

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

<b>EVETTE HERNANDEZ</b>	:	
	:	<b>C.A. No: 09A-07-003 RBY</b>
<b>Claimant/Appellant,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>STATE OF DELAWARE,</b>	:	
	:	
<b>Employer/Appellee.</b>	:	

**Submitted: July 12, 2010**  
**Decided: August 30, 2010**

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

**AFFIRMED**

**OPINION AND ORDER**

Joseph J. Rhoades, Esq., and Stephen T. Morrow, Esq., Wilmington, Delaware for Claimant/Appellant.

Anthony M. Frabizzio, Esq., John J. Ellis, Esq., Heckler & Frabizzio, Wilmington, Delaware for Employer/Appellee.

Young, J.

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### **SUMMARY**

\_\_\_\_\_ Evette Hernandez (“Appellant”) claims she was injured on January 23, 2008 while working as a bailiff for the State of Delaware (“Appellee”). She purports to have suffered a back injury. On September 4, 2008, she filed a Petition to Determine Compensation Due with the Industrial Accident Board (the “Board”). After its March 16, 2009 hearing, the Board, by decision dated June 23, 2009, found Appellee’s witness more credible, and denied Appellant compensation. Because “the Board properly discharged its exclusive authority as finder of fact to determine the credibility of witnesses,”<sup>1</sup> and “its credibility determination was based upon substantial evidence,”<sup>2</sup> the Board’s decision will not be disturbed. It is, therefore, **AFFIRMED.**

### **FACTUAL BACKGROUND**

\_\_\_\_\_ On January 23, 2008, Appellant was employed by Appellee as a bailiff in the New Castle County Courthouse. Prior to that day, Appellant had worked for Appellee as a bailiff for approximately twenty-five years. Appellant’s duties as a bailiff included assembling jurors, setting up the courtroom for hearings, and preventing disruptions in the courtroom. Appellant’s physical activities included walking, sitting, and standing.

In connection with her duties as a bailiff, Appellant was required to wear a

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<sup>1</sup> *Cabrera v. JDH Construction*, 2010 WL 2677301, at \*1(Del. Super. June 30, 2010).

<sup>2</sup> *Id.*

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leather utility belt that contained cases for handcuffs, gloves, mace, and a radio. Appellee's policy required that Appellant wear the utility belt whenever she was outside of the bailiff office area. The weight of the utility belt is disputed. Appellant, contends that the utility belt weighs approximately twelve pounds. Appellee, however, avers that the utility belt weighs approximately five pounds with the radio and all equipment attached.

In June of 2000, Appellant was promoted to Assistant Chief Bailiff. As such, Appellant assumed additional duties beyond those of a regular bailiff. She became responsible for assigning courtrooms for trials, synchronizing the bailiffs' schedule with the Court's calendar, and supervising other bailiffs. Generally, Appellant's duties as Assistant Chief Bailiff were more administrative than her earlier responsibilities as a regular courtroom bailiff.

In 2006, Appellant applied for the Chief Bailiff position. She did not receive the promotion. Instead, on February 28, 2007, James Strawbridge ("Strawbridge"), a bailiff Appellant had previously supervised, was appointed Chief Bailiff. According to both Appellant and Strawbridge, they endured a strained relationship.

In December 2007, Strawbridge met with Appellant and the Deputy Court Administrator to discuss Appellant's performance plan. At that meeting, Appellant's duties as a bailiff under Strawbridge were discussed. Specifically, Appellant was informed that she would only act in a supervisory capacity when Strawbridge was absent; that her administrative responsibilities would lessen; and that she would assume duties correlative to a regular courtroom bailiff.

On January 23, 2008, Strawbridge assigned Appellant to cover a jury trial.

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Although providing trial coverage was a typical bailiff job duty, Appellant had not been assigned a trial since 2001. The jury trial lasted three days.

