IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DEBRA WHITE, Employee-Below, Appellant, v. DELAWARE EYE CARE CENTER, Employer-Below, Appellee.	)))))))))))	C.A. No. 07A-06-004 PLA

ON APPEAL FROM THE INDUSTRIAL ACCIDENT BOARD
AFFIRMED

Submitted: February 1, 2008
Decided: February 12, 2008

Michael D. Bednash, Esquire, KIMMEL, CARTER, ROMAN & PELTZ, Bear, Delaware, Attorney for Employee-Below/Appellant.

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ABLEMAN, JUDGE

I. Introduction

Debra White ("White") has filed a Petition to Determine Compensation Due for worker's compensation benefits seeking total disability benefits from August 28, 2006 until November 2006, partial disability benefits from November 2006 until the present, payment of medical expenses to treat her injuries, and payment of attorney's fees as a result of various injuries she sustained on August 28, 2006. On that date, White was in a car accident that she claims occurred during the scope of her employment with Delaware Eye Care Center ("DECC").

Following a hearing before the Industrial Accident Board ("IAB" or the "Board"), the IAB issued a decision denying White's petition. The Board held that White had failed to meet her burden of proof that she was injured during the course and scope of her employment. White filed a timely appeal to this Court. Since this Court concludes that the IAB's decision is supported by substantial evidence, the Board's May 12, 2007 decision is hereby **AFFIRMED.**

II. Statement of Facts

A. *Background*

At the time of the accident in this case, White worked as an optician for DECC. As a "floater", she rotated between DECC's offices in Bear,

Smyrna, Newark, and Dover. Work that was not insurance-generated was generally completed in Dover, which required a DECC employee to transport files from the Bear and Newark offices to the Smyrna office for delivery to its Dover office.

On Friday, August 25, 2006, while working at the Newark office, White received a telephone call directing her to show for work at the Smyrna office the following Monday. White's supervisor, Ms. Billie Ray Ringgold ("Ringgold"), requested that she also deliver a box of eyeglass frames[1] to the Smyrna office on that same date. White testified that, on August 25, 2008, files had been placed by her purse to be taken to the Bear office. White, however, was not assigned to work at the Bear office that day, nor could she identify who had instructed her to deliver the files to Bear.

On August 28, 2006, White claimed that she left her home to visit the Bear location.[2] She first stopped at a Wawa Market across from the Bear office to purchase a cappuccino. When she arrived at the Bear location and

[1] The record is unclear as to whether White was requested to deliver one or two boxes. This discrepancy was never addressed at the Board hearing but is immaterial for purposes of this decision. *See* Docket 9, Ex. B (IAB Decision), at 6 n.4.

[2] Whether White went to the Bear office is disputed by the parties.

delivered the charts sometime before 6:49 a.m.,[3] no one else was present at the office. She then left the office and made a right turn onto Route 40 and a left turn onto Route 72. This route was further north than the route she would have taken had she proceeded directly to the Smyrna office. Shortly thereafter, a vehicle pulled out of a development striking White's car. White suffered a "dislocated and fractured knee cap and right knee, burns to her left wrist and elbow, and many other [injuries]." At no time after the accident did White submit a reimbursement request for this trip.

At the hearing before the Board, White's boyfriend, Franklin Hanna ("Hanna"), testified that he arrived at the accident scene and thereafter delivered the boxes to the Newark office at her request. Other than the box of eyeglasses, no other items were found in White's car.

Ringgold testified on behalf of DECC. She first testified that it was a normal procedure for employees who work at a specific office location to be asked to transport items, but only as to that specific location. She also testified that White was given the boxes to deliver to Smyrna, but she was unsure whether White was given anything to deliver to the Bear office.

[3] According to the police report, the accident occurred at 6:49 a.m. Because White allegedly delivered the files before the accident, she probably visited the Bear office before this time, although the police report could have been incorrect.

Notably, the Bear office was closed on August 28, 2006 because no optician was scheduled to work that day.

