

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

SALGARDO TABANNOR	)	
	)	
Claimant-Below/	)	
Appellant,	)	
	)	
	)	
v.	)	C.A. No. 02A-03-003 CHT
	)	
	)	
ADVANCED SECURITY,	)	
	)	
Employer-Below/	)	
Appellee.	)	

**OPINION AND ORDER**

**\_\_\_\_\_ On The Claimant's Appeal from the Decision  
of the Industrial Accident Board**

Date Assigned: November 19, 2002  
Decided: February 28, 2003

R. Scott Kappes, Esquire, SCHMITTINGER & RODRIGUEZ, P.A., 1300 North Market Street, Suite 205, Wilmington, Delaware 19801, Attorney for the Claimant-Below/Appellant.

Cassandra Faline Kaminski, Esquire, YOUNG, CONAWAY, STARGATT & TAYLOR, LLP, The Brandywine Building, 1000 West Street, P.O. Box 391, Wilmington, Delaware 19899-0391, Attorney for the Employer-Below/Appellee.

**TOLIVER, Judge**

This is an appeal from the decision of the Industrial Accident Board (hereinafter "Board") arising out of a claim for worker's compensation benefits based upon injuries resulting from a severe beating suffered by Appellant Salgado Tabannor while employed by Appellee Advanced Security.

**STATEMENT OF FACTS & NATURE OF THE PROCEEDINGS**

Mr. Tabannor was an employee of Advanced Security on June 26, 1998. He was employed as a security guard at White Chapel Village in Newark, Delaware, a retirement community that was in the construction phase on that date. Mr. Tabannor's duties included providing security by making rounds of the site during the evening and night hours. During the hours of his employment, Mr. Tabannor apparently wore a hat that read, "Police", as well as a uniform consisting of pants and a shirt with patches on the sleeves.<sup>1</sup>

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<sup>1</sup> Although the parties agree that the uniform was issued to Mr. Tabannor by Advanced Security, there is dispute over whether Mr. Tabannor or Advanced Security provided the hat he wore on that date.

At approximately 10:45 p.m. on the evening of June 26, 1998, Mr. Tabannor and a friend, Regina Johnson, left the security trailer at White Chapel Village to make a round of the site. Another friend, Mr. Jason Burkins, remained in the trailer. At approximately 11:15 p.m., Mr. Burkins heard a great deal of noise outside the trailer, and looked outside to see two men assailing Mr. Tabannor. Mr. Burkins called out to ask whether Mr. Tabannor was all right, and the two men fled. Mr. Tabannor subsequently entered the trailer and announced he'd been robbed. Mr. Burkins testified that Mr. Tabannor put on his uniform top (which he was apparently not already wearing), and retrieved his flashlight, cell phone and possibly mace/pepper spray. He then told Mr. Burkins that he was going across the street to the nearby Kimberton apartment complex<sup>2</sup> to ask some friends of his if they knew who robbed him. Mr. Burkins further testified that he asked Mr. Tabannor

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<sup>2</sup> Mr. Burkins estimated that the Kimberton apartment complex was approximately 75-80 yards from the security trailer. The area where the robbery took place was on a sidewalk approximately 20 yards from the trailer.

if he wanted him to call the police, and Mr. Tabannor told him to wait until he returned. Mr. Tabannor then walked briskly across the street toward the Kimberton apartments.

It is unknown exactly what occurred after Mr. Tabannor entered the Kimberton complex. He cannot recall the events that occurred there, and his current state of disability would prevent him from communicating any recollections in any event.

However, several hours later that night, he was found lying under a tree in the Kimberton Apartment tennis courts, severely beaten.

Mr. Tabannor filed a petition to determine compensation due on March 13, 2000. He claimed that his injuries, which have left him both physically and mentally disabled and unable to work, occurred from an incident that occurred during the course of his employment. Advanced Security opposed his petition, contending that Mr. Tabannor's injuries resulted from a personal altercation, and that he was therefore not acting as an employee of Advanced Security when he was

attacked.

