IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARTIN FINOCCHIARO,	)	
	)	
Claimant-below, Appellant,	)	C.A. No:06A-05-003 JRS
	)	
v.	)	
	)	
D.P., Inc. T/A DOMINOS PIZZA,	)	
	)	
Employer-below, Appellee.	)	

Date Submitted: September 1, 2006
Date Decided: December 29, 2006

Upon Appeal from the Industrial Accident Board.

AFFIRMED.

O R D E R

This 29th day of December, 2006, upon consideration of the appeal of Martin Finocchiaro from the decision of the Industrial Accident Board ("the Board") denying his Petition to Determine Compensation Due,[1] the Court finds as follows:

[1] The Industrial Accident Board of the State of Delaware, Decision on Petition to Determine Compensation, Hearing No: 1237318 (April 12, 2006) (hereinafter "IAB Decision") at 12.

1. Martin Finocchiaro ("Finocchiaro") was making a delivery for Domino's Pizza (Domino's) on July 13, 2003, when he was involved in a motor vehicle accident in his delivery van. He had worked for Dominos for approximate two-three weeks. On the day of the accident, he started work at 2:30 p.m. At the end of his shift, shortly before 8:00 p.m., his manager requested that he make another delivery. He agreed and pulled out of the Domino's Parking Lot shortly after 8:00. The accident occurred at approximately 8:23 p.m. There is no dispute that Finocchiaro was working within the course of his employment at the time of the accident. He woke up in the hospital eight days after the accident and learned that he had sustained a fractured skull on the left side of his head and a brain contusion with swelling.

2. On the evening of the accident, Finocchiaro was taken to Christiana Care Hospital ("CCH"), where a urine sample and a blood sample were taken.[2] The CCH laboratory report indicated that alcohol and two other substances, opiates and benzodiazepine, were in his system.

3. Finocchiaro does not know what hit him or what he hit. His last memory of the accident was going through a traffic light approaching School House Lane when his van's air bag deployed. Some time after the accident he went to the junk

[2] IAB Decision at 5. The blood sample was taken at 9:20 p.m.

yard and recovered personal belongings from his van, and saw that the van was damaged on the left side. There were pieces of a fiberglass boat inside the van. Finocchiaro believes that the fiberglass pieces came from a boat being towed by the other vehicle involved in the collision.

4. Finocchiaro received a citation for driving on the wrong side of the road, but the charge was subsequently dropped. The other driver was not charged.

5. Finocchiaro was not charged with driving under the influence ("DUI"). Finocchiaro states that he did not consume any alcoholic beverages at work and did not bring any from home. The Domino's store in which he was working was quite small - Finocchiaro would have been visible to his supervisors during the time he worked there. He made deliveries and performed tasks that required manual dexterity, such as folding pizza boxes. Earlier in the day, he cut grass and claimed to have had two beers around noon.[3] According to Finocchiaro, he hurt his rib about one and a half weeks prior to July 13, 2003, and was prescribed Tylenol 3 for pain associated with the injury. Finocchiaro maintains that this medication contains opiates.

6. Finocchiaro was previously employed for about 2½ years by the State Department of Transportation, ("DelDot"), as an equipment operator. On May 13,

[3] After Dr. Hameli testified that Finocchiaro likely consumed 7-8 beers, Finocchiaro admitted to drinking three beers. IAB Decision at 11.

2003, Finocchiaro tested positive for marijuana. On June 17, 2003, he met with a counselor who recommended substance abuse treatment. He contacted the Employee Assistance Program ("EAP") and was evaluated at Open Door.[4] After the evaluation, Open Door recommended treatment. EAP later notified DelDot that Finocchiaro had declined treatment. Based on EAP's notification, DelDot terminated Finocchiaro's employment. Although Finocchiaro claimed there was a mis-communication, he was terminated for not completing the required treatment classes within the specified time frame.[5] Finocchiaro did not file a grievance.

7. On July 12, 2005, Finocchiaro filed a Petition to Determine Compensation Due against D.P. Inc., T/A Domino's Pizza ("Domino's"), seeking recognition that the injuries he received in the July 13, 2006 accident were work-related. Domino's responded that Finocchiaro had forfeited his rights to workers compensation benefits under 19 *Del.C.* § 2353(b)[6] because he was intoxicated while working.

