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

LIBERTY MUTUAL INSURANCE COMPANY,	:	
	:	**C.A. No: 13A-01-002 (RBY)**
_____Appellant,	:	
	:	
v.	:	
	:	
JESUS SILVA-GARCIA, and CITY WINDOW CLEANING OF DELAWARE, INC.,	:	
	:	
Appellees.	:_____	

Submitted: June 24, 2013
Decided: August 22, 2013

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

ORDER

Linda Wilson, Esq., Wilmington, Delaware for Appellant.

William X. Moore, Jr., Esq., and Edward H. Wilson, III, Esq., Wilmington, Delaware for Appellee, Jesus Silva-Garcia.

Anthony G. Flynn, Esq., Cassandra F. Roberts, Esq., and William E. Gamgort, Esq., Wilmington, Delaware for Appellee, City Window Cleaning of Delaware, Inc.

Young, J.

SUMMARY

This is an appeal by Liberty Mutual Insurance Company ("Liberty Mutual") from a determination by the Industrial Accident Board ("IAB" or "Board") that City Window Cleaning of Delaware, Inc. ("City Window") was covered, at the time of an injury to a City Window employee, Jesus Silva-Garcia ("Claimant" or "Silva-Garcia").

Since the evidence, though complex, supports a factual finding that City Window had reviewed its workers' compensation policy with Liberty Mutual as of the time of Silva-Garcia's accident, the Board's determination that coverage existed and was applicable is proper. The same is, therefore, **AFFIRMED**.

FACTS

City Window, owned by Howard Herbert Hirzel ("Hirzel"), is in the business of window cleaning as well as the cleaning and dusting of high fixtures. As a result of the perceived risks involved with performing such work, City Window has been unable to obtain workers' compensation insurance on the open market for some time. Instead, City Window secures workers' compensation insurance on the involuntary market, pursuant to the Delaware Insurance Plan ("DIP"). The DIP is administered by the Delaware Compensation Rating Bureau ("DCRB"). The DCRB promulgates a Handbook, setting forth policies and procedures. Liberty Mutual was assigned to provide workers' compensation insurance for City Window, doing so without issue for several years. City Window was assigned a policy by Liberty Mutual to begin on January 1, 2009 and ending on January 1, 2010. On October 5, 2009, Liberty Mutual mailed a renewal notice to City Window indicating that payment was due "on or

before January 1, 2010" to renew the policy. The first renewal notice cited $14,054 as the amount due. City Window received the notice, but did not tender payment at the time because it believed it was owed reductions based on a decline in business and credits it believed it was due. A review occurred, resulting in Liberty Mutual's sending a second renewal quote letter dated December 3, 2009. The second letter reduced the premium amount to $11,869. City Window still did not mail payment, because it continued to believe that a credit of $1,276.00 was owed to the company. Hirzel requested that the credit be applied to reduce the cost of the policy, but Liberty Mutual refused to do so.

Hirzel testified that City Window had been relatively inactive up until a job at the Harrington Casino came in early January. The invoice for the premium payment was entered into City Window's system for processing on January 7th, around the same time City Window secured the Casino job. The job was to begin on January 11th, and was estimated to last about five days. On the first day of the job, a worker bumped into a door causing damage, resulting in a liability claim. As a result of the incident, Hirzel claims he was reminded to check on the workers' compensation insurance. He sent an email and placed a call to his office manager first thing on the morning of January 12th. Hirzel wanted to make sure that the payment had been mailed; and, if not, to make sure that it was done immediately. The office manager, Pamela Heron, had been holding off on the payment as a result of the dispute regarding the $1,276.00 credit. She also believed that they did not have the funds in the account necessary to pay the bill. When she was contacted on January 12, 2010 by Hirzel, he told her to issue the check, stamp it with his stamp, and make sure it was

mailed that day. Heron testified that she placed the premium payment and coupon in an envelope, which she ran through the office's postage meter. Heron left the office sometime between 4:30 and 4:45 p.m. that day. When there is mail to be sent, Heron testified that her normal procedure is to meter it, and then take it with her when she leaves. At that point, she drives directly to a mailbox located on Market Street with a final pickup time at 5:15 p.m. On the date in question, January 12, 2010, Heron says she followed her normal procedure, taking the seven minute drive to the Market Street mailbox, before proceeding to her second job.

Liberty Mutual provides a Philadelphia post office box address for customer payments. That post office box is checked by a bonded courier multiple times a day. The courier takes the contents of the box to Citibank's New Castle processing center, which is responsible for processing payments made to Liberty Mutual. Upon arrival, payments are sorted, captured with imaging, date stamped with processing date, and then deposited into the bank. Liberty Mutual has provided Citibank with instructions for the processing of its payments. These instructions include a 2:00 p.m. cut-off time for the processing of payments. At that time, Citibank stops processing payments, gathering the data to be transmitted to Liberty Mutual for its accounts receivable system. In order to meet this timeline, Citibank must stop internal processes an hour or two prior to the 2:00 p.m. cut-off. That generally means that any payments picked up from the post office box after 1:00 p.m would be stamped with a processing date of the next business date.

