1992 WL 179374
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Superior Court of Delaware, Kent County.

John BRITTINGHAM,
Employee-Below, Appellant,
v.
Draper King COLE,
Employer-Below, Appellee.

No. 91A-11-002.
|
Submitted: March 2, 1992.
|
Decided: June 15, 1992.

Appeal from a Decision of the Industrial Accident Board, Affirmed.

Attorneys and Law Firms

John J. Schmittinger, and Keith E. Donovan, Schmittinger & Rodriguez, P.A., Dover, for employee-below, appellant.

Colin M. Shalk, Casarino, Christman & Shalk, Wilmington, for employer-below, appellee.

ORDER

RIDGELY, President Judge.

***1** This 15th day of June, 1992, upon consideration of the briefs of counsel and the record in this case, it appears that:

(1) Claimant John Edgar Brittingham appeals a decision by the Industrial Accident Board ("Board") denying his petition to determine additional compensation due. Claimant sought compensation for temporary total disability for the period from May 1, 1990 to August 1, 1990 for medical treatment (neck surgery) and the associated period of disability following his involvement in an automobile accident on June 17, 1988. Within the year prior to that auto accident, claimant had sustained two compensable work-related injuries not directly at issue in this case. Mr. Brittingham claims the auto accident "re-injured his neck" and thus aggravated his underlying compensable condition.

(2) Claimant's car accident occurred during a period of his total disability as he returned from picking up his paycheck from the premises of his employer, Draper King Cole ("Draper"). Draper would not mail claimant his check. Subsequently, while unable to work from August 1988 to February 1989, claimant received total disability benefits. Claimant returned to work in February 1989 and continued light-duty work until May 1990 when Dr. Quinn instructed him to suspend working. Dr. Quinn performed surgery on claimant's neck in June 1990. Claimant resumed work on August 1, 1990.

(3) The Board heard testimony from two medical experts. Dr. Quinn testified he believed the cervical spine problem for which claimant underwent surgery derived 80 percent from the automobile accident and 20 percent from a prior work-related injury. The Board noted in its opinion that, according to Dr. Quinn, "surgery done in May 1990 was primarily due to the automobile accident." Dr. Quinn also diagnosed claimant's condition after the car accident as "exacerbation of anterior bone spur at C3-4, with marked degenerative changes at C4-5 and posterior spurring at C4-5 and C5-6." In contrast to Dr. Quinn, Dr. Varipapa testified he believed the surgery resulted from a combination of all the injuries and everyday wear and tear. The Board was persuaded by Dr. Quinn's testimony to conclude "[i]f the claimant had not been involved in an automobile accident in June 1988, he would not have needed the surgery."

In denying claimant's petition, the Board reasoned and concluded in relevant part as follows:
The Board agrees with Dr. Quinn that the primary event leading to cervical surgery was the automobile accident in 1988.... The Board concludes that the claimant had a pre-existing condition that had been exacerbated by work injuries most recently in April, 1988.... If the claimant had not been involved in an automobile accident in June, 1988, he would not have needed the surgery. The accident aggravated the claimant's degenerative process.... The Board is not persuaded that the course and scope of employment includes the activities as far removed from the job as picking up a workers' compensation check.

***2** (4) This Court may not alter any legally correct Board decision supported by substantial, competent evidence of

record. *Johnson v. Chrysler Corp.,* Del.Supr., 213 A.2d 64 (1965). On an appeal from a Board decision, the Superior Court must refrain from encroaching on the Board's exclusive authority to weigh the evidence, evaluate credibility, and make factual findings and conclusions. *Id.* The Board may freely adopt testimony of either of two experts and reject the other when the evidence presented by each clearly conflicts, yet the Board's reliance on either would satisfy the substantial evidence requirement. *DiSabatino Brothers v. Wortman,* Del.Supr., 453 A.2d 102 (1982).

(5) Delaware has adopted the following rule for determining compensability in cases of alleged multiple industrial injuries: When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

Amoco Chemical Corp. v. Hill, Del.Super., 318 A.2d 614, 618 (1974). The Board, as trier of fact, must determine both what constitutes the "primary injury" and what qualifies as "direct and natural results" of that injury. This Court has stated the rule relating to compensation for recurrence of an injury as follows:

[A] claimant is entitled to compensation if he suffers a recurrence of a compensable injury. [T]he meaning of the term 'recurrence' is limited to the return of an impairment without the intervention of a new or independent accident. The burden of showing a recurrence rests upon the claimant.