On Friday, January 25, 2008, while the jury was deliberating, Appellant claims she began experiencing pain in her back. Appellant attributes her back pain to two major causes: (1) the leather utility belt she was required to wear during the trial; and (2) the rigorous duties she was required to perform during the trial. Although Appellant managed to work until the end of January 25, it is her testimony that she spent the remainder of the weekend confined to her bed. In addition to bed rest, Appellant self-medicated with Advil.

On Monday, January 28, 2008, Appellant returned to work. She left early, however, because, according to Appellant, her back pain became too excruciating to tolerate. In the ensuing days, Appellant was prescribed pain medication, Flexeril and Prednisone, by her family doctor. Despite this medication, Appellant claims the low back pain continued with radicular symptoms down her right leg. Due to the pain, she asserts, Appellant was unable to work for a period of time.

At this point, two important factual points must be considered. First, in 1993, Appellant was injured in a motor vehicle accident. This accident caused injury to Appellant's neck and back, specifically her lower back.<sup>3</sup> Appellant complained of and treated for lower back pain from the time of the accident until 1999. Appellant's medical records describe her back condition as "chronic."

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<sup>3</sup> A January 17, 1994 MRI revealed a large central herniation at L5-S1 as well as narrowing at the central canal.

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Second, Appellee did not allege a work injury until February 4, 2008. In fact, at the commencement of her absence from work, Appellant advised that she thought her back pain was due to a “problem with her back” and her “woman’s monthly problem.” Therefore, from January 25, 2008 until February 4, 2008, there was no report about an alleged work injury.

Eventually, on February 25, 2008, Appellant returned to work. She was assigned to work in jury services, which was considered light duty work. Appellant continued to work in this light duty capacity until July 2008. In July 2008, Appellant was informed that, if she was unable to perform her full duties as a bailiff, she could no longer be employed with the State as a bailiff. This change arose because there was no longer a light duty position available. Consequently, due to her continuing pain, Appellant’s employment with the State ended. On September 4, 2008, Appellant filed a Petition to Determine Compensation Due with the Board.

### **THE BOARD HEARING**

On March 16, 2009, Appellant’s hearing was held. Dr. Peter Witherell (“Dr. Witherell”), a board certified physician who specializes in anesthesiology and pain management, testified on behalf of Appellant. Appellant was referred to Dr. Witherell by Dr. Michael Sugarman, a spinal surgeon, for therapeutic injections of the lumbar spine.

Dr. Witherell’s opinion was that Appellant’s work activities caused a right-sided disc extrusion resulting in low back and lower extremity pain. Dr. Witherell reviewed two MRI reports of Appellant’s lumbar spine. According to Dr. Witherell,

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the first MRI report, dated January 17, 1994, noted a large central disc herniation at L5-S1. In comparison, a March 24, 2008 MRI report of the lumbar spine showed a right-sided disc extrusion. In Dr. Witherell's opinion, the 2008 MRI appeared to show a new right-sided disc extrusion as compared to the 1994 MRI. Based on his review of the records, Appellant's statements, and his treatment of Appellant's pain, Dr. Witherell testified that he believed Appellant's low back and radicular pain was causally related to Appellant's job duties as a bailiff.

The State relied on the medical opinion of Dr. John B. Townsend, III ("Dr. Townsend"), a neurologist. Dr. Townsend examined Appellant on December 1, 2008, and reviewed all relevant medical records. During his physical examination of Appellant, Dr. Townsend noted decreased range of motion as well as tenderness over the paraspinal muscles. In addition, Dr. Townsend noted that Appellant was complaining of low back pain.

Dr. Townsend concluded that Appellant's herniation was unrelated to her work. According to Dr. Townsend, Appellant's medical records indicated that she had an injury to the low back that was ongoing at least through 1999. Due to this injury, Dr. Townsend submitted that Appellant could be expected to have temporary flare-ups of low back pain. Although Dr. Townsend conceded that Appellant's 2008 pain constituted more than a flare-up and that her 2008 herniation was right-sided and not central, he attributed her complaints to degenerative changes. Dr. Townsend further explained that a utility belt – even a twelve pound utility belt – was unlikely to cause a disc herniation because the weight would be evenly distributed as opposed to directed to one small area in the back.