As a result of this process, no one is precisely certain when City Window's payment actually got to the Philadelphia post office box. City Window's check was

processed January 19, 2010. The bank actually had the check on January 18, but that was a holiday. According to the Citibank representative, if the check arrived for processing on Friday January 15, 2010, it arrived after the 2:00 p.m cut-off time. Liberty Mutual issued a policy with coverage effective on January 20, 2010, the day the funds left City Window's account.

Claimant Jesus Silva-Garcia suffered an injury resulting in the partial amputation of his left leg. The injury, which occurred on January 15, 2010, as City Window was completing the job at the Casino, resulted from Silva-Garcia's being run over by the articulating lift as he was helping guide the operator out of the casino. When the accident occurred, the supervisor on the job immediately called Hirzel, who was at home in New Castle County at the time. The Claimant was taken by ambulance to Milford Hospital, where he was treated for nearly a month. Upon receiving the supervisor's call, Hirzel left home to drive to Milford Hospital to check on Claimant. During his drive from New Castle County, Hirzel contacted Heron, directing her to contact the company's insurance broker, Buzz Hennessey, to report the injury.

On February 12, 2010, Silva-Garcia was released from the hospital. According to Kilpatrick's notes, Liberty Mutual began investigating Claimant's injury immediately upon notice of the accident. In fact, an investigator from Liberty Mutual came to the Milford Hospital the day after the accident. That same investigator met with Hirzel on January 18, the first business day following the accident. At the time of his release from the hospital, Claimant's family contacted Hirzel to tell him that Silva-Garcia was out of the hospital, but had prescriptions to pick up that he could not afford. Hirzel called Hennessey to find out what was going on with the insurance

claim. Hennessey gave Hirzel the phone number for Gail Kilpatrick, the Liberty Mutual claims adjuster in charge of City Window's claim. Hirzel was informed that Kilpatrick was out of the office, and would not return until the following Tuesday. As a result, Hirzel decided, until he could talk with the insurance adjuster, to pay for the prescriptions himself.

On January 20th, five days after the accident, City Window received a letter from Liberty Mutual. The letter stated that, as the renewal quote was paid late, the quote had been rescinded. It further provided that the renewal policy would have a lapse in coverage up front.

This letter was sent after the premium payment was processed by Liberty Mutual. It would also have come after Liberty Mutual's investigator had taken a statement from and met with Hirzel.

Silva-Garcia filed a Petition to Determine Compensation Due with the Industrial Accident Board on February 22, 2010. The Petition alleged that the January 15 injury he had suffered at the Casino was a compensable work-related injury. At the time of his filing, Liberty Mutual had not yet issued a formal decision regarding whether the injury and resulting claim made by City Window were insured.

The IAB scheduled a bond hearing for March 31, 2010. At that hearing the Board would determine whether City Window would be required to post a bond pursuant to 19 *Del. C.* §2372 to secure the payment of compensation to the Claimant. Initially, City Window was unable to demonstrate proof of insurance, because the payment had occurred shortly before the accident and a policy had not yet arrived. At the Bond Hearing, City Window was still unable to provide proof of insurance

coverage because, Liberty Mutual was still investigating whether or not there was coverage in place at the time of the accident. At the time of the hearing, Liberty Mutual had still not issued a formal coverage decision. The IAB ordered that City Window post a bond of $250,000. A hearing on Claimant's Petition was scheduled for June 9, 2010.

On April 15, 2010, Claimant filed a separate negligence action against City Window in the Superior Court for New Castle County. On April 27, Liberty Mutual issued its official letter denying that coverage was in place at the time of the accident. The letter stated that the payment was not received by Liberty Mutual until January 19, 2010. Accordingly, the insurance policy became effective on January 20, 2010. As part of the negligence action, Claimant noticed and took a 30(b)(6) deposition of Liberty Mutual's designee, Gail Kilpatrick. That deposition took place on August 13, 2010, with most of the questioning focused on Liberty's investigation of the accident and subsequent denial of coverage. Shortly after Kilpatrick's deposition, the case was stayed by stipulation, pending a determination by the IAB as to whether or not there was insurance coverage for the accident.

In September 2010, City Window requested that the IAB schedule a hearing to determine whether there was coverage in place at the time of the accident. The hearing was scheduled for October 15, 2010. After receiving notice of the hearing, Liberty Mutual informed the IAB that it would be presenting a Motion to Dismiss hearing on October 15, 2010, because it believed that the IAB lacked jurisdiction to determine whether coverage existed. In addition, Liberty Mutual filed a Complaint for Declaratory Judgment in the Superior Court for New Castle County, seeking a

determination that there was no coverage in place on January 15, 2010.

When the parties appeared before the IAB for the scheduled hearing on October 15, the Board was informed of the pending Declaratory Action. The IAB decided to postpone the hearing, requesting that the parties submit memoranda of law addressing the issue of the IAB's jurisdiction to conduct such a hearing. The IAB ruled on November 23, 2010 that it had jurisdiction over the issue. As a result of that decision, City Window moved to dismiss the Declaratory Action. The New Castle County Court agreed, dismissing the Action on May 26, 2011. The Order stated that the IAB was "the most appropriate entity to resolve the dispute."

The Board scheduled the coverage hearing for August 17, 2011.[1] All the parties agreed that City Window did not pay its premium by the date required, and that as a result a lapse in coverage occurred. The dispute in this case is the question of the effective date of the renewed policy.