DECC's executive director, Matthew Corrozi ("Corrozi"), also testified at the hearing. He stated that, generally, if an employee was traveling to another location, the employee would announce that fact so that all items designated for that location could be transported at one time. Seven months after the accident, Corrozi questioned his employees. None of the employees at either the Bear location or the Newark location could remember whether the charts were taken from Newark or taken to Bear. They did, however, recollect that Ringgold had asked White to deliver the eyeglass boxes to Smyrna. Nonetheless, Corrozi asserted that his employees would have remembered whether White visited the office because the accident was on a road that employees take to and from the offices, and the incident was upsetting to the staff.[4]

On September 7, 2006, shortly after the accident, White filed a claim for PIP benefits related to the accident. In response to a questionnaire in support of her application, she stated that she was not "in the course of her employment" at the time of the accident. At the hearing, White testified that she decided to make a claim for worker's compensation benefits when she

[4] Docket 9, Ex. B, at 7-8.

realized her injury was more significant than she first realized, despite the fact that her claim conflicted with her statement on the PIP questionnaire.

B. *The IAB's Decision*

The IAB issued its decision on May 17, 2007, in which it denied White's petition for worker's compensation benefits. The Board held that White's accident occurred during her normal travel to her assigned workplace under the "going and coming" rule, and was not subject to the special errand exception. Specifically, the Board determined that had White been going directly to Smyrna, her trip would have fallen under the "going and coming rule." The Board rejected White's claim that she was on a special errand for DECC when she first visited the Bear office because there was no urgency, no special inconvenience, and no hazard. The Board noted that White could not specify who asked her to deliver the charts to the Bear office. Ringgold, who shared an office with White, testified that she had not seen, nor was she was aware of, any files that needed to be transported to Bear.

The Board further held that White had not offered any evidence to corroborate her claim that she was asked to deliver the charts. White similarly failed to offer any evidence that she had retrieved items from the Bear office for delivery to Smyrna. Since the Bear office was closed on

August 28, 2006, there was no urgency to have any files delivered to that location. Although White contended she was headed toward the Bear office rather than the Smyrna office, as demonstrated by her route of travel, the Board concluded that she would have taken the same path to get to Wawa for her morning coffee. Thus, the route of travel alone did not necessarily establish that she had traveled to the Bear office. The Board also concluded that there was no showing of a "special inconvenience" to White by bringing the eyeglasses to the Smyrna office because she was scheduled to work at that office on that date. Under these circumstances, the Board found that the accident was subject to the "going and coming" rule because White was merely engaged in normal travel to her assigned workplace.

III. Parties' Contentions

White contends that the Board's decision is not supported by substantial evidence. Specifically, White argues that there was substantial evidence that she was instructed by DECC to drive to the Bear office to deliver files and then to the Smyrna office to deliver eyeglasses. Even assuming that the there was substantial evidence supporting its decision, White submits that the Board misinterpreted the "going and coming rule"[5]

[5] 19 *Del. C.* § 2301(18).

and failed to apply the "special errand" exception[6] or the "dual purpose" exception.[7] As a result, White contends that her accident arose out of and in the course of her employment with DECC and is therefore compensable.

In response, DECC argues that the Board's decision is supported by substantial evidence. It notes that White's failure to offer any evidence that her supervisor instructed her to take the files to the Bear office or that the files were delivered to that office, demonstrates that the IAB reasonably concluded that White was engaged in her normal travel to work. DECC points to the conflicting evidence, presented through the testimony of Ringgold and Corrozi, that no one received the files, no one instructed White to deliver the files to the Bear office, and no one remembered White being present at the Bear office. Notably, Ringgold testified that no optician was scheduled to work at the Bear office on August 28, 2006, indicating a lack of urgency to have the files delivered to that office on that day. DECC submits that White's admission on her PIP benefits questionnaire that she was not injured during the course and scope of her employment is directly contrary to the position she takes in this litigation. As a result, DECC contends that the Board reasonably determined that White failed to meet her burden of

[6] *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 343 (Del. 1993).