The Board heard his petition on February 15, 2002. Ms. Juliet Tabannor, Ms. Joan Frances, Mr. Jason Burkins, and Noel Tabannor appeared on behalf of Mr. Tabannor. Mr. Jay Galloway and Mr. Gary Dunnigan appeared on behalf of Advanced Security. To a substantial degree, the facts material to the instant controversy were not in dispute, and the parties stipulated to Mr. Tabannor's complete disability. It was the issue of whether or not Mr. Tabannor was acting in the course and scope of his employment when he sustained his injuries that occupied most of the hearing.

On February 28, 2002, the Board released its decision in favor of Advanced Security. Relying on Histed v. E.I. DuPont de nemours & Co.<sup>3</sup>, the Delaware Worker's Compensation Act<sup>4</sup> and Bedwell v. Brandywine Carpet Cleaners<sup>5</sup>, the Board found that Mr. Tabannor had failed to establish that his injuries arose

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<sup>3</sup> 621 A.2d 340, 343 (Del. 1993).

<sup>4</sup> 19 Del. C. §§2301-2397.

<sup>5</sup> 684 A.2d 302, 305-06 (Del. Super. 1996).

out of the course and scope of his employment, and that Advanced Security was not required to provide him any disability benefits as a result.

The Board based its decision on three main factors. First, Mr. Tabannor's failure to contact the police after the initial robbery, despite his training and Mr. Burkins' urging to do so, was contrary to his obligation as an Advanced Security employee to cooperate with law enforcement agencies. In addition, Noel Tabannor, Mr. Tabannor's brother, testified that Mr. Burkins called him after Mr. Tabannor left the trailer and indicated that Mr. Tabannor was "going after" the men who had robbed him. This testimony, which the Board found credible, does not support Mr. Tabannor's assertion that he left the White Chapel site to pursue his employer's interests.

Second, the Board points out that the fact that Mr. Tabannor left the premises at all is contrary to his employer's policies as indicated in the employee handbook. At the hearing, Mr. Jay Galloway, who was employed as a regional

manager for the Delaware office of Advanced Security between August 1997 and 1998, testified that Mr. Tabannor was shown a training video and provided with a handbook upon hire. These materials clearly stated Advanced Security's policy that the security guards were not to leave a patrol area unprotected, and were expected to cooperate with all law enforcement agencies, but not to assume the duties of those agencies.<sup>6</sup> When coupled with the fact that he delegated his security duties to a non-employee, the circumstances of Mr. Tabannor's abandonment of his post are actually contrary to his employer's business interests, i.e., to provide security for the White Chapel site.

Third, the Board found that Mr. Tabannor breached Advanced Security's policy that its security guards retreat from dangerous situations to the extent that they can do so safely, and to proactively report and suspicious activity to

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<sup>6</sup> While Mr. Tabannor argues that no evidence of a training manual or video was produced at the Board hearing, he does not refute that he received the training discussed by Mr. Galloway. The Board committed no legal error by choosing to believe Mr. Galloway's averment that such a training manual and video existed.

the local police. Mr. Tabannor's assailants had already fled the White Chapel site when he announced his intentions to pursue them. Only his own personal property was taken, not that of the White Chapel site or Advanced Security. There was also a time lapse between the initial robbery and Mr. Tabannor's abandonment of the White Chapel site that negates his implication that he was in hot pursuit of the robbers. By leaving the White Chapel construction site and pursuing his assailants without notifying the police, Mr. Tabannor not only willingly subjected himself to the possibility of great personal injury, he violated numerous Advanced Security company policies as well.

In its conclusion, the Board reasoned that Mr. Tabannor chose to take the law into his own hands in what was a personal deviation from his employment. By leaving his post, Mr. Tabannor abandoned his job. The subsequent beating and resulting injuries therefore did not arise out of the course and scope of his employment.



Mr. Tabannor filed the present appeal in this Court on March 7, 2002, raising four arguments in support thereof. First, he alleges that the Board erred as a matter of law by finding that his injuries did not arise out of the course and scope of his employment. Second, he claims that the Board did not have substantial evidence to support a conclusion that he was pursuing purely personal interests at the time of his attack. Third, he argues that the Board did not have substantial evidence to find that he had abandoned his job, and contends that it failed to use the correct legal standard in making that determination. Finally, he contends that the Board's allowance of impermissible hearsay evidence deprived him of a fair hearing.