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When questioned about his initial December 1, 2008 report, Dr. Townsend testified that, in his report, he found that Appellant's treatment was reasonable, necessary, and causally related to her work activities. He based this opinion, however, upon the history he had available to him at the time of his report.

On or about June 23, 2009, the Board issued its decision denying Appellant's Petition to Determine Compensation Due. The Board was not satisfied that the claimed mechanism of injury was a substantial cause of Appellant's back injury. Specifically, the Board found that "[while] [Appellant's] duties may have been a factor in the re-emergence of back complaints, [it] [was] not satisfied that the evidence demonstrate[d] that her work was a *substantial* factor."<sup>4</sup>

On July 22, 2009, Appellant filed an appeal of the Board's decision to this Court.

### **PARTIES' CONTENTIONS**

Appellant argues that the Board's decision must be reversed because it was not based on substantial evidence. Specifically, Appellant charges that the Board: (1) impermissibly disregarded the opinions of both medical expert witnesses; and (2) failed to consider the medical evidence regarding Appellant's prior back complaints. Appellant posits that, by substituting its own opinion for those of the experts without any foundation to support that opinion, the Board committed reversible error.

In response, Appellee claims that the Board's decision was based on substantial

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<sup>4</sup> *Hernandez v. State of Delaware*, IAB Hearing No. 1316537 (June 23, 2009) at 15 (emphasis in original).

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evidence, and the Board “properly fulfilled its function as the trier of fact.”<sup>5</sup> Appellee disagrees with Appellant’s assessment of the Board’s decision. First, Appellee advances that the Board did, in fact, consider the opinions of both medical expert witnesses. The Board simply found Dr. Townsend’s testimony to be more credible. Second, while Appellee maintains the Board did properly consider Appellant’s prior medical history, it suggests that there is no indication that the Board’s finding that Appellant’s back likely continued to be symptomatic from 1999 to 2008 was dispositive as to the Board’s overall holding. In sum, Appellee submits that the Board properly exercised its authority, and made proper credibility determinations.

### **STANDARD OF REVIEW**

“The duty of the Court on appeal from the Industrial Accident Board is to determine whether the Board’s decision is supported by substantial evidence and free from legal error.”<sup>6</sup> “The Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility[,] and make its own factual findings and conclusions.”<sup>7</sup> “However, the Board must give its reasons for reaching the credibility conclusions it does.”<sup>8</sup> “Only when there is no substantial, competent evidence to support the Board’s factual finding may this Court overturn the Board’s

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<sup>5</sup> *Id.* at \*3.

<sup>6</sup> *Cabrera*, 2010 WL 2677301, at \*3 (citing *Gen. Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. May 16, 1985)).

<sup>7</sup> *Id.* (citing *Munyan v. DaimlerChrysler Corp.*, 909 A.2d 133, 136 (Del. 2006)).

<sup>8</sup> *Id.* (citing *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998)).



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decision.”<sup>9</sup> “When reviewing the Board’s decision for substantial evidence[,] the Court will consider the record in the light most favorable to the prevailing party below.”<sup>10</sup> “The Claimant has the burden of establishing a work-related injury and the extent of the injury.”<sup>11</sup>

### **DISCUSSION**

\_\_\_\_\_ Generally, where there is a specific and identifiable industrial accident, this Court has held that the “but for” definition of proximate cause is applicable.<sup>12</sup> “If [a] worker has a pre-existing disposition to a certain physical or emotional injury which ha[s] not itself manifested prior to the time of the accident, an injury attributable to the accident is compensable if the injury would not have occurred *but for* the accident.”<sup>13</sup> “The accident need not be the sole cause or even a substantial cause of the injury.”<sup>14</sup> “If the accident provides the ‘setting’ or ‘trigger,’ causation is satisfied

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<sup>9</sup> *Id.* (citing *Street v. State*, 669 A.2d 9, 11 (Del. 1995)).

