IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALAN SHORES,	:	
	:	
Claimant/Appellant	:	
	:	
v.	:	C.A. No. 02A-01-004-SCD
	:	
PARK N SHOP,	:	
	:	
Employer/Appellee.	:	

Submitted: June 18, 2002
Decided: September 5, 2002

O P I N I O N

This 5th day of September 2002, upon consideration of the claimant's opening brief, and the answering brief filed by the defendant, it appears that:

(1) This appeal arises out of a claim for compensation alleged to have occurred on December 27, 2000, while working at the Park-n-Shop.

(2) After a hearing, the Board issued a decision dated December 21, 2001. The Board concluded that the claimant had failed to prove that he had sustained a compensible injury.

(3) The claimant filed a timely appeal which has been briefed.

(4) The claimant testified that he was involved in an accident on December 27, 2000 when he was unloading beer. He said that the owner, Mr. Dallago[1] ("Dallago") had left for the day, the only other employee was Betty Rhudy ("Rhudy") who worked the cash register. The claimant said that after Dallago's departure, some deliveries came in, so he moved some of the boxes from the back cooler to the cooler accessed by customers. He said he moved approximately fifty or sixty thirty-packs of beer of the hand truck. When he finished, he was unable to straighten up.

(5) Rhudy testified. She confirmed that she worked as a cashier. She arrived at work about noon on the day in question. The claimant said he would like to get off early. Since they were not busy, he went to the back where he said he was going to move some beer. Rhudy testified that the claimant came out of the walk-in box and said that he had hurt himself. She denied that the claimant was bent over. Instead of reporting an injury to Dallago, the claimant called a co-worker to come in to work for him so he could leave. Rhudy did not report the incident.

(6) Dallago testified that he came in every morning to fill up the shelves. He said there was no reason for the shelves to be stocked when he left work on the December 27, 2000. He knew of no reason why the claimant would have been loading shelves that day. While there was a delivery on the morning of the alleged accident, he said the delivery was not 30 packs of beer.

(7) The claimant's past medical history is extensive and complicated. Medical witnesses testified, but both based their opinions on the premise that an accident had occurred on the date in question.

(8) The Board concluded that there was no work injury. It explained its conclusion:

> There was no direct witness who saw Claimant moving the beer packs. In the parts of the story that are able to be confirmed, though, Claimant's version of events is contradicted. Ms. Rhudy testified that, even before the alleged injury, Claimant expressed a desire to leave work early. Contrary to Claimant's story, she testified that there was no beer delivery and no need for Claimant to be moving the packs. Mr. Dallago confirmed that when he left that morning, the cooler was fully stocked and should not have needed refilling. This supports Ms. Rhudy's testimony and contradicts Claimant's story. Mr. Dallago also confirmed that no large beer delivery came that day. Ms. Rhudy also stated that claimant just emerged from the cooler and said he hurt his back. He was not bent over, as Claimant described the scene. From her demeanor, the Board found Ms. Rhudy to be a very credible witness.
>
> There are, therefore, reasons to doubt Claimant's story. The Board also finds it odd that Claimant did not call Mr. Dallago after the alleged injury as Ms Rhudy suggested. Claimant, by his own testimony, has had previous experience with workplace injuries at two prior employers. Claimant's reluctance to notify his employer promptly casts doubts on his credibility. According to Ms. Rhudy, Claimant expressed a desire to leave work early on December 27 before the alleged injury.

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[1] The name of the owner in the transcript is Dillogo, that is a misspelling. His name is Dallago.

(9) The claimant attempts to bolster his argument by providing additional affidavits which raise questions about the credibility of the testimony of both Rhudy and Dallago. The record is created at the hearing below and cannot be expanded at the appeal level. Thus, the proffered affidavits are given no consideration on appeal.

(10) In reviewing the factual decisions of the Board, this Court must determine whether the Board's findings are supported by substantial evidence and free from legal error.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The weight to be given to the testimony of witnesses is within the discretion of the fact finder. There is substantial evidence to support the conclusion that no compensible accident had occurred. There is no error or law.

NOW, THEREFORE, IT IS ORDERED that the decision of the Industrial Accident Board is *AFFIRMED.*

SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Gary S. Nitsche, Esq.
Anthony M. Frabizzio, Esq.
Industrial Accident Board

[2] *Johnson v. Chrysler Corp.,* Del. Supr., 213 A.2d 64, 66 (1965); Del. Code Ann. tit. 29 § 10142(d) (1977).;
[3] *Olney v. Cooch,* Del. Supr., 425 A.2d 610, 614 (1981)