8. The Board convened a hearing on March 29, 2006. Dr. Ali Z. Hameli, M.D., a board certified forensic pathologist and former State Chief Medical

[4] The record does not disclose the nature of "Open Door's" mission but Finocchiaro received an evaluation there and was waiting to hear back from them. Transcript of IAB hearing at 29.

[5] Transcript of IAB hearing at 29-30.

[6] 19 *Del. C.* § 2353(b) (2006).

Examiner, testified on behalf of Domino's. Dr. Hameli stated that he reviewed a letter from Domino's's counsel, a traffic report, and the medical records from CCH.[7] Dr. Hameli testified that he specifically relied upon the CCH laboratory report concerning the level of ethyl alcohol in the blood sample taken from Finnochiaro.[8] Using a conversion factor, he found that Finocchiaro's blood alcohol concentration ("BAC") was at 125 milligrams or .125 gram of whole blood at the time the blood sample was taken.[9] Based on this concentration, he concluded that at the time of the accident, Finocchiaro's BAC would have been, at a minimum, 135 milligrams or .135 gram percent. Dr. Hameli opined that Finocchiaro had consumed approximate seven or eight beers by about noon. Dr. Hameli concluded that Finocchiaro was under the influence of alcohol and that his faculties were severely impaired at the time of the accident. Further, Dr. Hameli testified that a mixture of opiates and alcohol would amplify the effects of alcohol. Dr. Hameli

[7] Dr. Hameli testified that he relied upon the police report solely to determine the time of the accident. Brief for Finocciaro at 3. The police report was not admitted into the record.

[8] Dr. Hameli explained that he did not use the results from the urine screening because a second procedure was not completed to confirm the data. IAB Decision at 4.

[9] Dr. Hameli relied on tests of ethyl alcohol from a serum of blood that showed .156 gram percent. Dr. Hameli used a conversion factor because Delaware law requires a calculation based on whole blood. The concentration of alcohol in whole blood is less than that found in serum. Using a conservative approach, he reduced the serum by 20%, the maximum level for reduction, to arrive at .125 gram of whole blood as Finocchiaro's BAC. IAB Decision, at 4-5. *See also* Transcript of IAB Hearing at 38-39.

could not conclusively say that intoxication caused the accident.[10]

9. On April 12, 2005, the Board denied the Petition because it found that the employer had met its burden under 19 Del.C. § 2353(b). This statute provides:

> If any employee be injured as a result of the employee's own intoxication, because of the employee's deliberate and reckless indifference to danger . . . the employee shall not be entitled to recover damages in an action at law or to compensation or medical, dental, optometric, chiropractic or hospital service under the compensatory provisions of this chapter. The burden of proof under this subsection shall be on the employer.[11]

10. The Board relied primarily on Dr. Hameli's testimony that Finocchiaro would have been intoxicated and severely impaired at the time of the accident. The Board pointed out that Delaware law prohibits a person whose alcohol concentration is .08 or more from driving.[12] The Board accepted the results from CCH because "in any proceeding in which an issue is whether a person is driving under the influence, evidence establishing the presence and concentration of alcohol or drugs in the person's blood, breath or urine shall be relevant and admissible."[13] Further, "in any proceeding, the resulting drug or alcohol

[10] Dr. Hameli admitted that not everyone operating a vehicle with a .135 whole blood alcohol level will get into a car accident. Brief for Appellant at 4.

[11] § 2353(b).

[12] 21 *Del. C.* § 4177(a)(4) (2006).

[13] IAB Decision at 8.

concentration reported in a test . . . shall be deemed to be the actual alcohol or drug concentration, without any regard to margin of error."[14] Thus, the Board concluded that Finocchiaro was intoxicated at the time of the accident because his BAC was over .08.

11. Counsel for Finocchiaro argued that the data from CCH was not admissible because the employer did not prove the sample was maintained through a reliable chain of custody as required by statute.[15] The Board found that chain of control need not be proven in this instance because chain of custody becomes relevant only when a matter is *prosecuted* under chapter 41, title 21 of the Delaware code.[16] In addition, the Board found that the medical records were admissible as business records and that the doctor was permitted to use these records as a basis upon which to form an opinion. Dr. Hameli was familiar with the hospital for 40 years. Accordingly, the Board accepted his testimony that the pathologist, not a forensic psychologist, signs the testing documents after the samples are taken and tested by a technician. The Board found that, in these

[14] *Id.* (citing 21 *Del. C.* § 4177(g)).

