87] *Id.*

[88] *Id.* at 713.

[89] Coverage Op. at 14-17.

[90] Super Ct. Op at 24.

ing Co., 46 P.3d 253, 255 (Wash. App. 2002) involved mail that was stamped by both a meter mark bearing one date and an official post office mark bearing a different date. In that specific situation, the courts in these cases held that the U.S.P.S. mark should control over a private meter mark. In the instant matter there were no conflicting date indicia on the envelope containing the Premium Payment.[91] Regardless, the IAB was within its rights to adopt and/or find persuasive the position of the majority of jurisdictions.

Liberty's position is also illogical given the wide-spread use of postage meter machines. Postage meter machines like the one used by City Window in this matter have been in existence for many years and are nearly universally used.[92] If the drafter of the Handbook intended to exclude the use of postage meter machines for the purposes of sending renewal premium payments, its terms would have expressly forbid their use.

The IAB did not clearly err in finding the term U.S. postmark to be susceptible to more than one reasonable meaning. Further, the IAB did not clearly err in its review of case law from other jurisdictions before concluding that for the narrow purpose of establishing the renewal date of a workers compensation policy pursuant to the Handbook that a private meter mark is a U.S. postmark.

---

[91] Coverage Op. at 14-17.

[92] *Chevron U.S.A. Inc.*, 154 P.3d at 338.

III. THE IAB DID NOT ERR IN CITING TO *LEVAN*[93] AS ADDITIONAL SUPPORT FOR, OR AN ALTERNATIVE BASIS FOR, ITS FINDING THAT THERE WAS COVERAGE FOR THE ACCIDENT.

A. Question Presented

Did the IAB err in citing to the *Levan* opinion as additional support for, or an alternative basis for, its holding that the Policy was renewed and effective at the time of the Accident?

B. Standard Of Review

See standard set forth in Argument Section I (B), *supra*. This Court reviews an administrative body's application of law to facts de novo.[94]

C. Merits Of The Argument

1. The IAB's citation to *Levan* need not be considered in this appeal.

The IAB held that the Handbook provides a standard for calculating the renewal date of the Policy.[95] The IAB also opined in the Coverage Opinion that if the Handbook were not controlling, *arguendo*, that it would have adopted the "date of mailing" standard from *Levan* as opposed to the "date of receipt" test proposed by Liberty and nonetheless found there to be coverage at the time of the Accident.[96] The IAB's alternative basis for concluding that there was coverage at the time of the Accident need not be considered unless this Court were to first conclude that the IAB erred in applying the Handbook in determining the renewal date

---

[93] *Levan v. Independence Mall Inc.*, 940 A.2d 929 (Del. 2007).

[94] Price v. Williams, 9 A.3d 476, 2010 Del. LEXIS 604, at *6 (Del. Nov. 24, 2010).

[95] Coverage Op. at 17.

[96] *Id.* at 19 (holding that applying the "date of mailing" standard compels a finding that the Policy was renewed effective January 12, 2010).

of the Policy.[97]

2. The discussion in *Levan* of the Delaware Workers Compensation statutory scheme and its use of "date of mailing" as a trigger in multiple situations is relevant.

Liberty focuses on how *Levan* is factually distinguishable from the instant matter and misses or ignores the value of the discussion in *Levan* where this Court notes that the Delaware Workers Compensation statutory scheme (19 *Del. C.* § 2301 *et seq.*) utilizes "date of mailing" as a trigger for establishing the date of a payment in multiple contexts.[98] The use of "date of mailing" for establishing the date of a payment made within the sphere of the Delaware Workers Compensation statutory scheme is consistent with the Handbook permitting City Window to renew the Policy by mailing its premium payment to Liberty. The IAB did not err in reasoning that if the use of "date of mailing" was sufficient for a "*Huffman*" demand[99] and as a trigger for a claimant to petition for additional compensation (as was the situation in *Levan*), both workers compensation scenarios involving payments, that it would likewise be sufficient for establishing the renewal date of a workers compensation policy.[100]

3. The public policy emphasis on predictability discussed in *Levan* applies equally in the instant matter.

Further, the IAB did not err in citing to the public policy pronouncement in *Levan* that "predictability" is better served by using "date of mailing" for establish-

---

[97] City Window does not mean to suggest that the IAB's discussion of the case was improper. City Window had offered the *Levan* "date of mailing" test as an alternative basis for the IAB to determine the renewal date of the Policy. A231-232.

[98] *Levan*, 940 A.2d at 934.

[99] *Id.*

[100] Coverage Op. at 18-19.

ing the renewal date of a policy.[101] Liberty argues that it is inequitable, unfair and invites fraud to use the date of mailing.[102] Liberty's complaint of unfairness is incredible given that is had complete control over the processing of the Premium Payment, and yet, could not offer any evidence as to when it received the Premium Payment at the lockbox in Philadelphia, the very address it required City Window to utilize. The only thing predictable about Liberty's processing scheme is that it would take a number of days to process a premium payment before Liberty would finally consider it received.[103] If this Court were to adopt the "date of receipt" standard advocated by Liberty, employers holding policies issued in the involuntary market would have no means of determining whether and when they had workers insurance coverage in place until such time as the insurer gets around to issuing a certificate of insurance. While the insured waits for a new certificate of insurance, they would need to either refrain from engaging employees in work or risk having employees work unprotected by the statutorily mandated insurance coverage. The "date of mailing" test provides predictability in that employer-insureds know precisely when their renewed workers compensation insurance is in place, limiting the risk that employees work without the protection of insurance. Undoubtedly, the Handbook was drafted to eliminate the uncertainty that would exist if coverage were considered renewed upon the date that a premium check was

---

[101] *Id.*

[102] Op. Br. at 35.