Howard v. York Roofing, Inc., Del.Super., C.A. No. 85A-AP-4, Ridgely, J. (Aug. 22, 1988) (citations omitted).

(6) In this case, claimant apparently first assumes the injuries from his work-related accidents prior to the car accident constituted his primary injury in this case. Given such an assumption, the Board had to determine whether the car accident followed as a "natural consequence that flows from the injury" as noted by the above-stated rule. *Amoco Chemical Corp., supra; see also Hudson v. E.I. duPont de Nemours & Co.,* Del.Super., 245 A.2d 805 (1968) ("a subsequent injury is compensable only if it follows as a direct and natural result of the primary compensable injury").

The Board did not find that the claimant's auto accident followed as a "natural consequence" of claimant's former injuries. Claimant does not argue the car collided because of claimant's disabled condition. Rather, claimant contends that the car accident qualifies as a natural consequence of the former injury because claimant's ride to pick up his paycheck naturally flowed from his industrial accident. The Board had the authority to make such a factual determination, and its decision is supported by substantial evidence.

(7) Claimant appears to argue, alternatively, the Board could assume the car accident and resulting neck surgery constituted the primary injury and that claimant's act of driving to and from picking up his workers' compensation check arose out of and in the course of his employment. In his brief, claimant asserts "[t]aking as true the premise that Mr. Brittingham's primary injury arose out of and in the course of employment and the premise that Mr. Brittingham's conduct was not an intervening cause leaves only one unanswered question in the analysis...." Contrary to such an assertion, the Board could not properly arrive at a decision if it assumed Mr. Brittingham's primary injury arose out of and in the course of employment. *See Amoco Chemical Corp., supra* at 618 (claimant must show primary injury arose out of and in course of employment to viably claim natural consequences of that injury also arose out of employment). The issue of whether claimant's injury arose out of and in the course of employment squarely faced the Board, and the Board properly and fairly addressed it. Once the Board properly determines the primary injury did not arise out of and in the course of employment, it need not address whether some conduct attributable to claimant's own fault intervened. *Id.*

***3** The Board properly determined the automobile accident caused claimant's primary injury and that such accident did not "arise out of and in the course of employment." While claimant offers authority to analogize the facts at issue to cases falling under the exception to the "to-and-from work rule," these cases lend little support to claimant's argument. Claimant cites no authority stretching so far as to include within the description "arising out of and in the course of employment" an off-time employee's driving to and from his workplace only to receive his paycheck but not to perform any task inherent to his position as employee. Indeed, even employees on their way to and from work whose activities to and from which they drive clearly do qualify as employment tasks could not generally claim their driving arises out of and in the course of employment. The Superior Court has stated the rule as follows:

[A]n employee using his own automobile to go to and from his place of work is not within the scope of his employment, unless there are factors present indicating that in so doing he is

performing his employer's work and subject to the employer's control.

See Ramunno v. Pusey, Del.Super., C.A. No. 78C-MY-44, Balick, J. (April 6, 1979) (holding employee did not act within scope of employment when driving home from work-related seminar even though during normal work hours); *Kent General Hospital v. Napolitano,* Del.Super., C.A. No. 84A-Se-1, Bush, J. (Jan. 21, 1986) (on-call employee fell under exception to general "to-and-from work" rule because employee received pay for travel time on-call, and such travel clearly fell under employer's control).

There is substantial evidence to support the Board's decision on this issue. Claimant received no supplementary compensation for his traveling time, nor did the employer specifically require that claimant drive as part of his employment duties. Draper's refusal to mail paychecks differs markedly from specifically requiring claimant to drive as part of performing his work duties. *Cf. Delaware State Police v. Hagan,* Del.Super., C.A. No. 83A-MY-9, Taylor, J. (Jan. 23, 1985) (claimant's authorized use of police vehicle and continuous on-call job duties in vehicle justified Board's decision that his driving home from overtime work tasks arose out of and in the course of employment). The Court finds no error in the Board's refusal to find claimant's driving trip as arising out of and in the course of employment.

NOW, THEREFORE, IT IS ORDERED that the decision of the Industrial Accident Board is AFFIRMED.

All Citations

Not Reported in A.2d, 1992 WL 179374

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