IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNITED PARCEL SERVICE,	§	
	§	No. 459, 2013
Employer Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	New Castle County
	§	
RYAN TIBBITS,	§	C.A. No. N12A-03-006
	§	
Claimant Below,	§	
Appellee.	§	

Submitted: March 19, 2014
Decided: June 12, 2014

Before **HOLLAND, BERGER,** and **JACOBS**, Justices.

O R D E R

This 12th day of June 2014, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. United Parcel Service ("UPS"), the employer-below/appellant, appeals from a Superior Court judgment reversing an Industrial Accident Board ("Board") decision and granting the petition of claimant-below/appellee, Ryan Tibbits ("Tibbits") to determine compensation due. UPS claims that the Board decision denying Tibbits' petition is supported by substantial evidence and that, therefore, the Superior Court improperly disregarded the Board's factual findings. Alternatively, UPS argues, the Superior Court erred by not remanding the case to the Board for further proceedings. We affirm the Superior Court judgment insofar

as it determined that the Board decision was not supported by the record. We remand the case to the Board, however, for further proceedings.

2. Tibbits began working for UPS in June 1997. On October 29, 2009, while working as a delivery truck driver, Tibbits was delivering packages on his Middletown route. At about 10:15 a.m., while crossing St. Georges' Bridge, Tibbits experienced "cramping" and "knotting pain" in his lower, left back.[1] Shortly afterwards, Tibbits reported his back trouble to UPS. Tibbits continued to work—with worsening pain—until 4:30 p.m. that day, when another UPS worker relieved him. The next day, Tibbits saw a doctor about his back pain. On November 11, 2009, Tibbits visited a hospital emergency room because of severe pain and spasms in his low back. He returned to the emergency room on November 18, 2009 after experiencing (for the first time) urine incontinence. Sometime thereafter, Tibbits began physical therapy treatment. On December 4, 2009, after his primary care physician's referral, Tibbits consulted with Dr. Kennedy Yalamanchili, a board-certified neurosurgeon.

3. On April 4, 2011, Tibbits filed a petition with the Board to determine compensation due for his October 29, 2009 injury.[2] A hearing was held on November 9, 2011, at which Tibbits testified and submitted the deposition

[1] Before his back pain started, Tibbits had delivered light-weight packages.

[2] It appears that Tibbits had filed (but later withdrew) a petition in December 2009.

testimony of Dr. Yalamanchili. After the hearing, UPS submitted the deposition testimony of Dr. Michael Mattern, a board-certified orthopedic surgeon. The parties also submitted written closing arguments.[3]

4. Dr. Yalamanchili testified, based on his physical examination of Tibbits and a review of Tibbits' medical records, that Tibbits had a herniated lumbar disc, lumbar spondylosis without myelopathy, lumbar disc degeneration, and lumbar radiculopathy. Dr. Yalamanchili opined that Tibbits' symptoms were likely the result of an acute injury (as distinguished from chronic changes), probably caused by Tibbits' work-related lifting and driving activities. Dr. Yalamanchili concededly could not point to a specific episode or distinct trauma that caused Tibbits' injury, but he did agree that Tibbits' acute injury could have been caused by a single incident, or by cumulative stress. Dr. Yalamanchili also testified that, to the extent Tibbits suffered from degenerative changes, Tibbits' work activities would have aggravated those degenerative changes.

5. Dr. Mattern testified, based on his review of Tibbits' medical records, that Tibbits' symptoms were consistent with a muscle strain or sprain, and not a herniated disc. Dr. Mattern further opined that Tibbits' back injury was not necessarily caused by any specific triggering work-related incident, but more likely resulted from underlying degenerative changes. As Dr. Mattern explained, it is not

[3] The record was left open after the Board hearing to allow for those additional submissions.

uncommon for persons with underlying spine defects to experience episodic back pain. In 2008, Tibbits had experienced a similar onset of acute low back pain while brushing his teeth. Dr. Mattern conceded that prolonged, repetitive driving of a delivery truck on uneven pavement could worsen a degenerative disc, but adhered to his opinion that Tibbits' injury was unrelated to his work activities.