[15] *See* 10 *Del. C.* § 4331(3) (stating that "a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated..." is *prima facie* evidence of proper chain of custody).

[16] *See* 21 *Del. C.* § 4177(h) (stating that "For purposes of introducing evidence of a person's alcohol concentration *pursuant to this section* . . . .") (emphasis supplied).

circumstances, the chain of custody with respect to blood screening was not relevant.[17]

12. The Board also cited "public policy" reasons to support its finding that Finocchiaro was intoxicated.[18] Dr. Hameli testified that someone having a .135 gram of alcohol in the blood is ten to twelve times more likely to have an accident than someone who is sober.[19] The Board found that it is sound public policy to consider that a person is intoxicated when his/her BAC is above the .08 statutory limit because of the statistical evidence relating to an increased incident of accidents under such conditions.

13. The Board also did not find Finocchiaro to be a credible witness because his testimony was inconsistent and demonstrated a lack of candor. Specifically, Finocchiaro changed his testimony several times and did not volunteer that he was taking medication, including opiates, at the time of the accident. Further, the Board considered testimony regarding DelDot's termination of Finocchiaro.

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[17] The laboratory report is not signed by a forensic toxicologist at CCH, because there is no forensic toxicologist at CCH. IAB Decision, at 6. Dr. Hameli testified that CHH does not have a forensic pathologist. Transcript of IAB Hearing at 57.

[18] Intoxication is not defined in 19 *Del. C.* § 2301. *See Stewart v. Oliver B. Cannon & Son, Inc.*, 551 A.2d 818, 820-21 (Del. Super. Ct. 1988) ("While the Board may consider the provision of Tit. 21 § 4177 as a legislative expression of public policy regarding being under the influence of intoxicating liquor, such provisions are not controlling in a workmen's compensation case.").

[19] Dr. Hameli cited studies conducted by the American Medical Association and the National Safety Council indicating that someone having .135 milligrams percent alcohol is more likely to be in an automobile accident. IAB Decision at 6. *See also* Transcript of IAB Hearing at 43-44.

Although Finocchiaro testified that he stopped using marijuana and that he did not refuse treatment, the Board still found Finocchiaro's testimony suspect in light of the fact that he did not file a grievance after his termination. The Board concluded that Finocchiaro's testimony was "incredulous."[20]

14. Finally, the Board noted that 19 *Del. C.* § 2353(b) provided an alternate reason to deny benefits. Benefits may be denied to one whose behavior demonstrates a "deliberate and reckless indifference to danger."[21] The Board accepted Dr. Hameli's testimony that the combination of beer and drugs in the Finocchiaro's blood would have rendered Finocchiaro even more impaired. Thus, Finocchiaro's use of Tylenol 3 and alcohol constituted a "deliberate and reckless indifference to danger" because he knew he would be driving.

15. Finocchiaro appeals the Board's findings on two grounds: (1) that the employer did not establish the chain of custody for the CCH laboratory report, thereby rendering Dr. Hameli's testimony based on that report inadmissible; and (2) that the finding of the Board is not supported by substantial evidence.[22]

[20] IAB Decision at 11.

[21] § 2353(b).

[22] Brief for Appellant at 5-6.

16. This Court has jurisdiction to hear and determine appeals from the Board.[23] The scope of review is narrow. "[I]t is well established that the appellate court does not sit as trier of fact, rehear the case, or substitute its own judgment for that of the Board."[24] Questions of law, however, are subject to *de novo* review. In that instance, the appellate court must determine whether the Board erred in formulating or applying legal precepts.[25] Therefore, the "only role of the appellate court is to determine whether the decision of the Board is supported by substantial evidence and free of legal error."[26] In its review, "the Court will consider the record in the light most favorable to the prevailing party below."[27]

17. Finocchiaro first argues that the Board erred when it permitted Dr. Hameli to rely on the CCH laboratory report in his testimony. According to Finnochiaro, Domino's failed to establish a chain of custody and the validity of the blood alcohol reading taken at CCH, rendering Dr. Hameli's testimony

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[23] 19 *Del. C.* § 2350.