[103] As this Court in *Levan* noted, the idea of using payment "receipt" as a triggering date is fraught with problems and could be construed to mean the date a check is issued, sent, received, deposited or honored. 940 A.2d at 933. Unsurprisingly, Liberty argues that "receipt" must be latest of the five options outlined in *Levan*.

processed and debited from the insured's bank account through the use of the "date of mailing" standard. Liberty's attempt at distinguishing *Levan* from the instant matter misses the mark because the *Levan* opinion makes a public policy pronouncement that is generally applicable to any payment being made pursuant to the Delaware Workers' Compensation scheme – predictability is best served by deeming payments as having being made on the date of mailing.

The IAB did not err in finding the public policies addressed in *Levan* as instructive for purposes of the instant matter and concluding that if the Handbook did not provide a test for calculating the renewal date of the Policy (as it did) that it would have applied the standard from *Levan* and nonetheless found the Policy to have been renewed and effective at the time of the Accident.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE IAB'S FACTUAL FINDING AS TO LIBERTY'S RECEIPT OF THE PREMIUM PAYMENT

A. Question Presented

Whether there is substantial evidence supporting the IAB's factual finding that the Premium Payment, more likely than not, was received by Liberty on January 15, 2010, after 2 p.m.

B. Standard Of Review

This Court must determine whether the IAB's finding as to receipt of the Premium Payment was supported by substantial evidence.[104] The record is to be reviewed in the light most favorable to the party prevailing below.[105] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[106] It means more than a scintilla, but less than a preponderance of the evidence.[107] Weighing the evidence, determining the credibility of witnesses, and resolving any conflicts in testimony are functions reserved exclusively to the IAB.[108] Further, the Delaware Administrative Procedures Act, 29 *Del. C.* § 6401 *et seq.*, compels this Court when reviewing factual determinations to take due account of the experience and specialized competence of an agency.[109] If there is some relevant evidence to support the decision, this Court must

---

[104] *Stoltz Mgmt. Co.*, 616 A.2d at 1208.

[105] *General Motors Corp. v. Guy*, 1991 Del. Super. LEXIS 347, *8 (Del. Super. Aug. 16, 1991).

[106] *Street v. State*, 669 A.2d 9, 11 (Del. 1995) (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[107] *Breeding v. Contractors-One-Inc.*, 548 A.2d 1102, 1104 (Del. 1988).

[108] *Olney*, 425 A.2d 610, 613-14 (Del. 1981).

[109] *Brooks v. Johnson*, 560 A.2d 1001, 1002 (Del. 1989).

affirm, even if the decision is objectively wrong or against the weight of evidence, and even if this Court would have decided the matter differently.[110]

C. Merits of the Argument

The IAB's factual conclusion as to Liberty's receipt of the Premium Payment is dicta from the Coverage Opinion because the IAB determined (through its review of the Handbook) that the appropriate basis for establishing the renewal date for the Policy was not the date that the Premium Payment was honored, but was instead 12:01 a.m. the day after "the date of the U.S. Postmark appearing on the envelope containing the item [Premium Payment] correcting the default..." consistent with the postmark binding rule set forth in Section II of the Handbook[111] The postmark binding rule set forth in Section II of the handbook provides that a renewed policy is effective and bound at 12:01 a.m. on the first day following the "postmark time and date" on the envelope containing the premium payment.[112] Accordingly, in order for the date of Liberty's receipt of the Premium Payment to be an issue that must be resolved in this appeal, this Court must first find that the IAB (i) erred in applying the Handbook to determine the renewal date of the Policy and (ii) further erred in alternatively adopting the "date of mailing" test from *Levan*. Unless this Court first finds that the IAB twice so erred, the date of Liberty's receipt of the Premium Payment is a non-issue. Nonetheless, the IAB's factual conclusion is based on substantial evidence.

The IAB's finding as to Liberty's receipt of the Premium Payment is sup-

[110] *Olney*, 425 A.2d at 614.

[111] Coverage Op. at 17.