[7] *Karl-Mil, Inc. by Home Ins. Co. v. Storm*, 1982 WL 172843, at *3 (Del. Super. Ct. Oct. 14, 1982).

proving that her accident occurred in the course and scope of her employment.

Significantly, DECC notes that White never argued to the Board that her journey to the Bear office constituted a "special errand" or that her travel served a "dual purpose." Because she failed to make this argument to the IAB in the first instance, DECC contends that these claims are waived. Even if the argument is not waived, however, DECC submits that the "dual purpose" exception is inapplicable in this case because White was driving to Smyrna for the purpose of normal work rather than for the business purpose of delivering eyeglasses.

IV. Standard of Review

Appellate review of an IAB decision is limited. The Court's function "is confined to ensuring that the Board made no errors of law and determining whether there is 'substantial evidence' to support the Board's factual findings."[8] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] The "substantial evidence" standard means "more than a scintilla but less than a

[8] *Bermudez v. PTFE Compounds, Inc.*, 2006 WL 2382793, at *3 (Del. Super. Ct. Aug. 16, 2006).

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

preponderance of the evidence."[10] The Court "does not weigh the evidence, determine questions of credibility, or make its own factual findings."[11] The Court must also give "a significant degree of deference to the Board's factual conclusions and its application of those conclusions to the appropriate legal standards."[12] In reviewing the evidence, the Court must consider the record "in the light most favorable to the prevailing party below."[13] The Court reviews questions of law *de novo* to determine "whether the Board erred in formulating or applying legal precepts."[14]

V. Analysis

An employee may recover worker's compensation benefits from his employer for personal injuries from an accident "arising out of and in the course of employment[]."[15] Because White's accident occurred while she was driving to work, the "going and coming" rule applies. Under the "going and coming" rule, "[a]s to employees having a fixed place of work, the generally accepted rule is that injuries occurring while they are going to and

[10] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

[11] *Hall v. Rollins Leasing*, 1996 WL 659476, at *2 (Del. Super. Ct. Oct. 4, 1996) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

[12] *Bermudez*, 2006 WL 2382793 at *3 (citing 29 *Del. C.* § 10142(d)).

[13] *Id.*

[14] *Id.*

[15] 19 *Del. C.* § 2304.

from work are compensable if they occur on the employer's premises, but are not compensable if they occur off the premises."[16] Thus, "injuries resulting from accidents during an employee's regular travel to and from work are noncompensable."[17]

Even if an employee is driving to and from work, the accident may still arise out of and in the course and scope of her employment if the "special errand" exception applies. That exception provides:

> When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the *special inconvenience, hazard* or *urgency* of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.[18]

Similarly, when a supervisor instructs the employee to "run some private errand or do some work outside his normal duties for the private benefit of the employer or superior, an injury in the course of that work is

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[16] *Delhaize America, Inc. v. Barkas*, 2007 WL 2429375, at *2 (Del. Super. Ct. Aug. 22, 2007 (quoting *Quality Carwash v. Cox*, 438 A.2d 1243, 1245 (Del. Super. Ct. 1981)). In apparent contradiction, White admits that this rule only applies to employees having a fixed place of employment, even though she states that she was a "floater" who worked at numerous offices. Docket 6, at 10. That fact alone precludes the application of the "special errand" exception to this case and supports the Board's decision.

[17] *Histed*, 621 A.2d at 343.

[18] *Id.* (citing 1A Larson, The Law of Workmen's Compensation § 16.10 (1990) (emphasis added)).

compensable."[19] The errand, however, must be an integral part of the employment.[20] "Although the irregularity and suddenness of a call from an employer almost always qualifies as a special errand, exempt from the going and coming rule, the single circumstance of irregular hours is by itself insufficient."[21]

Initially, the Court notes that White did present the argument that her accident fell within the "special errand" exception. In fact, the Board discussed that exception throughout its decision denying her petition.[22] As a result, White's argument regarding the "special errand" exception is properly before this Court on appeal.