[24] *Standard Dist., Inc. v. Hall*, 897 A.2d 155, 157 (Del. 2006) (citing *Johnson v. Chrysler*, 213 A.2d 64, 66-67 (Del. 1965)).

[25] *See Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998); *Hudson State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1170 (Del. 1990).

[26] *Standard Dist., Inc.*, 897 A.2d at 157.

[27] *General Motors Co. v. Guy*, 1991 WL 190491, C.A. No. 90A-JL-5, at *3 (Del. Super. Ct. Aug. 16, 1991).

inadmissible.[28]

18. Finocchiaro relies on Delaware Uniform Rules of Evidence 702,[29] 703,[30] and 705[31] to support his argument that the failure of the CCH report to either identify the toxicologists or technicians who performed the blood study, or indicate whether the analysis was performed in accordance with the procedures approved by the Forensics Laboratory Offices of the Chief Medical Examiner or the Delaware State Police Crime Laboratory renders the report inadmissible and any reference to it improper.[32] Moreover, according to Finocchiaro, the record is devoid of any evidence that shows that the blood sample was properly delivered to the laboratory for testing.

19. Finocchiaro also relies on 10 *Del. C.* Section 4331(3) and 21 *Del. C.* Section 4177. Section 4331(3)[33] requires each person in the chain of custody to sign a statement containing a description of the material tested. Finocchiaro points

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[28] Brief for Appellant at 5-6. Counsel for Finocchiaro objected to the police report, and the Board did not admit it into the record. Counsel also objected to Dr. Hameli's testimony because the CCH report was not verified, but the Board admitted Dr. Hameli's references to the report during his testimony. Brief for Appellant at 5.

[29] *See* D.R.E. Rule 702 (setting out the requirements for testimony by expert witnesses).

[30] *See* D.R.E. Rule 703 (discussing bases of expert opinions).

[31] *See* D.R.E. 705 (stating the requirements for disclosure of facts or data underlying expert opinions).

[32] Brief for Appellant, at 5-6.

[33] 10 *Del. C.* § 4331(3).

out there were no such statements offered in this case. Section 4177(h)(1)[34] requires the forensic toxicologist, forensic chemist or state police forensic analytic chemist who performed the test to sign the report. In this case, there was no such signature on the report.

20. Domino's argues that Finocchiaro did not cite any case law concerning the chain of custody issue as applied to a proceeding before an administrative board. Domino's points to IAB Rule 14(B), which provides:

> The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed insofar as practicable; however, that evidence will be considered by the Board which, in its opinion, possesses any probative value commonly accepted by reasonably prudent men in the conduct of their affairs. The Board may, in its discretion, disregard any of the customary rules of evidence and legal procedures so long as such disregard does not amount to an abuse of its discretion.[35]

The Board may admit any evidence that it believes has probative value.[36] An "abuse of discretion" only occurs when the Board exceeds "the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."[37] Domino's relies on *Thomas v. Christiana Excavating*

[34] 21 *Del. C.* § 4177(h)(1).

[35] IAB Rule 14(B).

[36] *Id.*

[37] *McDowell v. State*, 1991 WL 35679, No. 88A-JN-3, at *2 (Del. Super. Ct. March 14, 1991) (citing *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954)).

Co.,[38] where this court found that it was not error to admit V.A. Hospital Records at the hearing despite the lack of testimony from the hospital's records custodian as to the records' accuracy.

21. The Court finds that the Board did not err when it admitted the CCH laboratory report. Under IAB Rule 14, the Board was not bound to follow the formal rules of evidence or "legal procedures" and it was reasonable to allow the report into evidence. The laboratory report was relevant and the Board could reasonably find that the report was reliable because, according to Dr. Hameli, it was compiled by medical personnel in the usual manner at CCH. The Board gave due consideration to Finocchiaro's objection to the report and ultimately concluded that the report was probative and reliable. Therefore, under IAB Rule 14(B), the Board properly exercised its discretion when it received the report in evidence.

22. Similarly, the Board was within its authority to allow Dr. Hameli to rely upon the report in his testimony. IAB Rule 14(B) gives the Board discretion to allow his testimony and decide what weight to give that testimony. Dr. Hameli is a forensic medical expert and the laboratory report is the sort of data "reasonably relied upon by experts in [his] field."[39] Dr. Hameli gave his conclusion and

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[38] *Thomas v. Christiana Excavating Co.*, 1994 WL 750325, Civ.A. No. 94A-03-009, at *5 (Del. Super. Ct. Nov. 15, 1994) (Mem.Op.).