<sup>10</sup> *Id.* (citing *Sewell v. Del. River and Bay Auth.*, 796 A.2d 655, 660 (Del. Super. Feb. 29, 2000)).

<sup>11</sup> *Id.* (citing *Gray’s Hatchery & Poultry Farms v. Stephens*, 81 A.2d 322, 324 (Del. 1950)).

<sup>12</sup> *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. Super. Dec. 23, 1992) (citing *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991)) (additional citation omitted).

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> *Id.*

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for purposes of compensability.”<sup>15</sup>

However, in cases where a claimant is injured by the aggravation of a pre-existing condition and there is no identifiable industrial accident, causation is governed by the “usual exertion” rule.<sup>16</sup> The usual exertion rule provides that “an injury is compensable, notwithstanding the previous condition, if the ordinary stress and strain of employment is a *substantial cause* of the injury.”<sup>17</sup> “The substantial factor standard of proximate cause permits the employee to recover in the absence of an identifiable accident, notwithstanding a pre-existing condition, if the employee can demonstrate[,] through expert testimony[,] that his or her usual employment was ‘a material element and a substantial factor in bringing it about.’”<sup>18</sup>

The parties agree that the substantial factor standard is the governing standard. Accordingly, the question for the Board was whether Appellant had established, by a preponderance of the evidence, that her work activities were a substantial cause of her low back and right leg pain complaints. The Board agreed with Dr. Townsend, Appellee’s medical expert, who found that Appellant’s work activities were unrelated to her injury. Therefore, the Board found that Appellant had not met her burden of proof, and denied her compensation. This Court will not disrupt the Board’s factual

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<sup>15</sup> *Id.*

<sup>16</sup> *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1136 (Del. 1989).

<sup>17</sup> *Id.* (citing *Mr. Pizza, Inc. v. Schwartz*, 489 A.2d 427, 433 (Del. 1985)) (emphasis added). CHECK

<sup>18</sup> *State v. Steen*, 719 A.2d 930, 935 (Del. 1998) (citing *Culver*, 588 A.2d at 1097) (additional citations omitted).

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findings.

The Board was free to choose between the conflicting diagnoses of Dr. Witherell and Dr. Townsend. Either opinion would constitute substantial evidence for purposes of appeal.<sup>19</sup> While Dr. Townsend testified that the disputed medical *treatment* was causally related to the claimant's work duties, the Board was correct not to rest its analysis on that singular point. Dr. Townsend ultimately opined that Appellant's work duties were not a substantial factor in bringing about her condition. The Board accepted Dr. Townsend's testimony.

The Court finds that the Board acted within its authority to disregard the testimony of Dr. Witherell. Despite Appellant's iterations that the Board erroneously disregarded the opinions of both experts, that is not correct. As demonstrated by the lengthy opinion of the Board, it simply found that Dr. Townsend's explanation and diagnosis were more plausible. The Board's decision to weight Dr. Townsend's testimony more heavily than Dr. Witherell's was based on substantial evidence. The Court finds no error in this determination.

Additionally, the Court finds no reversible error as to the Board's findings on Appellant's ongoing back condition. Given the ongoing degeneration identified in Appellant's 2008 MRI, it was reasonable for the Board to conclude that her chronic pain likely did not disappear after 1999. In fact, Dr. Townsend's testimony supports this conclusion. Furthermore, as emphasized by Appellee, even with substantial

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<sup>19</sup> *Reese*, 619 A.2d at 907 (citing *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 105-06 (Del. 1982)).

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evidence to support its determination, there is no indication that this factual finding was dispositive as to the Board's overall finding. Accordingly, the Board's decision is **AFFIRMED**.

**SO ORDERED.**

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/s/ Robert B. Young

J.

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