After consideration of the record, the Board held as follows:

1) It was more likely than not that Citibank received the envelope containing City Window's payment on January 14, 2010 after 2:00 p.m. and stamped it with the next business day's date, January 18, 2010.

2) A meter mark is the same as a U.S. postmark for purposes of mailing.

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[1] Portions of the record (including the transcript of the hearing itself) are erroneously labeled as occurring August 17, 2012.

3) The Delaware Workers' Compensation Insurance Plan Handbook provided an applicable rule to this situation.

4) Based on the Handbook provisions, the period of lapse was from January 1, 2010, the date of cancellation, to January 12, 2010, the date of the postmark appearing on the envelope.

5) Following the applicable Handbook provisions under "Binding of Coverage," the Board found that the policy was renewed or reinstated as of 12:01 a.m. on the next day, January 13, 2010.

6) As a result, City Window was covered by workers' compensation insurance, through Liberty Mutual, at the time of Jesus Silva-Garcia's accident.

Liberty Mutual has appealed the Board's decision to the Superior Court.

STANDARD OF REVIEW

For administrative board appeals, this Court is limited to reviewing whether the Board's decision is supported by substantial evidence and free from legal error.[2] Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."[3] It is "more than a scintilla, but less than

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[2] 29 *Del C.* §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

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

preponderance of the evidence."[4] An abuse of discretion will be found if the board "acts arbitrarily or capaciously...exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."[5] Questions of law will be reviewed *de novo*.[6] In the absence of an error of law, lack of substantial evidence or abuse of discretion, the Court will not disturb the decision of the board.[7]

DISCUSSION

In its Opening Brief, Liberty Mutual contends that the Board erred in reaching its decision in the following ways:

1) The Board erred as a matter of law in rendering its August 31, 2011 decision, because the issue of insurance coverage had already been determined and was, therefore, barred by the doctrines of *res judicata* and/or collateral estoppel.

2) The Board erred as a matter of law in basing its decision on provisions in the Handbook that are not applicable to this case.

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[4] *Id.* (quoting *Cross v. Calfano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

[5] *Delaware Transit Corp. v. Roane*, 2011 WL 3793450, at *5 (Del. Super. Aug. 24, 2011) (quoting *Straley v. Advanced Staffing, Inc.,* 2009 WL 1228572, at *2 (Del. Super. April 30, 2009)).

[6] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).

[7] *Carrion v. City of Wilmington*, 2006 WL 3502092, at *3 (Del. Super. Dec. 5, 2006).

3) If the Court finds that the Board did not err in basing its decision on the Handbook provision discussed above, the Board erred as a matter of law when it ignored the express language in the Handbook.

4) The Board erred in finding that a private meter mark is the same as a U.S. postmark.

5) The finding of the Board, that the premium payment was more likely than not received on January 15, 2010 after 2:00 p.m. is not supported by substantial evidence in the record.

6) The Board erred in relaying on the *LeVan* case as it is both factually and legally distinguishable from the present matter.

Res Judicata and/or Collateral Estoppel

Liberty Mutual argues that the Board should not have held the August 17, 2011 hearing on the issue of whether City Window had insurance coverage, because the Board had already reached a decision about that in a previous hearing. The prior hearing Liberty Mutual is referencing is a March 2010 Bond Hearing. It is Liberty Mutual's position that the Bond Hearing provided City Window with a full and fair opportunity to present its case, on the merits, to the Board, on the issue of whether the Liberty Mutual insurance policy was in place at the time of the accident. City Window was ordered by the Board to post a bond to cover

compensation that may ultimately be awarded to the Claimant. This outcome, and some of the language in the order, led Liberty Mutual to argue that the Board had considered the issue of whether there was workers' compensation coverage in place at the time of the accident.

The doctrines of collateral estoppel and *res judicata* are related, in that both are aimed at conserving judicial resources as well as providing the certainty of an end point to the parties.[8] The doctrine of *res judicata* serves as a bar "where there has been a final judgment on the merits in a first suit involving the same parties, followed by a second suit based on the same cause of action. In those circumstances, *res judicata* bars the second suit."[9] Under the doctrine of collateral estoppel, "where a question of fact essential to the judgment is litigated and determined by a valid and final judgment, the determination is conclusive between the same parties in a subsequent case on a different cause of action. In such situation, a party is estoppel from relitigating the issue again in the subsequent case."[10] More simply put, the required elements to establish the applicability of collateral estoppel are: "(1) a determination of fact; (2) in a prior action; (3) between the same parties."[11]

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[8] *See generally Columbia Cas.Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 & n.4 (Del. 1991).

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

[10] *Columbia Cas. Co. v. Playtex FP, Inc.,* 584 A.2d 1214, 1216 (Del. 1991) (quoting *Tyndall v. Tyndall,* 238 A.2d 343, 346 (Del. 1968)).

[11] *E.B.R. Corp. v. PSL Air Lease Corp.,* 313 A.2d 893, 895 (Del. 1973).