Turning to the facts of this case, the Court concludes that the Board's decision is supported by substantial evidence. The Board noted that White failed to produce any evidence to support her claim that she received any files for delivery to the Bear office or ever visited the Bear office on August 28, 2006. Ringgold testified that it was not DECC's policy to send employees scheduled to work at one location to another location that same day. She also could not remember any files that needed to be delivered. She

[19] *Cook v. A.H. Davis & Son,* 567 A.2d 29, 32 (Del. Super. Ct. 1989).

[20] *Id.* at 31.

[21] *Histed,* 621 A.2d at 343.

[22] *See* Docket 9, Ex. B, at 8-12.

further testified that the Bear office was closed on August 28, 2006, suggesting a lack of urgency for delivery of any files. Moreover, White's testimony was inconsistent with her own admission on her PIP benefits application that her accident did *not* occur in the course and scope of her employment. Giving the Board's factual conclusions significant deference, and reviewing the evidence in a light most favorable to DECC, the Court finds that the Board's decision is supported by substantial evidence.

White's argument that there was evidence in support of her claim is simply not persuasive. As the fact-finder, the Board had the duty to evaluate the evidence, listen to the testimony of witnesses, and apply the relevant law to that evidence. This Court is not in a position to second-guess the Board's factual conclusions.[23] While White points to the police report, her testimony, and the admissions by Ringgold and Corrozi, that White's claim that she was on a work errand was possible but unlikely, the Court finds that the Board could reasonably conclude that this evidence alone was insufficient. White presented little, if any, evidence that she was instructed to go to the Bear office on August 28, 2006 or that her errand was urgent, hazardous, or caused her a special inconvenience. Given (1) the inconsistencies in her statements, (2) the lack of any corroborating testimony

[23] *Hall v. Rollins Leasing*, 1996 WL 659476, at *2 (Del. Super. Ct. Oct. 4, 1996) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

or evidence supporting her argument, (3) her inability to identify who instructed her to deliver the files, (4) the explicit disagreement by Ringgold and Corrozi that she was instructed to go to the Bear office, and (5) the fact that the Bear office was closed on August 28, 2006, the Board had substantial evidence which with to conclude that White did not deliver files to the Bear office nor did she run a special errand for DECC. Thus, the Board's decision that White's accident fell within the "going and coming" rule is supported by substantial evidence.

Similarly, the Board correctly determined that the "special errand" exception did not apply to White's delivery of the eyeglasses to Smyrna because there was no evidence of urgency, hazard, or special inconvenience. Although not mentioned in its decision, the Court finds that the "special errand" exception would not apply to White because she did not work at a fixed location.[24] In any event, even if the "special errand" exception were considered to apply, the Board relied on substantial evidence in rejecting her claim. Ringgold and Corrozi testified that an employee may bring items to an office location only when she was scheduled to be there. Because White was scheduled to be in Smyrna on August 28, 2006, DECC asked her to

[24] *See Delhaize America, Inc.*, 2007 WL 2429375 at *2 ("As to employees *having a fixed place of work*, the generally accepted rule is that injuries occurring while they are going to and from work are compensable if they occur on the employer's premises, but are not compensable if they occur off the premises.") (emphasis added).

bring eyeglasses to that location. Thus, there was no special inconvenience. Importantly, White offered no evidence that Ringgold or Corrozi asked her to deliver the eyeglasses outside her normal duties. Because there was no evidence of urgency, hazard, special inconvenience, nor any request by White's superiors, the Board correctly applied the "going and coming" rule and found that the "special errand" exception did not apply.

White next urges this Court to find her accident compensable under the "dual purpose" exception. This argument was never presented to the Board. The Board's decision itself never addresses the "dual purpose" exception, and White does not dispute that she failed to raise this argument with the IAB. Failure to present the argument to Board in the first instance precludes this Court's consideration of that argument on appeal.[25] On that basis alone, White's claim fails.

