IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JONATHAN LEWICKI	)	
	)	CIVIL ACTION NUMBER
Appellant	)	
v.	)	**05A-06-010-JOH**
	)	
NEW CASTLE COUNTY	)	
	)	
Appellee	)	

Submitted: January 4, 2006
Decided: March 10, 2006

MEMORANDUM OPINION

Upon Appeal from a Decision of the Industrial Accident Board - ***AFFIRMED***

Appearances:

Thomas J. Roman, Esquire, of Kimmel Carter Roman & Peltz, Bear, Delaware, attorney for employee-below, appellant

Tabatha L. Castro, Esquire, Rapposelli, Castro & Gonzalez, Wilmington, Delaware, attorney for employer-below, appellee

HERLIHY, Judge

Jonathan Lewicki appeals the Industrial Accident Board's denial of his claims for benefits. While serving as a New Castle County Police officer, in uniform, seated in a marked police car, doing police work and during an authorized meal break, he choked on a piece of hamburger. He was able to call for and receive help. Taken to a hospital, further medical care had to be administered to remove a portion of the hamburger from his throat.

Ultimately, it was determined he had a congenital esophagus defect. Lewicki underwent several surgical procedures to rectify the defect. There is no dispute that Lewicki was on duty, allowed to have a meal break during his shift and was working on police paper work when he choked.

To recover worker's compensation benefits the employer must suffer an injury. Lewicki did. A claimant must also show that the injury occurred in the course of employment. The circumstances demonstrate Lewicki meets that requirement. But to receive benefits, a claimant must also show the injury "arose out" of his employment. The issue, therefore, is whether an injury suffered while working but not related in any way to a job activity or function is an injury arising out of employment.

As compelling as the facts are in this case, the Court holds such an injury is not one arising out of employment, and is, therefore, not compensable.

Factual Background

Lewicki had been a New Castle County Police officer for around seven years as of December 31, 2002. On that occasion, he was working the 8 p.m. to 4 a.m. shift as a

patrol officer. His duties, following roll call, were to ride around in his police car responding to complaints or to observe criminal activity. He was in uniform driving a marked County Police car. Just after finishing responding to a complaint somewhere around 3 a.m., he purchased a hamburger, french fries, and a soda. The County Police permit their officers to take a meal break (no specific time specified), during an eight hour shift.[1] Lewicki pulled into the Delcastle Park lot do work and eat.

Lewicki kept his radio on while in the parking lot. If he were dispatched while there, he would have stopped eating and responded to the call. He chose to work on police paperwork while eating his food. While doing so, he choked on a piece of hamburger. Lewicki was somehow able to summon help and another officer arrived. That officer performed a Heimlich maneuver on Lewicki which dislodged most of the hamburger.

But not all of it was dislodged. He had to be taken by ambulance to Christiana Hospital. There Dr. Bruce Panasuk surgically removed the remaining piece of hamburger. Lewicki was diagnosed with a tight cervical esophageal web. His throat was smaller than normal. Though congenital, this was the first time diagnosis had been made. Lewicki had

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[1] There was some confusion in the record on this point, with the County arguing in this Court that he was not allowed a lunch break. The Court quotes from the Board hearing transcript:

Counsel: Is it permissible for you by your superiors to stop and eat druing the tour of duty?
Lewicki: Yes.
Counsel: Do you have a certain time alloted?
Lewicki: No, no we don't get lunch breaks.
Counsel: Well how do you eat?
Lewicki: On the run.

only previously known he had difficulty swallowing large pills. The esophagus condition had never been found in prior police physicals.

After some swelling and irritation dissipated, Dr. Panasuk was able to perform a second surgical procedure, an endoscopy and stretching of the esophagus. Dr. Panasuk opined that the ingestion of the hamburger was a substantial cause of the emergency treatment and subsequent surgery. Dr. Jack Chodos, who testified for the County, agreed that the esophagus condition was congenital. He and Dr. Panasuk said the condition was asymptomatic prior to the choking incident. Dr. Chodos agreed that the ingestion of the hamburger was the cause or a substantial cause of the choking.

Board's Decision

The Board held that Lewicki had not shown the injury arose out of his employment as a police officer. The Board examined the origin of the accident and its cause. The esophageal defect was congenital and nothing in Lewicki's duties, the Board said, contributed to or caused the hamburger to lodge in his throat.

The Board relied on "but for" causation. There was no "but for" in his job requirements which caused this incident to occur. The Board also rejected the application of the "Personal Comfort Doctrine" to this case.

Parties' Contentions

Lewicki, as he should, focuses his argument on whether the injury arose out of his employment. He points out he was on duty, in a police car, and exercising the privilege

given to him to have a meal break. Taking such a break, he argues, is reasonably related to his employment. Such a break is incidental to his police work. Lewicki contends that the "Personal Comfort Doctrine" enables him to receive benefits.

The County responds that nothing in Lewicki's job or its duties caused or precipitated his injury. It, therefore, fails the "but for" causation test. Also, it notes that Lewicki's throat condition was congenital and unrelated to his job and not caused by his job.