[39] D.R.E. 703.

explained the basis of his findings. He was subjected to cross examination. Thus, the Board's decision to allow Dr. Hameli's testimony was a sound exercise of discretion and free from legal error.

23. Finocchiaro's second argument is that the Board's decision is not supported by substantial evidence because Domino's failed to show that he was intoxicated or, alternatively, that intoxication caused the accident. Substantial evidence means "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion."[40] Substantial evidence is more than a mere "scintilla" yet less than a preponderance.[41] For example, in an administrative hearing, the IAB "may not base an award [or denial of an award] solely upon incompetent evidence," although "the admission of incompetent evidence will not invalidate an award of compensation if there is other competent evidence to support it."[42]

[40] *Standard Dist., Inc. v. Hall*, 897 A.2d 155, 158 (Del. 2006) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

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

[42] *Schock Bros., Inc. v. Stacey*, 1991 WL 113329, Civ. A. No. 90A-JA-4, at *2 (Del. Super. Ct. June 18, 1991) (citing *General Chemical Division, ETC v. Fasano*, 94 A.2d 600 (Del. Super. Ct. 1953)).

24. Finocchiaro argues that Domino's must establish "but for" causation.[43] He relies upon *Stewart v. Oliver B. Cannon & Sons, Inc.*,[44] where this court stated that to prevail on a 19 *Del. C.* § 2353(b) defense, "the employer must clearly establish that actual intoxication caused the accident."[45] Intoxication must be the "actual, proximate cause of the accident" not a "passive" cause that merely aggravated the injury.[46]

25. Finocchiaro first argues that Domino's did not meet its burden because there is no evidence that Finocchiaro was intoxicated other than the CCH laboratory report. Finocchiaro worked for hours in a small space performing tasks that required manual dexterity and no co-worker testified that he appeared

[43] Claimant-Below, Appellant's Reply Brief on Appeal at 1.

[44] *Stewart v. Oliver B. Cannon & Son, Inc.*, 551 A.2d 818 (Del. Super. Ct. 1988) (finding that provisions of a drunk driving statute adopting a .10% BAC as a conclusive presumption of intoxication were not controlling in a Section 2353(b) case involving a painter who fell off of scaffolding).

[45] *Id.* at 821. "The employer meets its burden when the Board is satisfied by the preponderance of the evidence that [the employee's] accident was a result of his intoxication even when other factors may have contributed to the accident." *General Motors Corp. v. Edwards*, 1998 WL 283392, No. 97A-01-005-NAB (Del. Super. Ct. Jan. 07, 1998) (citing *Murphy v. UE&C Catalytic, Inc.*, 1995 WL 465194, Civ.A. No. 95A-01-006 (Del. Super. Ct. July 11, 1995)) (Mem. Op. at 3) (instructing IAB to apply the proximate cause standard to determine cause of employee's accident in a case where employee fell to his death from a screen guard while dodging a swinging sledgehammer). *General Motors* was issued after the case had been remanded to the Board to determine if intoxication was the proximate cause of the accident. After a second remand, the Board found that the employer had not met its burden to show that intoxication was the proximate cause of the accident. The third Board decision was affirmed. *See General Motors Corp. v. Edwards*, 2000 WL 710181, No. 99A-10-10-010-NAB (Del. Super. Ct. April 27, 2000), *aff'd,* 765 A.2d 951 (Del. 2000).