[25] *See Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976) ("[T]he Superior Court is limited to consideration of the record which was before the administrative agency. . . . As the regulations sought to be admitted were not a part of that record, they may not be considered now in this Court's determination of whether the evidence supported the findings of the Referee and Board."); *Delaware Elec. Co-Op v. Duphilly*, 703 A.2d 1202, 1206 (Del. 1997) ("It is a basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court. Parties are not free to advance arguments for the first time on appeal."); *Kidd v. Community Systems, Inc.*, 1995 WL 862129, at *2 (Del. Super. Ct. Jul. 5, 1995) ("Appellant cannot introduce new evidence or argument on appellate review of the Board's decision.").

Even if the "dual purpose" exception were properly before this Court, White's argument would still be unavailing. In *Karl-Mil, Inc. v. Storm*,[26] a case upon which White relies, the Court defined a "dual purpose" trip as one in which the employee "combined business and personal purposes."[27] The Court explained:

> Injury or death during a trip which serves both a business and a personal purpose is regarded as being within the scope of employment if the business purpose is such that it alone would have caused such a trip to have been made. If the business purpose of the trip actually created the necessity for the travel of an employee who is injured or killed, the employee is regarded as having been within the scope of employment, even though some private purpose was incidentally served. . . . . *The test is whether it is the employment or something else that impels the journey and exposes the traveler to its risks.*[28]

In that case, Storm traveled to Montana to attend a business meeting for her employer. While in Montana, Storm traveled out of her way to visit Yellowstone National Park. After leaving the park to go to the meeting in Boise, Idaho, Storm was killed in a car accident. On appeal, the Superior Court held that Storm's accident was compensable under the "dual purpose" exception because Storm would not have gone to Boise, regardless of her

[26] *Karl-Mil, Inc. by Home Ins. Co. v. Storm*, 1982 WL 172843 (Del. Super. Ct. Oct. 14, 1982).

[27] *Id.* at *3.

[28] *Id.* at *2.

personal trip to Yellowstone, absent specific instructions from her employer to be there for business purposes.

The instant case is easily distinguishable from *Karl-Mil, Inc.* There, Storm was expressly asked to travel out of state to a location where she would not have otherwise been in order to serve her employer's business purpose. There is no indication in this record, however, that White was driving to Smyrna for a specific business purpose of DECC. In fact, White was traveling *away* from Smyrna when the accident occurred. Although delivering files to the Bear office would be a business purpose, White presented little, if any, evidence to support a conclusion other than that she was engaged in her normal travel to work.

Furthermore, the fact that White was asked to deliver eyeglasses does not indicate a business purpose. White was scheduled to go to Smyrna – a normal work location– and was merely asked to deliver a box of eyeglasses when she arrived. Both Ringgold and Corrozi testified that items were given to an employee only when that employee was scheduled to be at that location. In other words, had White not been scheduled to work at the Smyrna location, she would not have been asked to deliver the eyeglasses. Thus, the purpose of her trip was not for employer business but was simply a routine trip to work.

Importantly, if the Court were to accept White's argument that the "business purpose" of the trip was to deliver the eyeglasses, the Court would be permitting any employee injured in a car accident to recover worker's compensation benefits as long as she had any items from her employer in her possession. Under White's theory, whenever an employee takes office material in her vehicle home from the office, she may recover worker's compensation benefits in the event of an accident. This expansive interpretation would eviscerate the "dual purpose" exception. The analysis must be focused on what "impels the journey and exposes the traveler to its risks."[29] In this case, the evidence shows that White's assignment was to work in Smyrna, and that is what impelled her journey, not the delivery of the eyeglasses. The Court thus finds that the "dual purpose" exception is inapplicable to this case.

[29] *Id.* at *2.

VI. Conclusion

Based on the foregoing, the Court finds that the Board's decision denying White's petition is supported by substantial evidence. Accordingly, the Board's decision is **AFFIRMED.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Michael D. Bednash, Esq.
H. Garrett Baker, Esq.