The doctrines of *res judicata* and/or collateral estoppel do not apply to the circumstances present in the instant case. The Bond Hearing held by the IAB in March was merely a routine matter of procedure. When a certificate of insurance cannot be located, or under other circumstances, the Board may hold such a hearing to insure that there will be adequate compensation available to a claimant. As there was no proof of insurance available to demonstrate that the time period of the accident was covered, a bond hearing was essentially automatic. At the time of the hearing, City Window was unable to show proof of insurance for the time of the accident, because they had not yet received a final decision letter from Liberty Mutual. Liberty Mutual was still in the process of determining when the renewal occurred. As such, the issue of whether or not insurance was definitively in place at the time of the accident was not ripe for decision.

That procedural hearing was the hearing on the merits, and cannot be considered as a final judgment. Furthermore, there is some question about whether the March activity involved all the parties, as Liberty Mutual itself claimed it did not have an official representative present at the Bond Hearing.[12] The August hearing also does not constitute a second suit about the same cause. It was a further step in the same case. The same reasoning applies to demonstrate that the elements of collateral estoppel are not met.

The Board's authority to hold bond hearings is set forth in 19 *Del. C.*

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[12] *See Silva-Garcia v. City Window Cleaning of Delaware, Inc.*, Industrial Accident Board Hearing (Aug. 17, 2011), at 151-158.

§2372.[13] The express language of the statute demonstrates that a bond hearing does not necessarily establish whether insurance covers an issue or not. The statute clearly allows the Board to request a bond be posted "in any case," not simply one where insurance is not in place.[14] This language demonstrates both that requiring a bond does not mean that there is no insurance, and that the nature of such a determination is preliminary.

Non-Renewal vs. Cancellation-Applicable Handbook Provisions

Liberty Mutual next argues that, if the August 31, 2011 decision is not barred by *res judicata* or collateral estoppel, the Board erred as a matter of law by basing that decision on inapplicable Handbook provisions. This argument is based on Liberty Mutual's contention that the Handbook acknowledges a legal difference between non-renewal and cancellation of a policy. According to Liberty Mutual, though the Board was correct in looking first to the Handbook for guidance in determining the policy's effective date, the Handbook cannot be used, because it contains only a provision discussing calculating the period of lapse for a cancelled policy, not for a non-renewed/expired policy as Liberty Mutual claims is the case here. Liberty Mutual suggests that, as there is allegedly no Handbook provision discussing a lapse calculation for non-renewed policies, the Board should have looked to case law for guidance. The suggested available case law

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[13] 19 *Del C.* §2372(b).

[14] *Id.*

cited by Liberty Mutual states that a non-renewed policy does not become effective until the carrier has actually received the premium payment. Therefore, under this theory, City Window's policy would not have been in effect on January 15, 2010, when the accident occurred.

The Appellant has included definitions of renewal, non-renewal/expiration, and cancellation in its briefs in support of its argument that the Board was wrong in applying the Handbook provisions to the issue in this case. The definitions utilized by Liberty Mutual come from *Moore v. Travelers Indemnity Ins. Co.*, a case regarding casualty insurance contracts for automobile accidents.[15] While the language and terminology are similar to the workers' compensation insurance context, Appellant's reference to this case law is a flawed attempt to compare unrelated situations. *Moore* deals with a section of the Delaware Code, 18 *Del. C.* §3901et. seq., while the present case requires review and interpretation of the Delaware Workers' Compensation Insurance Plan Handbook. Additionally, in Moore, the Court was able to review the legislative history in determining the intentions of the legislature.[16] Finally, a different standard of deference applies to an administrative agency's statutory interpretation as opposed to the interpretation of an agency of its own rules and regulations.[17]

The Handbook, promulgated by the DCRB, and utilized by administrative

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[15] 408 A.2d 298 (Del. Super. 1979).

[16] *Id.*

[17] *See Public Water Supply Co. v. DiPasquale,* 735 A.2d 378, 381 (Del. 1999).

agencies like the IAB, is essentially an administrative regulation or policy. Thus, the IAB was interpreting its own rules and regulations in reaching the decision to apply the relevant Handbook provision. The Delaware Supreme Court has stated:

> Judicial deference is usually given to an administrative agency's construction of its own rules in recognition of its expertise in a given field. This deference is reflected in an appellate court's standard of review that an administrative agency's interpretation of its rules will not be reversed unless 'clearly wrong.'[18]

The August 17, 2011 hearing was held to allow the Board to hear evidence to reach a decision on the effective renewal date for City Window's insurance policy. In order to reach that decision, the Board considered a quantity of information and a variety of arguments presented by the parties. Ultimately, the Board determined that the Handbook provided the appropriate calculation, defining the period of lapse as: "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..."[19] Based on this definition, the Board found that the

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[18] *Div. of Social Services Dept. of Health. v. Burns,* 438 A.2d 1227, 1229 (Del. 1981).

[19] Employer's Exhibit No. 1, *Delaware Workers' Compensation Insurance Plan Handbook,* at 13.

period of lapse was from January 1, 2010, the date of cancellation, to January 12, 2010, the date of the U.S. postmark appearing on the envelope containing City Window's payment. Thus, as a result of the above-cited passage and the Handbook's provision under Binding of Coverage, the Board found that the policy was renewed or reinstated as of 12:01 a.m. on January 13, 2010. The Court's review of the Board's interpretation of the Handbook provisions are considered in accordance with the Supreme Court's holding in *Burns.* As this Court does not find that the Board's interpretation was clearly wrong, the decision is will not be reversed.