[112] C85.

ported by the "credible," "vivid" and unrebutted testimony of Mr. Hirzel and Ms. Heron that the Premium Payment was cut and mailed by City Window on January 12, 2010, three days prior to the Accident, using the payment coupon provided by Liberty.[113] The IAB's finding is further supported by a letter and email from Mr. Barone summarizing how premium payments are processed consistent with the agreement between Citibank and Liberty, including marking checks as having been processed the next business day if they are received by Citibank after approximately Noon or 1 p.m.[114] Mr. Barone concluded that the Premium Payment likely arrived at the Citibank New Castle, Delaware processing facility after the processing cutoff on January 15, 2010.[115] Mr. Barone testified that he had no information as to when the Premium Payment arrived at the Philadelphia lockbox.[116] Liberty also called Ms. Bennett from Wilmington Trust Co. as a witness at the Coverage Hearing, but she too admitted to having no information as to when the Premium Payment arrived at the Philadelphia lockbox.[117] Similarly, Ms. Kilpatrick, Liberty's claims adjuster assigned to investigate the Accident, testified that she had no idea when the Premium Payment arrived at the Philadelphia lockbox.[118]

Faced with the reality that there was no evidence to rebut the IAB's finding that the Premium Payment arrived in the Philadelphia lockbox on January 15, 2010, Liberty creatively argues that its receipt of the Premium Payment was not

[113] Coverage Op. at 4, 7-9, 15-17.

[114] Coverage Op. at 14; C182, 188.

[115] C188.

[116] Coverage Op. at 10.

[117] A145.

[118] Coverage Op. at 11.

the date the payment arrived at the Philadelphia lockbox, but was instead January 20, 2010, the date the Premium Payment was honored by Wilmington Trust Co., undeniably at least two days after the Premium Payment arrived at the Citibank processing facility in New Castle, DE after having been couriered from Philadelphia.[119] Liberty proffers this unsupported standard for receipt, which it then attempts to apply to the instant matter using irrelevant testimony evidencing that the Premium Payment was processed by Citibank on January 19, 2010.[120]

Liberty admitted in this instant matter that although its records show that the Premium Payment arrived at the New Castle, Delaware processing facility on January 18, 2010 it was not processed until January 19, 2010 because January 18 was the Martin Luther King, Jr. holiday.[121] Liberty further admitted that its processing agreement with Citibank provided for a daily processing "cutoff" and that any checks picked up from the lockbox on or after approximately Noon or 1 p.m. would be stamped as having been processed the next business day.[122] Given that January 16 and 17, 2010 were a Saturday and Sunday, respectively, and that Monday, January 18, 2010 was the Martin Luther King, Jr. federal holiday, the evidence presented to the IAB reflected that the Premium Payment likely arrived at

---

[119] Op. Br. at 30.

[120] Op. Br. at 29. Liberty's definition of "receipt" as the date a payment is debited from an insured's account is particularly unfair given that (i) Liberty has premium payments travel through multiple destinations in different states before they are processed, (ii) Liberty uses a processing cutoff deadline in the middle of a workday that is not disclosed to insureds and that can result in days of processing delay, and (iii) Liberty is in sole control over the processing of payments, and yet, apparently keeps no records of when payments initially arrive at the destination pre-printed on the payment coupon provided to insureds.

[121] Coverage Op. at 10.

[122] *Id.*

the Philadelphia lockbox on January 15, 2010 before being processed and ultimately debited from City Window's account on January 20, 2010.

In the Coverage Opinion, the IAB noted that it believed it was unfair for Liberty to argue that it received the Premium Payment when the payment was debited from City Window's account given that the payment processing was in Liberty's exclusive control and because Liberty utilized a processing "cutoff" and multiple destinations creating days' worth of delay.[123] It was within the power of the IAB to consider fairness and public policy in rending the Coverage Opinion.[124]

The IAB's factual finding as to the date Liberty received the Premium Payment was supported by substantial documentary and testimonial evidence, which the IAB appropriately weighed, and should not be set aside by this Court.

[123] Coverage Op. at 15.

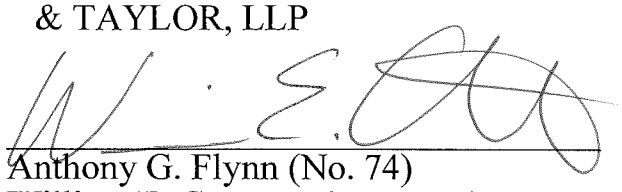
[124] *See Eckeard v. NPC Int'l, Inc.*, 2012 Del. Super. LEXIS 455, at *12-13 (Del. Super. Oct. 17, 2012) (in reversing the decision of the Unemployment Insurance Appeal Board the appellate court held it was unfair for the board to require the claimant to demonstrate facts completely out of her control).

CONCLUSION

For all of the reasons set forth in this Brief, this Court should affirm the Coverage Opinion of the IAB in all respects. If this Court were to find that the IAB erred in determining that the Handbook provides a basis for establishing the renewal date of the Policy, this Court should defer to the IAB's adoption of the "date of mailing" standard from *Levan* and affirm the IAB's alternative holding that it requires a finding that the Policy was renewed and effective at the time of the Accident.

Respectfully submitted,

YOUNG CONAWAY STARGATT
& TAYLOR, LLP



Anthony G. Flynn (No. 74)
William E. Gamgort (No. 5011)
Robert M. Vrana (No. 5666)
1000 N. King St.
Wilmington, DE 19801
(302) 576-3267
wgamgort@ycst.com

Attorneys for Employer Below – Appellee, City Window Cleaning Inc. of Delaware

Dated: December 9, 2013