[46] *Wills v. Penn Dell Salvage, Inc.*, 274 A.2d 144 (Del. Super. Ct. 1971), *aff'd*, 282 A.2d 612 (Del. 1971) (holding § 2353(b) did not apply when employee was killed at his job site when he attempted to remove scrap wire under a car while intoxicated, because "in order for section 2353(b) to apply, the employee's intoxication must be an active proximate cause of the injury, not a passive condition which aggravates an injury otherwise created").

intoxicated. Furthermore, Finocchiaro was not charged with DUI and there was no evidence of Finocchiaro's level of impairment other than Dr. Hameli's testimony. Moreover, Dr. Hameli could not conclude that Finocchiaro's alleged intoxication led to the accident.[47] Second, Finocchiaro argues that Domino's did not meet its burden because, after all the evidence was in, the Board was still left to speculate about what really caused the accident.[48]

26. Domino's responds that Section 2353(b) applies because: (1) Finocchiaro was clearly intoxicated, with a BAC 59% over the legal limit; [49] (2) Dr. Hameli's testimony established that Finocchiaro drank more than he admitted; (3) there is no other plausible cause of Finocchiaro's accident because the road was a straight two-lane road; (4) Finocchiaro was familiar with the road; and (5) there was no evidence of distractions within the car itself.[50] In sum, according to Domino's, the substantial evidence supports the Board's conclusion that Finocchiaro endangered himself and others on the road by willfully, intentionally, and deliberately driving while intoxicated and that his intoxication was a proximate cause of the accident.

[47] Brief for Appellant at 4.

[48] Claimant-Below, Appellant's Reply Brief on Appeal at 1.

[49] Brief for Appellee at 7-8.

[50] *Id.* at 9.

27. After reviewing the record, the Court finds that there is substantial evidence to support the Board's decision that Domino's met its burden to show by a preponderance of the evidence that intoxication was the proximate cause of the accident.

28. In a Section 2353(b) case, the Board must apply Delaware's settled proximate cause standard to determine the cause of the employee's accident.[51] In practical terms, the employer must show by a preponderance of the evidence that: (1) the employee was intoxicated; and (2) the employee's intoxication was a "but for" cause of the accident which led to the injury.

29. In Delaware, proximate cause is "that direct cause without which the accident would not have happened."[52] In other words, a proximate cause is one "which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have

[51] *Duphily v. Delaware Elec. Co-op., Inc.,* 662 A.2d 821, 828 (Del. 1995) ("Delaware recognizes the traditional 'but for' definition of proximate causation."). *See also Edwards*, 1998 WL 283392, at *3 (reporting that "it seems equally compelling to apply the 'but for' definition of proximate cause to all preluding events which contributed to the accident when a § 2353(b) defense is raised in a workers compensation case.").

[52] *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991) (citing *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965)). The Delaware Supreme Court has said that the law of torts "finds equal application in fixing the relationship between an acknowledged industrial accident and its aftermath." *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. 1992) (rejecting use of the substantial contributing factor causation in determining if psychiatric expenses stemming from an industrial accident were compensable).

occurred."[53] Either direct or circumstantial evidence, or both, may be used by a fact-finder to determine the causal sequence of events.[54] To prove proximate causation by circumstantial evidence, "it is necessary that the conclusion of proximate causation be the only reasonable inference possible from the proven circumstances."[55]

30. The Board considered Finocchiaro's argument that there was no proof that intoxication caused the accident and found that Finocchiaro's reliance upon *Stewart* was misplaced because Stewart did not concern drunk driving. Therefore, unlike *Stewart*, the Board in this case considered Finocchiaro's BAC to determine

[53] *Culver*, 588 A.2d at 1097. The Board may not presume that intoxication was the "but for" cause of an accident if another abnormal hazard existed at the same time as the accident. "When the facts have presented, in addition to intoxication, a special source of hazard bearing upon the accident, courts have frequently, but by no means always; held that intoxication was not the proximate cause." 2 Arthur Larson, *Larson's Worker's Compensation Law* §36.03 (2006). However, "[t]he basic rule remains that if there is no substantial evidence that the accident was caused by any other factor, compensation will be denied." *Id. See also Harvey v. Allied Chemical Corp.*, 51 A.D.2d 1066 (N.Y. App. Div. 1976) (finding that if there is medical proof of intoxication and if, in a perfectly safe place, the employee falls and injures himself, it is clear that the injury results solely from intoxication.)

[54] *See Dixon v. Reid*, 1991 WL 138375, Civ. A. No. 86C-NO-14, at *3 (Del. Super. Ct. July 03, 1991) (finding in a negligence action resulting from car accident that "[a]s a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires the [factfinder] find the facts in accordance with the preponderance of the evidence in the case, whether direct or circumstantial or both."). "Circumstantial evidence, expert testimony or common knowledge may provide a basis from which the causal sequence may be inferred in a particular case." Prosser and Keaton, *The Law of Torts*, § 41 at 270 (5th Ed. 1984).