Advanced Security, as expected, argues in support of the Board's decision. In particular, Advanced Security asserts in response that Mr. Tabannor's injuries did not arise out of the course and scope of his employment, and that the evidence supports findings that he both abandoned his job and did so in

the pursuit of personal interests. Finally, Advanced Security contends that the Board specifically explained in its decision that it disregarded the testimony with which Mr. Tabannor takes issue as impermissible hearsay.

The following is the Court's disposition of the issues so raised.

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### **DISCUSSION**

This Court is bound by the Board's findings if supported by substantial evidence and absent abuse of discretion or error of law.<sup>7</sup> "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>8</sup> It "is more than a scintilla and less than a preponderance" of the evidence.<sup>9</sup>

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<sup>7</sup> Ohrt v. Kentmere Home, 1996 Del. Super. LEXIS 356.

<sup>8</sup> Anchor Motor Freight v. Ciabattoni, 716 A.2d 154, 156 (1998); and Streett v. State, 669 A.2d 9, 11 (1995).

<sup>9</sup> City of Wilmington v. Clark, 1991 Del. Super. LEXIS 118 at \*6.

This Court does not weigh the evidence, determine questions of credibility or make its own findings of fact.<sup>10</sup> Its function is to determine if the evidence is legally adequate to support the factual findings below.<sup>11</sup> An evaluation of the Board's decision in light of these standards requires this Court to affirm that decision.

**The Board's Decision is Free from Legal Error**

First, the Board's determination that Mr. Tabannor's injuries did not arise out of the course and scope of his employment was both legally correct and supported by substantial evidence in the record. Mr. Tabannor cites heavily to 1 Larson, *Workers' Compensation Law*, §8.01 [1][a] (2002) in his opening brief. He avers that his particular sphere of employment (i.e., security) exposes him to an increased risk of associated assault that should be

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<sup>10</sup> Johnson v. Chrysler, 213 A.2d 64, 66 (1965).

<sup>11</sup> 29 Del. C. §10142(d).

compensable. However, the Court cannot dispute the Board's observation that Mr. Tabannor's injuries did not arise from the initial robbery at White Chapel. The record contains substantial evidence in support of the conclusion that the injuries resulted from a subsequent attack on his person that occurred away from the job site, and as a result of his unfortunate decision to pursue vigilante justice.

Mr. Tabannor's reliance on Judge Cardozo's "continuity of the quarrel" test, advanced in Field v. Charmette Knitted Fabric Company<sup>12</sup>, is also misplaced. Mr. Tabannor's quarrel with his attacker, from origin to ending, did not constitute a continuous course of conduct. He had sufficient opportunity to involve the appropriate authorities when he entered the security trailer after the initial robbery. While the Board is indeed under an obligation to "construe and administer [the Workers' Compensation Act] with reasonable liberality"<sup>13</sup>, even

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<sup>12</sup> 156 N.E. 642 (Ct. App. N.Y. 1927).

<sup>13</sup> 621 A.2d 340, 346 (Del. 1993).

a liberal view of the facts in the instant case supports the Board's determination that once Mr. Tabannor abandoned the White Chapel site, he was engaged in a personal deviation from the course and scope of his employment, no matter how inherently dangerous his actual employment may have been.

The Court also finds the various cases Mr. Tabannor cites from other jurisdictions unpersuasive. True, each of those cases did contemplate situations in which an employee's injuries were compensable for injuries that occurred after a significant amount of time had lapsed since an initial incident, or away from the actual job site. However, those cases also involved employees who were assaulted by other employees or ex-employees, and those altercations were never initiated, continued or provoked by the employee later seeking workers' compensation benefits. As a result, those cases are distinguishable from the instant situation. Mr. Tabannor went looking for trouble when he had the opportunity to avoid it.

