

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

LARRY SPENCER,)	
Claimant/Appellant,)	
)	
v.)	C.A. No.: 09A-05-012 FSS
)	
STATE OF DELAWARE,)	
Employer/Appellee.)	

Submitted: September 8, 2009
Decided: December 28, 2009

MEMORANDUM OPINION AND ORDER

Upon Appeal from the Industrial Accident Board – *AFFIRMED*

Larry Spencer appeals the Industrial Accident Board’s denial of his Petition to Determine Compensation Due. Spencer contends that the Board’s decision was not based upon substantial evidence because it disregarded the testimony of three independent, fact witnesses and the cross-examination of his employer’s medical expert.

I.

For approximately twenty-four years, Spencer, who is six foot four and stocky, worked as a bus driver for the Delaware Administration for Regional Transit (DART), a state agency. On May 31, 2008, Spencer worked from approximately 7:30 a.m. until 6:30 or 7:00 p.m., operating a series 502 bus, which Spencer describes as

“a forty foot bus which has a smaller driver seating compartment as compared to other buses.” According to Spencer, “[t]he primary design problem with bus number 502 . . . is that the driver’s seat is closer to the steering column than other buses in the DART fleet. Although a driver can make adjustments to the driver’s seat, the seat cannot be moved far enough back from the steering column.”

After driving the series 502 bus for several hours, “Spencer began experiencing pain in the lower part of his back which radiated down into his right leg and into his toes.” Spencer claims that when he asked for a replacement bus, DART refused to provide one due to a maintenance issue. Spencer testified that he was hurt on May 31, 2008, and he “limped home as usual[.]” He further testified that the next morning, he was able to “make it [to] the bus[,] hop in and went to work.”

On June 13, 2008, Spencer again experienced “pain and numbness in the low back and right leg” while he was working. As a result, he was relieved of his driving duties for that day. Spencer then sought treatment at Christiana Hospital’s Emergency Room three days later, on June 16, 2009. Subsequently, his family physician, Dr. Hugh Bonner, referred Spencer to a neurosurgeon, Dr. Magdy Boulos, who recommended back surgery for a disc herniation on L4-5. Spencer underwent back surgery on August 13, 2008.

Spencer was also examined by Dr. Alan Fink, a neurologist, in April and

December 2007, before the event at issue. Dr. Fink also saw Spencer after the event, in September 2008 and January 2009. Dr. Fink testified in his deposition that Spencer “severely herniated” his L4-5 disc between April 2007, when he was previously seen by Dr. Fink, and June 24, 2008, when the new, “large ruptured disk” was seen on an MRI. Dr. Fink also opined that for Spencer’s injuries to be causally related to driving the series 502 bus in May 2008, the difference in the bus’s driver’s compartment “would have to be extreme. In other words, going from something comfortable to something – a fairly large man, would put his posture in a different position and put extreme pressure on his lower back.” Dr. Fink further testified that patients with Spencer’s symptoms “come to medical attention almost on an emergency basis[.]”

On cross-examination, Dr. Fink agreed that Spencer, subjectively, related the June 2008 emergency room visit and subsequent surgery to the May 31, 2008 “event.” Dr. Fink also agreed that his January 2009 report indicates that Spencer’s “treatment has been reasonable and necessary and related to the May 31, ‘08 injury while working for DART[.]” As to that, Dr. Fink said, “[b]y [Spencer’s] history, yes.” That and a similar reference in the report to “the May 31, ‘08, work event” forms the core of Spencer’s medical expert testimony on causation.

II.

On October 15, 2008, Spencer filed a Petition to Determine Compensation Due “alleging that he sustained injuries to his back and right leg while operating [the series 502] bus[.]” The Industrial Accident Board held a hearing on April 16, 2009. Spencer was required to prove that his “injury would not have occurred but for the” change in driving condition on the series 502 bus.¹ Spencer did not call a biochemical expert to discuss the series 502's configuration and the stress it would put on an unusually large person, such as Spencer. Spencer also did not call a medical expert. As presented above, he relied instead on his cross-examination of DART's expert, Dr. Fink, and the inferences he hoped the Board would draw.

During the hearing, Spencer testified:

It's a 40 foot bus and the seating compartment is smaller than the rest of the five hundreds. . . . It seems to be most of the buses from five fifty or five forty five down to five hundred the compartments are closer to the steering column than the rest of them. And we have adjustments for the seats but in those series buses the adjustment doesn't take you back far enough.

Furthermore, on cross examination, Spencer testified:

MR. KLUSMAN: Okay. Now how much closer is
 the seat in the 502 bus to the

¹*Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. 1992).

dash board [than] the higher series five hundred buses?

LARRY SPENCER: I don't know exactly.

MR. KLUSMAN: Well you, I know you don't know exactly but can you estimate for the Board?

LARRY SPENCER: No I can't.

MR. KLUSMAN: Is it a foot?

LARRY SPENCER: I can't say. I know I am not comfortable when I am sitting in it.