Furthermore, the alleged distinction between cancellation and non-renewal, for the IAB's purpose of determining the dates of lapse and effective renewal, is merely a distinction without a difference. Not only does the Handbook itself fail to define these terms or make any sort of distinction between them, practically speaking, the result is the same. Whether a policy is termed cancelled, not renewed, or expired, the result is that there is no longer insurance coverage in place, until the point payment and/or reinstatement occur. The term used to describe this scenario is irrelevant. It is also unnecessarily confusing.[20] Except in situations where it matters whether the insurance policy ended deliberately as opposed to being the result of forgetfulness, these terms are essentially synonymous. The Handbook uses the terms together, and the language of

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[20] It should be noted that in all this arguing about this alleged distinction, Appellant's own counsel has used the term "cancellation" in describing the present situation, rather than "non-renewal." *See e.g., Silva-Garcia v. City Window Cleaning of Delaware, Inc.*, Industrial Accident Board Hearing (Aug. 17, 2011), at 50.

Subsection III provides a calculation to be used in just this type of fact scenario. This Court finds that the Board's application of the Handbook rule to this situation is proper. The Board's opinion demonstrates that no prolonged debate or consideration of what was meant was necessary. It was just logical reading of the Handbook.

Is the Term U.S. Postmark, as used in the Handbook, Ambiguous and Open to Interpretation?

Liberty Mutual contends that even if the Court finds that the Handbook applies, the Board erred as a matter of law by engaging in interpretation of the applicable provision, ignoring the express language in the Handbook. This argument is based upon the Board's decision, which interprets the Handbook provision governing determination of effective renewal date for a lapsed policy. The passage in question reads as follows: "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."[21]

The specific issue is whether the Board should have engaged in any interpretation of the meaning of the term "U.S. postmark." The Appellant argues that the standard rules of interpretation should apply to Handbook provisions, including giving effect to plain, unambiguous terms and giving ordinary or

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[21] Employer's Exhibit No. 1, *Delaware Workers' Compensation Insurance Plan Handbook,* at 13.

common meanings to those terms that are undefined. It is Liberty Mutual's position that the meaning of that term is clear and unambiguous, and the Board should not have looked beyond the language of the Handbook in determining the meaning. According to the Appellant, the term U.S. postmark means a postmark applied by the actual post office to a piece of mail presented to it, not a private meter machine. The affect of this argument would be that, absent a U.S. postmark, the Handbook provides for a different calculation for the lapse time period: the time period of a policy lapse will be determined based on the date the item curing the defect is received. In this case, that would be January 20, 2010, several days after the accident occurred in which Silva-Garcia was injured.

As discussed above, this Court finds that the Board properly relied on the Handbook provisions in reaching its decision as to the effective renewal date. In its application of the Handbook rules, the Board interpreted the term "U.S. postmark" to include private meter marks. The Board's decision to engage in an interpretation of the provision in question was appropriate. The Court agrees with Appellant that, even though the material in question is a handbook setting forth guidelines, rather than a statute or contract, the standard rules of interpretation should apply. "A statute is ambiguous if it is reasonably susceptible of two interpretations."[22]

The Board determined that it was appropriate to look beyond the four corners of the document, a decision with which this Court agrees. It is completely

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[22] *Dewey Beach Enters. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305, 307-08 (Del. 2010).

reasonable, particularly in times where "in person" use of a post office is minimal, to determine that there is more to the term "U.S. postmark" than the official kind occurring at the post office.[23] In fact, a reasonable person, could very well presume that a private meter mark would be considered the equivalent of an official post mark, even if "the marks" are technically different. There is a wealth of case law cited by the parties and the Board regarding instances where other jurisdictions have considered whether these terms are equivalent. A further discussion of the substance of that case law is left for later. At this time, this case law is emphasized merely to demonstrate that, if the term "U.S. postmark" were so clearly unambiguous, there probably would not be such a plethora of cases discussing the very dispute present here.

Finally, as was discussed above, "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."[24] The Industrial Accident Board has jurisdiction over cases arising under Part II of Title 19, of the Delaware Code. [25] The provisions in question come from a Handbook,

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[23] *Cf. Severs v. Abrahamson*, 124 N.W.2d 150, 152 (Iowa 1963) ("Thirty billion pieces of metered mail are handled each year by the post office department, 295,000 postage meter machines are in daily use. Charles Pomeroy Collins in his article, 'The Validity of Postmarks,' in the April, 1961, issue of the American Bar Association Journal, states metered mail represents 45% of all mail and more than half of all business mail. It seems the business comm unity, comprised of those paying the type of tax we have here, finds postage meters expeditious and sufficient for their use.").

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

[25] 19 *Del. C.* §2301A(i).

promulgated by the DCRB. However, the subject matter of the Handbook is workers' compensation insurance. As the administrative body charged with handling matters arising under the Workers' Compensation Act, and enforcing the rules and procedures related thereto, the IAB has unique expertise in this field. Therefore, this Court not only agrees that the term in question could be considered reasonably open to more than one interpretation, we also defer to the IAB's judgment, as it is not clearly erroneous.