[55] *Suburban Propane Gas Corp. v. Papen*, 245 A.2d 795, 798 (Del. 1968) (discussing a plaintiff's burden in order to prove proximate causation by circumstantial evidence in a negligence action).

whether actual intoxication caused the accident.[56]

31. The Board effectively found "but for" causation. Based on competent expert testimony, the Board found that Finocchiaro would have been intoxicated and severely impaired "in judgment, observation, attention, concentration, motor coordination, reaction and response time, visual acuity and depth perception."[57] There was no other cause for the accident apparent in the evidence. Further, Finocchiaro's testimony lacked credibility. For these reasons, the Board found that Finocchiaro's intoxication caused the accident.[58]

32. Even if Finocchiaro could show that the Board did not find "but for" causation, the outcome would be the same because there is substantial evidence

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[56] *Stewart* found that BAC was not a controlling factor in a workmen's compensation case which did not involve drunk driving. *Stewart*, 551 A.2d at 820-22 (finding that employer had not met its burden to show that employee was intoxicated because eyewitnesses did not see employee drink on the job and he did not appear intoxicated prior to the accident).

[57] IAB Decision, at 7-9.

[58] The Board also cited the public policy reasons behind Delaware's drunk driving statute as a basis for finding that Finocchiaro's intoxication caused the accident. IAB Decision at 10. However, the public policy supporting drunk driving statutes is irrelevant to finding causation in workman's compensation cases. The public policy behind the workers' compensation statute is to provide prompt payment of benefits without regard to fault, and to relieve employers and employees of the burden of civil litigation. *Champlain Cable Corp. v. Employers Mut. Liab. Ins. Co.*, 479 A.2d 835, 840 (Del. 1984). The "ultimate 'social philosophy' behind nonfault compensation liability is the desirability of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits which an enlightened community would feel obligated to provide in any case . . . ." 1 Arthur Larson, *Larson's Worker's Compensation Law* § 1.03[2] (2006). However, the Delaware legislature has chosen not to extend that benefit to individuals whose behavior fits Section 2353(b). Section 2353(b) "is a statement of public policy, clear and unequivocal on its face, creating a complete defense in cases involving intoxicated employees." *See Hopper v. F.W. Corridori Roofing Co.*, 305 A.2d 309, 311 (Del. 1973) ("There is no provision for application of the doctrine of estoppel or for any other exception to the statutory mandate."). The nature of the employee's conduct is not dispositive; Section 2353(b) applies whether the employee was driving a car or folding pizza boxes.

that Finocchiaro's intoxication was the "but for" cause of the accident.[59] There is medical evidence that both alcohol and opiates were in Finocchiaro's system the night of the accident. Dr. Hameli's testimony established that Finocchiaro would have been impaired at the time of the accident. The Board properly exercised its sole authority to determine that Finocchiaro's testimony lacked credibility. There is no evidence in the record that there was any other intervening cause or abnormal risk factor that might have caused the accident. Therefore, it is reasonable to conclude that Finocchiaro's intoxication probably caused the accident. Looking at the record as a whole, substantial evidence supports that Finocchiaro was intoxicated and that intoxication was the proximate cause of the accident.

33. There was also substantial evidence to support the Board's finding that Finocchiaro acted deliberately and recklessly.[60] Finocchiaro admitted that he was taking Tylenol 3 with opiates, and that he had been drinking immediately prior to reporting to work as a delivery driver. Dr. Hameli testified that opiates would amplify the impairing effects of alcohol, increasing the risk that someone ingesting both of those substances would have a greater chance of getting into a car accident. Accordingly, the Board had substantial evidence to support its finding that

[59] IAB Decision at 9-11.

[60] *Id.* at 11-12.

Domino's met its burden to show that Finocchiaro acted deliberately and recklessly by driving when he was under the influence of alcohol and drugs. The Board did not abuse its discretion, and the Court will not disturb its findings.

37. Based on the foregoing, the decision of the Board denying benefits to Finocchiaro is **AFFIRMED.**

IT IS SO ORDERED.

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Judge Joseph R. Slights, III

Original to Prothonotary

cc: Kenneth F. Carmine, Esquire
Eric D. Boyle, Esquire