Standard of Review

On appeal, this Court's role is limited to determine if the Board's decision is supported by substantial evidence and free of legal error.[2] Substantial evidence is such relevant evidence that a reasonable person can accept as adequate to support a conclusion.[3]

The facts are not in dispute. Dr. Panasuk opined that Lewicki had a congenital narrowing of the esophagus. He also said the condition was asymptomatic until the December 31st incident caused it to become sympotmatic. The triggering cause for that change was choking on the hamburger. Dr. Chodos was not as sure about the congenital nature of Lewicki's condition because he had not actually seen the throat at the time or been present to see tests performed or their results as they were performed. He saw nothing in Lewicki's job which caused the choking. Nor, candidly, did Dr. Panasuk.

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[2] *State v, Dalton*, 878 A.2d 451, 454 (Del. 2003).

[3] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

Therefore, the issue of whether Lewicki's injury arose out of his employment is one of fact and law and is to be examined under the totality of circumstances.[4] Further, the Workers' Compensation statutes are to be liberally construed.[5]

Discussion

There is no dispute that Lewicki suffered an injury. There is no dispute that while eating the hamburger Lewicki was on duty. The County does not dispute that Lewicki was working within the scope of his employment. Nor does the County dispute the obvious. The police car in which Lewicki was seated when he choked was its premises.[6] The lack of dispute over these issues narrows the issue to just the one: was this injury which arose out of Lewicki's duties as a police officer? That is the issue because:

> 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 course or employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.[7]

The County is liable only if the answer to the question in this case is in the affirmative.

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[4] *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 345 (Del. 1993).

[5] *Stevens v. State*, 802 A.2d 939, 946 (Del. 2002).

[6] See *Cox v. Quality Car Wash*, 449 A.2d 231 (Del. 1982).

[7] 19 *Del.C.* §2304

An essential causal relationship between the employment and the injury is unnecessary.[8] An employee, therefore, need not be injured doing a job related to activity to be eligible for benefits.[9] The phrase "arising out of … employment" refers the origin of the accident and its cause.[10]

The origin of Lewicki's injury was his own congenital narrowed esophagus. That, both physicians, agree set him up for a choking incident. What sets this case apart, of course, is that the incident occurred in a police car while he was on duty. This was not a case as in *Tickles* where there was a slip and fall on the employer's premises.

Nor is this situation the same as the one *Bedwell v. Brandywine Carpet Cleaners*,[11] upon which Lewicki so heavily relies. In *Bedwell*, the employee was part of a group of cleaners who traveled from place to place to do cleaning jobs. Bedwell and his co-workers were driven in a company van from work site to work site. Bedwell and his co-workers were given 30 minutes to eat lunch but the time was not specified. They stopped in a Burger King. After eating, Bedwell was in the act of leaving when he slipped on a wet floor and injured himself.

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[8] *Stevens v. State*, 802 A.2d at 945 (Del. 2002).

[9] *Tickles v. PNC Bank*, 703 A.2d 633, 637 (Del 1997).

[10] *Storm v. Karl-Mil, Inc. by the Home Ins. Co.*, 460 A.2d 519, 521 (Del. 1983), quoting *Children's Bureau v. Nissen*, 29 A.2d 603, 607 (Del. Super. 1942).

[11] 684 A.2d 302 (Del. Super. 1996).

This Court in *Bedwell* referred to the claimant as a "traveling employee." Next it recognized the "Personal Comfort Doctrine" which allows for employees to minister to their personal needs as long as reasonably related to the employer's business.[12] This includes, the Court said, taking a break to eat.[13]

All the above supports Lewicki's position. He is a "traveling employee." He was on the County's police business. He was utilizing the meal break to which he was entitled. Clearly eating during that time was intended to minister to his personal comfort and there was no disqualifying deviation from that police business in the act of eating in this case.

But there is one key and essential difference. Bedwell would not have slipped and fallen but for being on the job and being allowed to take the lunch break. There was nothing congenital in his situation. The origin of Lewicki's injury, however, was the congenital narrowed esophagus. Choking could have occurred while on duty or off. There was nothing in his job which caused the esophagus to narrow. He would not have choked but for a non-job related, personal condition.

Delaware does recognize the personal comfort doctrine[14] and Professor Larson comments on it favorably.[15] Nevertheless, even utilizing the doctrine does not equate to

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[12] *Id*. at 306.

[13] *Id*.

[14] See *Stevens v. State*, *supra*.

[15] Arthur K. Larson and Dex K. Larson, 2 *Larson's Workers' Compensation Law* § 21, 01 (2004), at 21-1.

an entitlement of benefits for Lewicki. To award benefits in this situation could lead to an award of benefits if he had a heart attack due to a congenital heart condition and without any contributing event, trauma, stress or trigger due to his job.[16]

Of course, there are compelling elements of sympathy for Lewicki's claim. It may have been most fortuitous he on duty and able to summon a fellow officer for help and receive it as he did. Despite that sympathy, however, the totality of the circumstances of this case do not permit an award of benefits.

Conclusion

For the reasons stated herein, the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

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J.

[16] Compare Lewicki to *Bramble v. State Board of Pension Trustees*, 579 A.2d 1131 (Del. Super. 1990) where a State Police officer suffered a heart attack while fishing but cumulative job stress and overwork were contributing factors.