## **The Board's Decision is Supported by Substantial Evidence**

There is no conceivable arrangement of the facts present in this case that suggests Mr. Tabannor sought to further Advanced Security's interests when he left his post after the initial contact. On the contrary, both the evidence and common sense demand the conclusion that Mr. Tabannor abandoned his job, as well as Advanced Security's interests, when he left the job site under the facts of this case.<sup>14</sup> The Court is also not persuaded that Mr. Tabannor was confused as to his security guard role, or any additional authority implicitly conferred, as a result of his "Police" hat. Whether provided by Advanced Security, the White Chapel developer, or Mr. Tabannor himself, at no time was Mr. Tabannor deputized as a police officer. Moreover, his training indicated clearly that

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<sup>14</sup> As to whether the Board correctly determined that the Claimant temporarily abandoned his job, Mr. Tabannor contends that the Board implicitly relied on 2 Larson §25.00 (2002) (which addresses traveling employees) by citing to Bedwell v. Brandywine Carpet Cleaners, 684 A.2d 302 (Del. 1996) (in which a carpet installer was awarded workers' compensation benefits after slipping and falling on the steps of a restaurant during his lunch break). At no point in its opinion does the Board indicate reliance on 2 Larson §25.00 (2002), and the Court will not assume such reliance. In any event, the Court need only determine whether the Board's decision is supported by substantial evidence and free from abuse of discretion or error of law.

he was to refer all situations of this type to actual law enforcement authorities.

Further, the Court finds that the Board's decision that Mr. Tabannor was pursuing personal interests when he went after his assailants, and not seeking to advance the interests of his employer, is also supported by substantial evidence. Only Mr. Tabannor's personal property was taken. The robbers had already fled the White Chapel site. Mr. Tabannor failed to follow company protocol when he refused to contact the police, abandoned his job post and delegated his security duties to a non-employee as he went to investigate the identity of those who had robbed him. Mr. Tabannor's actions cannot, therefore, be considered to fall within the course or scope of his employment.

Finally, although it may be an abuse of discretion to rely solely on hearsay evidence to establish Mr. Tabannor's intent when he left the White Chapel site<sup>15</sup>, that is not the

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<sup>15</sup> Liberto v. Delaware Violent Crimes Compensation Board, 1992 Del. Super. LEXIS 558 at \*4-5.

case here. The Board's decision was based on the testimony of the witnesses present, especially Mr. Burkins, who certainly provided the most persuasive evidence of Mr. Tabannor's intentions on the night in question.

The Board's decision is not fatally flawed because of the admission of Regina Johnson's statement to the police, in which she claimed Mr. Tabannor was involved in a drug transaction prior to his assault. As to those statements, the Board noted:

Claimant's counsel objected [to the admission of the statements] on the grounds of hearsay, noting that neither statement was taken under oath or subject to cross-examination. Ms. Johnson was not present at the hearing to be questioned. Advance (sic) responded that it had attempted unsuccessfully to locate Ms. Johnson. It also noted that the police statement was taken as a normal part of a criminal investigation and contained statements against Claimant's penal interest.

The Board allowed the submission of the statements, but advised it would determine the appropriate weight to be given them in light of Ms. Johnson's absence. Upon review of the statements, it became apparent that they contained



multiple inconsistencies and contradictions both between and within themselves. As such, and without the witness present to clarify or explain, the Board found the statements unreliable. Accordingly, no weight was given them.<sup>16</sup>

While the Board initially allowed the admission of Ms. Johnson's statements in her absence, it explicitly omitted them from consideration when reaching its decision. Since the Board did not incorporate those statements into its conclusions of fact, Mr. Tabannor cannot claim that he has been unfairly prejudiced in some way, or that a new hearing is warranted.

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<sup>16</sup> Industrial Accident Board Decision in the matter of Salgado Tabannor v. Advanced Security, I.A.B. Hearing No. 1127413, February 28, 2002 at 8.

CONCLUSION

Based upon the foregoing, the decision of the Industrial Accident Board is supported by substantial evidence and is free from legal error. It therefore must be, and hereby is, **affirmed.**

**IT IS SO ORDERED.**

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**Toliver, Judge**