Did the Board Err as a Matter of Law in Finding a Private Meter Mark Equivalent to a U.S. Postmark?

A major issue the Board had to decide as part of the overall determination in this case was whether a private meter mark is equivalent to United States Postal Service postmark, also referred to as a cancellation mark. Postmarks are considered to be reliable proof of when something was actually mailed, because the item is marked when it comes into the postal system. Thus, the major concern in deciding whether a private meter mark is the same as a U.S. postmark is whether it is an equally valid way to determine when an item was mailed.

In reaching that decision, the Board looked to a variety of sources for guidance. First, the Board considered the facts of this case and the way that private meter marks work. Private meter machines such as the one used by City Window are licensed by the United States Postal Service, and leased to companies. These machines do not permit a party to back date a meter mark.[26] Testimony provided

[26] Employer's Exhibit No. 10, P700 P7L1 Operator Guide, at Bates stamped pp. 125-129

by City Window's office manager, Pamela Heron, also served as part of the basis for the Board's decision. Heron testified credibly about the fact that she had personally run the envelope containing the premium payment through the meter machine, and had later placed that envelope in a USPS postbox. No contrary testimony was offered to refute Heron's version of events.

The Board next looked to outside sources to support the credible testimony and belief that meter marks provided equally valid proof of the date an item was mailed. The Board considered the Random House Webster's College Dictionary definition of the term "postage meter," which stated that a postage meter is "an office machine used in bulk mailing that imprints prepaid postage and a dated postmark."[27] This definition certainly does not explicitly support or detract from the Board's view that a private meter is equivalent to a U.S. postmark. However, there are more helpful sources. The next item the Board considered was Domestic Mail Manual ("DMM"), published by the USPS. It provides that "mailpieces bearing a complete date in the indicia must be deposited or presented on that date..."[28] This rule demonstrates that one likely could not meter mark an item with a complete date, such as January 12, 2010, and then simply wait to mail the item until a later date. Meter marks are entitled to both the same privileges and rules as mail stamped with USPS postmarks.

Finally, in determining whether to find a private meter mark equivalent to a

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[27] Random House Webster's College Dictionary, at 1064 (1992).

[28] Employer's Exhibit No. 11, Domestic Mail Manual, 4.5.2. Mailing Date Accuracy and Mailing Periods, http://pe.usps.gov/text/dmm300/604.htm,

U.S. postmark, the Board considered case law from other jurisdictions that had faced the same issue, as the question has not yet been addressed by Delaware courts, nor its administrative agencies. The Board cites to four cases from outside jurisdictions in support of the decision to find that private meter marks are equivalent to U.S. postmarks. In *Frandrup v. Pine Bend Warehouse*, the Court of Appeals of Minnesota denied an appellants"narrow interpretation" of statutory language.[29] The language in question required filings to include "the day indicated by the cancellation mark of the United States Post Office Department."[30] The administrative agency had held that the private meter mark was an acceptable way to meet this requirement.[31] In affirming the agency decision, the Court stated:

> The cancellation mark of the post office is, therefore, merely indicative of the Postal Service's acknowledgment that a piece of mail passed through the postal system on a given date. The mark of a private postage meter performs the same service...It is illogical to carve out one relatively minor area of law as requiring old fashioned hand cancellation at the post office when private postal meters are acceptable for all the other thousands of pieces of mail

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[29] 531 N.W.2d 886 (Minn. Ct. App. 1995).

[30] *Id.* at 889.

[31] *Id.* at 887-88.

> that accompany litigation. It does not comport with common sense that private postal meters are not acceptable alternatives when the U.S. Postal Service authorizes and closely regulates the private meters to insure integrity in the mail system.[32]

In *Chevron U.S.A., Inc. v. Dept. of Revenue*, the Supreme Court of Wyoming reviewed the holding by an administrative agency which had concluded that a private postage meter stamp was a "postmark."[33] The *Chevron* case is particularly helpful as the Court considered a variety of case law on the question, including case law from jurisdictions that reached a different result. Ultimately, the Supreme Court of Wyoming was persuaded by "the majority view" concluding that "private postage meter stamps are equivalent to a USPS cancellation because the regulatory scheme governing those meters gives them the same effect and assures their reliability."[34]

The Supreme Court of Ohio, in *Bowman v. Administrator, Ohio Bureau of Employment Services*, reversed the decision of the lower courts which had held that a private meter postmark was not sufficient as a matter of law to satisfy the

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[32] *Id.* at 890.

[33] 154 P.3d 331, 337-39 (Wyo. 2007).

[34] *Id.* at 337.

administrative requirement that an appeal be evidenced by a "postmark."[35] On review, the Supreme Court held that private meter marks were equivalent to postmarks for this purpose.[36] In so holding, the Court went into detail about the reliability and regulation of private meter machines stating:

> Private meter postmarks are official postmarks imprinted under license from the United States Postal Service, and metered mail is entitled to all the privileges applying to the various classes of mail. The United States Postal Service requires the date shown on private meter postmarks to be the actual date of deposit of mail (or the next scheduled collection day). If the wrong date appears, a .00 postage meter impression with the correct date is stamped on the envelope by the post office. Otherwise, metered mail is not cancelled or postmarked by the Postal Service. Although metered mail is subjected to only random, selective sampling to detect misuse of meters, such samplings and the sanction of license revocation discourage misuse of postmark meters.[37]

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[35] 507 N.E.2d 342 (Ohio 1987).