6. By decision and order dated February 17, 2012, the Board denied Tibbits' petition. The Board first determined that Tibbits failed to establish a specific work accident or event that triggered his symptoms. Therefore, the Board could not apply a "but for" standard of causation and, as a consequence, was required to determine whether the "ordinary stress and strain" of Tibbits' employment was a "substantial cause" of his condition.[4] The Board concluded that Tibbits (despite Dr. Yalamanchili's testimony) had not carried his burden to prove that his work activities were a "substantial cause" of his back pain.

7. Tibbits appealed to the Superior Court, which reversed. By opinion dated March 28, 2013,[5] the court determined that the Board's determination that

[4] *See Reese v. Home Budget Ctr.*, 619 A.2d 907, 911 (Del. 1992) ("[T]he term 'substantial cause' as applied in *Duvall* is limited to claims arising out of the ordinary stress and strain of employment. It has no application to causation relating to specific and identifiable industrial accidents.").

[5] *Tibbits v. United Parcel Serv.*, 2013 WL 1400864 (Del. Super. Mar. 28, 2013), *rearg. denied*, 2013 WL 4203383 (Del. Super. July 31, 2013).

Tibbits had failed to satisfy his burden of proof was not supported by the record.[6] Rather, the court concluded that any reasonable reading of Dr. Yalamanchili's testimony established that the ordinary stress and strain of Tibbits' employment was a substantial cause of his injury.[7] UPS moved for reargument, claiming that because Tibbits did not timely advance the "usual exertion" theory in the Board proceedings, UPS was deprived of a fair opportunity to defend against that theory. Accordingly (UPS urged), the case should be remanded to the Board for further proceedings. On July 31, 2013, the Superior Court denied that motion,[8] and UPS timely appealed to this Court.

8. This Court reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by examining directly the decision of the agency.[9] We review a Board decision to determine if that decision is supported by substantial evidence and is free from legal error.[10] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a

[6] *Id.* at *5.

[7] *Id.* at *4, 5.

[8] *Tibbits v. United Parcel Serv.*, 2013 WL 4203383 (Del. Super. July 31, 2013).

[9] *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 380 (Del. 1999).

[10] *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, 1062 (Del. 1999).

conclusion."[11] On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[12] We review questions of law *de novo*.[13] Absent an error of law, our review of a Board decision is for abuse of discretion.[14] The Board will be found to have abused its discretion where, in the circumstances, its decision has exceeded the bounds of reason.[15]

9. Under the Delaware Workers' Compensation Act, an injury is compensable only if it "ar[ose] out of the employment and . . . occurred in the course of the employment."[16] The parties agree that Tibbits' injury occurred in the course of his UPS employment. The parties also agree that the "but for" causation standard is inapplicable here. Accordingly, this appeal presents two issues. First, is the Board's causation finding under the "usual exertion" rule—that Tibbits failed to meet his burden of proof through Dr. Yalamanchili's testimony—supported by

[11] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

[12] *Person-Gaines v. Pepco Hldgs., Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Bermudez v. PTFE Compounds, Inc.*, 2007 WL 2405119, at *2 n.9 (Del. Mar. 29, 2007) (citing *Rose v. Cadillac Fairview Shopping Ctr. Props. (Delaware) Inc.*, 668 A.2d 782, 786 (Del. Super. 1995)).

substantial evidence and free from legal error?[17] Because we conclude that it is not, the second issue becomes whether a remand for further Board proceedings is required.

10. Tibbits' injury is compensable if he can demonstrate that the ordinary stress and strain of his employment was "a material element and a substantial factor in bringing it about."[18] The Superior Court held, and we agree, that the Board's determination—that Dr. Yalamanchili's testimony failed to establish that Tibbits' work activities were a substantial cause of his back injury—lacks support in the record. The Board incorrectly applied the causation standard by "premis[ing] [its decision] on the fact that [Dr. Yalamanchili] did not use the precise words 'substantial factor' in giving his opinion."[19] In so doing, the Board ignored the substance of Dr. Yalamanchili's testimony, which was that Tibbits' work-related lifting and driving activities were *the* cause of Tibbits' back pain on

[17] UPS raises this issue as two separate claims of error in its Opening Brief on appeal. First, UPS claims that the Board's "no causation" finding is supported by substantial evidence and is free from legal error. Second, UPS argues that the Superior Court, in reversing the Board decision, impermissibly weighed the evidence and made factual findings. We address these two claims as one.