Next, DART employee Greg Downing testified that "in the lower level five hundred the seat doesn't slide all the way back. I guess as you can say it slides but it doesn't slide as far back as the higher level five hundred buses." Downing further explained: "[i]f my recollection is correct it should be [] about a foot probably less that if a five hundred series bus is here you can probably scoot it back about here for I guess longer limbs and things of that nature." Downing, however, stated that it was "[j]ust a guess" that the seat would move back a foot or less.

Third, DART employee Charles McLarin testified:

I notice a small difference myself. There are times when you get in a lower five hundred it does seem quite tight and the seat doesn't go back as much as I'm six two as much as

I would like it to. Some of the higher five hundreds the seat does go back a little bit farther so you feel a little bit more comfortable as far as the position of your knees would be in the bus.

Fourth, DART employee Charles Moulds testified:

I am told that there is a difference in the space between the [dashboard] and the seat pedestal. I am not sure that it's a foot because a foot is a good amount of space in a driver's compartment. I am not exactly [sure] how far the difference but I understand there is a slight difference.

On April 27, 2009, the Board denied Spencer's petition. Spencer filed this appeal on May 22, 2009.

III.

When analyzing an appeal from the Industrial Accident Board, the limited function of the court "is to determine whether or not there was substantial competent evidence to support the finding of the Board, and, if it finds such in the record, to affirm the findings of the Board."² Accordingly, the court "reviews the facts to determine whether a reasonable person would conclude the evidence supports the findings."³ Substantial evidence is "such relevant evidence as a reasonable mind

²*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

³*Workers' Comp. Fund v. Kent Constr. Corp.*, 2008 WL 4335873, at *2 (Del. Super. Sept. 19, 2008).

might accept as adequate to support a conclusion.’ [It] is ‘more than a scintilla but less than a preponderance[.]’⁴ “As to questions of law, the review [of the court] is plenary.”⁵

IV.

Spencer contends that the Board’s decision was not based upon all the evidence, specifically the testimony of the three other DART employees. Spencer claims that “the Board not only ignored [his] testimony but it ignored the testimony of Mr. Downing, Mr. McLarin and Mr. Moulds, all of whom testified as to the poor seating configuration in bus number 502. As such, the Board’s decision denying Mr. Spencer’s Petition is not based on substantial evidence.” Furthermore, Spencer contends that the Board “disregarded the medical expert opinion of Dr. Alan Fink.”

The Board found that Spencer “failed to meet his burden of proof that his injury to his low back and right lower extremity are causally related to his employment[.]” The Board concluded that Spencer’s “injury is significant,” but that based on Dr. Fink’s testimony, “the manner in which Claimant would be seated would have to be extremely different in the 502 series than in the buses Claimant drove prior to May 31, 2008.”

⁴*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

⁵*DaimlerChrysler v. Aakala*, 2006 WL 1579785, at *2 (Del. Super. May 31, 2006).

The Board “recognize[d] that the driver’s compartment in the 502 series was more compact and cramped than [in] other buses” and that Spencer “is a large man.” The Board did not conclude, however, that “such change in condition was so extreme to cause Claimant’s ‘significant’ injury.” The Board was also troubled by the fact that Spencer “did not appear credible[,]” that he “would not proffer an estimate of how much more compact the 502 driver’s compartment was[,]” and that Spencer “continued to work for nearly two weeks” after his alleged injury on May 31, 2008.

Finally, the Board noted that Downing’s testimony on the size of the series 502 bus was “just a guess[,]” and that Moulds “stated that the adjustment differential was less than one foot.” Thus, as to Downing and Moulds, the Board did not ignore their testimony; it rejected or discounted it. And, McLarin characterized the difference in the series 502 buses as “a little bit.” Again, no expert testified that the series 502's seating configuration accounted for Spencer’s back injury.

The Board considered the above-mentioned evidence. In the Board’s Decision on Petition to Determine Compensation Due, it referred to and accurately summarized in detail the testimony of each of the witnesses. Nevertheless, the Board concluded that Spencer’s driving the series 502 bus once was not an extreme event explaining Spencer’s significant injury. In other words, the Board appears to have

compared the testimony regarding the series 502's compartment with the medical expert's opinion and decided that Spencer's driving this particular bus on one occasion did not prove his injury was caused by that single event. Perhaps driving the series 502 bus factored into Spencer's injury. Nevertheless, the Board was not satisfied by the evidence that it was a proximate cause.

V.

In summary, Spencer presented some evidence supporting his claim. It does not appear, however, that the Board failed to consider Spencer's evidence, including his lay witnesses and the cross-examination of Dr. Fink. Rather, the Board did not put enough stock in it. Having concluded that the Board weighed all the evidence, the court, as explained above, cannot re-weigh it. The Board's finding that Spencer failed to demonstrate his injury would not have occurred but for driving the series 502 bus is supported by substantial evidence. Thus, the court must **AFFIRM** the Board's findings.

IT IS SO ORDERED.

Date: _____

Judge

cc: Prothonotary (civil)
John J. Klusman, Jr., Esquire
Stephen T. Morrow, Esquire