[36] *Id.*

[37] *Id.* at 344.

The final case cited by the Board is *Headrick v. Jackes-Evans Mfg. Co.*[38] In this case, the Missouri Court of Appeals considered the decision of the state Labor and Industrial Relations Commission.[39] The Commission had held that an appeal, the envelope for which was erroneously date stamped two months in the future, was not timely filed.[40] *Headrick* is factually different from the case at hand, for the very reason that it involves a piece of mail that was erroneously stamped with a future date. This is an important difference, resulting in an analysis that does not lend itself easily to providing support for the Board's position. However, this case was helpful as it cites to established Missouri case law pertaining to the question of whether a postmark includes private meter marks. In *Abrams v. Ohio Pacific Exp.,* the Supreme Court of Missouri concluded that "a date inscribed on an envelope by a licensed postage meter and delivered to the addressee by the United States post office is the date 'endorsed by the United States post office on the envelope'" [41] In *Burk v. Labor and Indus. Relations Comm'n., Div. of Employment Security*, the Missouri Court of Appeals explained more simply that the Abrams case served to find that the imprint of a private postage meter is equivalent to an endorsement by the United States post office.[42]

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[38] 108 S.W.3d 114 (Mo. Ct. App. 2003).

[39] *Id.* at 115.

[40] *Id.*

[41] 819 S.W.2d 338, 343 (Mo. Banc, 1991).

[42] 821 S.W.2d 585, 586-87 (Mo. Ct. App. 1992).

In addition to the case law provided by the Board, this Court has found some additional support for the Board's determination.[43] Having reviewed the case law discussed by the parties and the Board, the Court finds that the Board has conducted a thorough, appropriate analysis. It is clear that, while a few jurisdictions have held that a private meter mark is not equivalent to a U.S.

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[43] *See Lozier Corp. v. Douglas County Bd. of Equalization*, 829 N.W.2d 652 (Neb. 2013). The Nebraska Supreme Court held in relevant part:

> We conclude that a postage meter stamp, when viewed in the context of the pertinent USPS regulations, satisfies this purpose and is a 'postmark' within the meaning of §77-5013(2). The USPS licenses and regulates the use of postage meters, as outlined in the DMM. Only authorized entities, such as Pitney Bowes, are able to provide postage meters, and no one but the USPS may actually own a postage meter. The use of postage meters is heavily regulated. Mailers are required to place metered mail in the mail by the labeled date or correct the date using a date correction indicium. Failure to do so will subject the mailer to penalties, such as loss of the postage meter. Additionally, a person who misuses a postage meter runs the risk of being criminally prosecuted. We believe these regulations are sufficient to qualify a postage meter stamp as satisfactory evidence of the date mailing

See also Haynes v. Hechler, 392 S.E.2d 697 (W.Va. 1990)("We agree with the Ohio court's rationale in Bowman, and find it applicable to the case before us, involving candidacy for public office. The administrative provision at issue in Bowman, like W.Va.Code, 3-5-7 [1985], uses the term 'postmark' in a very general sense. W.Va.Code, 3-5-7 [1985] does not define 'postmark,' nor does it exclude any method by which a mailed certificate of candidacy should be so postmarked...we conclude that a private postage meter stamp is a presumptively valid and accurate postmark for purposes of W.Va.Code, 3-5-7 [1985]"); *Severs v. Abrahamson*, 124 N.W.2d 150 (Iowa 1963); *Gutierrez v. Industrial Claim App. Office*, 841 P.2d 407 (Colo. Ct. App. 1992)(holding that private postage meter marks are postmarks within the meaning of §8-74-102(1) based on a review of the United States Postal Service regulations and case law, including *Bowman* and *Haynes*).

postmark, the majority of jurisdictions considering the issue has found private meter marks and U.S. postmarks to be the same. As the Board's decision pertains to interpretation of a Handbook provision, rather than statutory interpretation, this Court "applies a deferential standard of review."[44] As stated above, "[t]his deference is reflected in an appellate court's standard of review what an administrative agency's interpretation of its rules will not be reversed unless clearly wrong."[45] In the present case, the Court is tasked with determining only whether the Board's decision was appropriate in the limited context of the Handbook. Thus, in affirming the Board's holding on this topic, this decision confirms only that the IAB has not erred as a matter of law in the interpretation of its own rules and regulations.

Substantial Evidence

Liberty Mutual argues that substantial evidence does not support the Board's finding that City Window's premium payment was more likely than not received on January 15, 2010. Appellant raises a variety of arguments under this heading, most notably the following: that City Window did not offer any evidence to show when the premium payment actually arrived in the post office box, and thus failed to meet its burden; that the Board was wrong in finding the testimony of Herzel and Heron consistent with the testimony of Melissa Bennett, officer

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[44] *American Fed'n of State, County and Mun. Employees, Council 81 v. State, Pub. Employees Relations Bd.*, 2011 WL 2176113, at *3 (Del. Super. May 25, 2011).

