IN THE SUPREME COURT OF THE STATE OF DELAWARE

JONATHAN LEWICKI,	)	
	)	No. 171, 2006
Employee/Below	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
NEW CASTLE COUNTY,	)	C.A. No. 05A-06-010
	)	
Employer/Below	)	
Appellee.	)	

Submitted: October 25, 2006
Decided: November 15, 2006

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 15th day of November 2006, it appears to the Court that:

(1) The claimant-appellant, Jonathan Lewicki, filed an appeal from a Superior Court order affirming the Industrial Accident Board's denial of his petition for medical expenses resulting from a choking incident that occurred during his employment as a New Castle County Police Officer. Lewicki contends that the IAB erred by denying his petition and concluding that his injury did not "arise out of" and "within the course and scope of" his employment.[1] Because

[1] 19 *Del. C.* § 2304, in pertinent part:

> Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the

there is substantial evidence in the record to support the Board's findings that Lewicki's choking incident did not occur as a result of any specific job requirements and that a congenital medical condition caused his injuries, we AFFIRM.

(2) Lewicki, a New Castle County Police Officer, suffered injuries resulting from a choking incident that occurred during his shift on December 31, 2002. Lewicki was scheduled to work as a road officer, answering radio and criminal complaints, from 8:00 p.m. to 4:00 a.m. Lewicki was permitted to stop and eat lunch during his shift because he did not have a specific break time allotted for lunch. Shortly before 3:00 a.m. on December 31, 2002, Lewicki purchased a hamburger, fries, and a soda from a nearby fast food restaurant and drove to Delcastle Recreational Park to eat and work on his computer. Lewicki took a bite of the hamburger and a piece of meat became lodged in his throat.

(3) Lewicki radioed for help and another officer arrived and dislodged some of the meat by performing the Heimlich maneuver. An ambulance transported Lewicki to the Christiana Hospital, where Dr. Bruce Panasuk determined that Lewicki had an esophageal obstruction. Dr. Panasuk performed an emergency surgery to remove the remaining food bolus and attempted to enlarge Lewicki's esophagus, but could not completely enlarge it because of swelling and

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course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

irritation. On January 15, 2003, Dr. Panasuk determined that Lewicki had a tight cervical esophageal web. On February 4, 2003, Dr. Panasuk performed a second surgery to fully stretch out Lewicki's esophagus.

(4) At Lewicki's IAB hearing, Dr. Panasuk, Lewicki's own treating physician, opined that Lewicki's esophageal condition was congenital and that Lewicki's position and duties as a police officer did not cause the food impaction, nor did it substantially contribute to his injury. Dr. Panasuk opined that eating the hamburger was a substantial cause of the injury that required the emergency treatment and surgeries. He explained that eating the hamburger was a triggering event that accelerated an asymptomatic condition. Essentially, Dr. Panasuk opined that the incident could have happened anywhere, anytime.

(5) Dr. Joel Chodos, a gastroenterologist who examined Lewicki on two separate occasions, testified on behalf of NCC. Dr. Chodos testified that Lewicki's esphogeal web caused the food impaction. Based on his review of the x-rays and history from Lewicki, Dr. Chodos stated that he "cannot see how [Lewicki's] duties as a police officer contributed to a congenital condition." He also opined that Lewicki would have suffered from a food impaction regardless of work conditions.

(6) Before the incident, Lewicki was not aware of any condition in his esophagus. Lewicki was never treated for a narrow esophagus and never had

trouble swallowing food, though he had trouble swallowing large pills. Lewicki also took and passed a physical examination during each of his seven years of employment with New Castle County Police Department.

(7) The IAB denied Lewicki's petition for compensation, finding that he had failed to prove that the incident "arose out of" his employment because his job requirements were not a "but for" cause of the food impaction. The Board examined the origin of the accident and its cause. The Board reasoned that the esophageal defect was congenital and nothing in Lewicki's duties contributed to or caused the hamburger to lodge in his throat.

(8) On appeal, the Superior Court affirmed the IAB's decision reasoning that Lewicki choked because of a preexisting congenital condition. Although Lewicki's injury occurred "during the course of" his employment, it did not "arise out of" his employment, because it could have occurred anywhere, on or off duty.

(9) Lewicki claims that the IAB erred by concluding that Lewicki's injury did not "arise out of" and "in the course of" his employment as a police officer. Lewicki relies on a Superior Court decision, *Bedwell v. Brandywine Carpet Cleaners*,[2] to support his contention that all injuries sustained while eating lunch

[2] *Bedwell v. Brandywine Carpet Cleaners*, 684 A.2d 302 (Del. Super. 1996) (where a carpet cleaner was compensated for injuries sustained after a slip and fall in the parking lot of a fast food restaurant where claimant (Bedwell) had stopped to eat lunch while traveling from one work site to another).

during work hours are compensable because they arose during an eating period arising out of one's employment.

(10) "In an appeal from the IAB, the function of both this Court and the Superior Court 'is to determine only whether or not there was substantial evidence to support findings of the Board.'"[3] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion;[4] therefore, this Court must affirm the findings of the Board if we find such evidence in the record.

(11) For an employer to be liable for workers' compensation under 19 *Del. C.* § 2304, a claimant must establish that he suffered a "personal injury or death by accident sustained by accident a rising out of and in the course of employment."[5] For workers' compensation to be available, the claimant must establish both requirements of "arising out of" and "in the course of employment."[6] The Board

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3 *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005).

4 *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1983); *see also Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

5 19 *Del. C.* § 2304; *see also* 19 *Del. C.* § 2301(15) (defining "injury" and "personal injury").

6 *Stevens v. State*, 802 A.2d 939, 945 (Del. Super. 2002).

must analyze both "the origin of the accident and its cause" when deciding whether an incident arose out of employment.[7]

(12) In the present case, Lewicki's choking incident did not occur as a result of any specific job requirements; his congenital medical condition caused his injuries. The Superior Court judge compared Lewicki's situation to awarding benefits to a person who suffered a heart attack because of a congenital heart condition, but without any contributing or triggering event. Because of Lewicki's congenital condition, he could have choked at any time while eating at any place. Lewicki was not performing any specific job requirements at the time of the choking incident that caused him to eat other than normally. Although Lewicki was eating while sitting in his car, consistent with the nature of shift work and while completing paperwork, it was mere coincidence that Lewicki choked while on duty. After consideration of the record, we hold that there is substantial evidence to support the Board's findings. Although the incident occurred "during the course of" Lewicki's employment, it did not "arise out of" his employment. Accordingly, we AFFIRM.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

[7] *Id.*