[18] *State v. Steen*, 719 A.2d 930, 935 (Del. 1998) (quoting *Culver v. Bennett*, 588 A.2d 1094, 1097 (Del. 1991)); *see Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1136 (Del. 1989) (explaining that under the "usual exertion" rule, "an injury is compensable if the ordinary stress and strain of employment is a substantial cause of the injury" irrespective of a previous condition); *San Juan v. Mountaire Farms*, 2007 WL 2759490, at *3 (Del. Super. Sept. 18, 2007) ("Where there is no specific accident causing an injury, compensation is determined by the 'usual exertion rule.'").

[19] *Tibbits v. United Parcel Serv.*, 2013 WL 1400864, at *4 (Del. Super. Mar. 28, 2013), *rearg. denied*, 2013 WL 4203383 (Del. Super. July 31, 2013).

October 29, 2009.[20] Having inappropriately disregarded Dr. Yalamanchili's testimony, the Board erroneously determined that Tibbits did not carry his burden of proof.[21] Accordingly, we conclude that the Board's "no causation" decision is neither supported by substantial evidence nor free from legal error.

11. Our disposition of the Board's "no causation" finding, however, requires us to remand the case to the Board for further proceedings. UPS claims that Tibbits did not raise the "usual exertion" theory of recovery and that the Board, *sua sponte*, applied that theory to evaluate Tibbits' claim. As a result, UPS was not afforded a fair opportunity to defend against the "usual exertion" theory. UPS urges that fairness considerations require a remand for further proceedings so that UPS may present a responsive defense to that theory. We agree.

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[20] *See* Deposition of Kennedy Yalamanchili, M.D. at 24, Tibbets v. United Parcel Serv., No. 1346171 (Del. I.A.B. Nov. 7, 2011) (A87) (entered into evidence Nov. 9, 2011) ("Q. So within a reasonable degree of medical probability is it your medical opinion that the injuries sustained by Mr. Tibbets [sic] were, in fact, caused by the lifting and driving? A. That's correct."); *id.* at 16-17 (A85) ("Q. Is it fair to say that the kind of acute injury we are talking about that can result in herniations, bulging, could come from . . . one lifting episode or could be a result of cumulative on [sic] stress? A. It can be associated with either of those two. That's correct.").

[21] Because the Board determined that Tibbits failed to meet his burden of proof, the Board did not squarely address whether Dr. Mattern's testimony effectively rebutted Dr. Yalamanchili's testimony. UPS argues that Dr. Mattern's testimony constitutes substantial evidence supporting the Board decision. To be sure, the Board noted that "Dr. Mattern was persuasive that given Claimant's extensive degenerative spine . . . he would expect that Claimant would experience at times an episodic onset of back pain with no identifiable trigger source." *Tibbets v. United Parcel Serv.*, No. 1346171, at 14 (Del. I.A.B. Feb. 17, 2011). Nonetheless, the Board's decision was based, not on a finding that Dr. Mattern's testimony effectively rebutted that of Dr. Yalamanchili, but instead, on its determination that Dr. Yalamanchili's testimony did not, as an initial matter, establish the requisite causation. *See id.* at 14-15 ("Without expert testimony that Claimant's work activities were a substantial cause of . . . his low back condition . . . the Board was not satisfied that Claimant met his burden in this case.").

12. The Board decision itself supports UPS' remand argument. In determining whether the ordinary stress and strain of Tibbits' work activities was a substantial cause of his back pain, the Board noted that Tibbits had not advanced that claim in his pre-trial papers. The Board explained that, in general, fairness considerations would preclude the Board from considering a theory not timely advanced by a claimant. Here, however, the Board concluded that it could fairly decide whether the ordinary stress and strain of Tibbits' employment substantially caused his injury, because Tibbits had not carried his burden of proof.[22] Given the reversal of the Board decision, fairness requires that UPS be afforded the opportunity to defend fully against a "usual exertion" claim before any judgment is entered on the merits of the petition.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED** in part, and that the case is **REMANDED** to the Board for further proceedings in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[22] *See id.* at 13 n.1 ("This did not give [UPS] a fair chance to investigate [the ordinary stress and strain] assertion. Considering the different standards, it is unfair to let Claimant "switch" causation opinions late in the game.").