[45] *Div. of Social Services Dept. of Health. v. Burns,* 438 A.2d 1227, 1229 (Del. 1981).

coordinator for the Legal Department at Wilmington Trust Company, City Window's bank; and that the Board's decision was not based on substantial evidence, but rather on ideas of public policy and fairness.

In an appeal from an administrative board, the Superior Court's role is to perform a review limited to whether the Board's findings are supported by substantial evidence and free from legal error. The term substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[46] Were it to be measured on a continuum, substantial evidence would fall " somewhere between a scintilla and a preponderance of the evidence."[47] Where an administrative board's decision is supported by substantial evidence and free from legal error, "the Board's decision will not be disturbed."[48]

Liberty Mutual has specifically challenged the Board's finding that the premium payment was more likely than not received by Citibank after 2:00 p.m. on January 15, 2010. This particular finding is part of the Board's ultimate determination that there was insurance coverage in place at the time of Claimant's injury. Review of the record demonstrates that both the particular finding challenged by the Appellant and the Board's overall decision are supported by substantial evidence. The IAB based its findings on documentary evidence,

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[46] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)(quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026 (1966)).

[47] *Diamond Fuel Oil v. O'Neal,* 734 A.2d 1060, 1062 (Del. 1999) (citing *Breeding v. Contractors-One-Inc.,* 549 A.2d 1102, 1104 (Del. 1988)).

[48] *Neal v. Perdue Farms*, 2012 WL 1415710, at *1 (Del. Super. March 7, 2012).

supporting testimony, and the lack of testimony provided by Liberty Mutual's witnesses to rebut or tell when the premium payment actually arrived in the post office box.

The IAB determined that the premium payment was placed into USPS postbox on January 12, and probably received on January 15. This finding was supported by the "credible," "vivid," and unrebutted testimony of Hirzel and Heron. These two witnesses testified regarding the reasons for the delay in paying the premium, how it was prepared and mailed, and the events leading up to the decision to pay the bill on January 12, 2010. "Credibility of witnesses and the weight to be accorded their testimony is to be determined by the Board and [this Court] may not substitute its judgment for that of the Board."[49]

In reaching its conclusions, the Board also relied upon Barone's August 11, 2010 letter to Kilpatrick, which stated that Citibank had "determined that the metered envelope entered the postal streams on either Wednesday, January 13th or Thursday, 14th." Finally, the Board relied on the fact that Liberty Mutual was unable to present any witness who could testify as to when the premium payment arrived in the Philadelphia post office box, or who could rebut the stories of Hirzel and Heron which it found to be credible. All of these pieces of evidence clearly constitute substantial evidence relied upon by the Board in its decision.

The last issue that must be addressed herein is Liberty Mutual's contention that it was improper for the Board to consider fairness and public policy in its

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[49] *Harchuska v. Phoenix Steel Corp.,* 1990 WL 140066, at *3 (Del. Super. Sept. 12 1990).

analysis. The portion of the opinion with which Liberty Mutual takes issue reads as follows:

> [I]t would be against public policy for an insurer to set up intervening receipt stations and then argue that a payment is late when it is finally received days later. It would also be unfair to hold the insured to a processing cut-off time, which ends before the business day and which was established between Liberty Mutual and its agent, Citibank.

First and foremost, it should be noted that the very next sentence of the opinion states that "after consideration of all the evidence, the Board finds more substantial and clear reasons for its decision." Thus, it seems quite clear that the Board included this discussion as an acknowledgment of those considerations, or at most as a small part of its reasoning. Considering the fairness and policy implications of a decision is not inappropriate. In fact, this Court took issue with an administrative decision that did not consider fairness. In *Eckeard v. NPC Intern. Inc.*, this Court reversed and remanded a decision of the Unemployment Insurance Appeal Board where it held a party responsible for demonstrating facts through evidence that was entirely outside of her control.[50] The same is true in this case. City Window could prove when the premium payment entered Liberty

[50] 2012 WL 5355628 (Del. Super. Oct. 17, 2012).

Mutual's Philadelphia post office box. Liberty Mutual has set up a complicated procedure, with intervening receipt stations, for the processing of customer payments. It would be entirely unfair to require the customer to mail a check earlier just to clear that process, or to be able to provide testimony on the subject of when a payment reaches a post office box or proceeds through a process that it has no control over. Furthermore, the Board's opinion makes clear that this whole topic of fairness and policy played little to no role in the final decision. Ultimately, the Board decision that there was insurance coverage in place was primarily based on the application of relevant provisions of the Delaware Workers' Compensation Insurance Plan Handbook.

The LeVan Decision

Liberty Mutual's final argument is that the Board erred in relying on *LeVan v. Independence Mall Inc.,*[51] to support its decision, because that case is both factually and legally distinguishable. The IAB's primary basis for finding that there was coverage at the time of the accident was its interpretation and application of relevant Handbook provisions. While the "date of mailing test" from the *LeVan* opinion, was cited by the IAB, the Board's discussion and reliance on this case served only as an alternative or additional support for its conclusion. As this Court has already held that the Board's reliance on and interpretation of the Handbook were correct, there is no need to analyze the applicability of the Supreme Court's holding in *LeVan.*

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[51] 940 A.2d 929 (Del. 2007).

CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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