BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

Horseplay defense rejected; Claimant hit w/ block of cheese

ANNA HAMILTON,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1244476
	)	
	)	
WAWA, INC.,	)	
	)	
Employer.	)	

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on September 9, 2004, in the Hearing Room of the Board, New Castle County, Delaware.

PRESENT:

JOAN SCHNEIKART
Workers' Compensation Hearing Officer

APPEARANCES:

Glenn C. Ward, Attorney for the Employee

Scott A. Simpson, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On April 28, 2004, Anna Hamilton ("Claimant") filed a Petition to Determine Compensation Due against Wawa, Inc. ("Wawa") alleging she sustained injuries to the neck and low back on January 8, 2004, while working as a shift manager. Claimant seeks a compensability finding for injuries sustained when a co-worker hit her with a block of cheese. The employer contends that Claimant was acting outside the course and scope of her employment when she sustained the injuries since she was involved in horseplay. Wawa does not otherwise dispute that an incident took place, the period of total disability, or the medical expenses.

The parties stipulated to having the matter decided by a Workers' Compensation Hearing Officer, in accordance with Del. Code Ann. tit. 19, § 2301B(a)(4).

SUMMARY OF THE EVIDENCE

Claimant, age thirty-five, has worked for Wawa for twelve years of which she has been a shift manager for the last nine years. On January 8, 2004, she arrived at work early at 7:45 a.m. and talked with co-worker Aaron Toomey in the break room. The supervisor, Kate Moriarty, asked her to clock in early because of customers. Claimant went to the deli area and started preparing sandwiches. Mr. Toomey later came over to the deli area and began to talk with her. He was standing and leaning close to her. While she was bending over the deli case something hit her in the mid-back. She turned around to see Mr. Toomey holding a five pound block of cheese. Claimant immediately reported the incident to Ms. Moriarty, but Mr. Toomey was laughing about it. Claimant left work at 9:30 because her back hurt. She also called the corporate office of Wawa from home to report the incident. She wanted a referral to a doctor

and was sent to see a physician at the occupational health services. She was taken out of work by Dr. Carole Tinklepaugh on January 9.

When Claimant reported back to work on February 4, Ms. Moriarty gave her a completed "Deficient Performance Document" (Claimant's Exhibit No. 1) dated January 8, and asked Claimant to sign it. She refused because the description indicated that she had verbally abused and "pushed and poked" Mr. Toomey on the day of the incident. She did agree that she had touched him to remove his hand from her shoulder in the break room. She had not engaged in unnecessary banter with him. Claimant had worked with Mr. Toomey for six months. She had never received a warning before and was not formally disciplined. However, Mr. Toomey received a two-day suspension. Claimant did not involve in any horseplay with Mr. Toomey on January 8. However, no one witnessed the incident.

Aaron Toomey, age eighteen, testified that he has worked at Wawa since March 2003 and worked with Claimant for several months. They had a friendly, joking relationship, including some physical contact. For example, she would grab his shirt and he would sometimes pinch and poke her. On the morning of January 8 in the break room, he kidded her about eating breakfast with her boyfriend and she "grabbed" his chest and told him, "I'll mess you up." He "playfully" hit her with the block of cheese in the upper back as she was bending over the deli case. He had no intent to hurt her. She then hit him in the crotch area. She later said her back hurt. He did not report her contact with him. He was aware that Wawa had a policy concerning no physical contact between employees. He was "written up" for horseplay and suspended from work for three days.

Kathleen Moriarty, now works as an assistant to the supervisor for Wawa. She has worked for the company for seventeen years. On January 8, 2004, she was the manager at the

Philadelphia Pike store. She had worked with both Claimant and Mr. Toomey at other stores. Claimant and Mr. Toomey had a friendly and joking relationship, and would "kibitz" back and forth. Both were excellent workers. Ms. Moriarty was not aware of any previous physical contact between them. However, the deli area was a small space of about four feet, and it was likely there would be some incidental contact between them there.

Claimant reported the hitting incident to Ms. Moriarty and told her that she had to go home. Ms. Moriarty completed an investigation report on that same date. There were no other witnesses to the incident. Claimant refused to sign the document when she returned to work after being out for four weeks. Mr. Toomey was suspended for three days. Ms. Moriarty was supposed to suspend Claimant also, but had lost track of doing that after her absence. The employer's policy is that assaults are prohibited but joking around is not a violation of the code of conduct (Employer's Exhibit No. 1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to collect the workers' compensation benefits requested in her Petition to Determine Compensation Due, Claimant carries the burden of proof and must demonstrate, by a preponderance of the evidence, that she suffered an injury which resulted from an accident occurring within the course and scope of her employment. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965). Wawa does not contest the causation of Claimant's physical injuries, her medical expenses, or the period of total disability benefits. Wawa disputes that the injuries sustained by Claimant arose "out of and in the course of the employment." Del. Code Ann. tit. 19, §§ 2301 (15), 2304. The employer asserts a "horseplay" defense.

Whether Claimant's injuries occurred during the scope of employment is a legal conclusion determined by the facts under a totality of the circumstances test. *Histed v. E. I.*

Mr. Toomey. The banter initially took place before she clocked in that day. She did not engage in banter when Mr. Toomey later came to the deli area as she was working. Even if she had grabbed Mr. Toomey's chest at one point during the day, as he alleges, this event took place some time before the assault with the cheese took place, and was not as serious as Mr. Toomey hitting her with a brick of cheese. In addition, there was no report to Ms. Moriarty by Mr. Toomey that Claimant then hit him in the crotch in the deli area. A joking relationship consisting of verbal banter had become an accepted part of their employment as Ms. Moriarty testified, but physical contact, especially of the nature of an assault, had never been condoned. The code of conduct given to all employees (Employer's Exhibit No. 1) clearly prohibits any physical assault with another employee.

For the above reasons I find that Claimant's injury occurred within the course and scope of her employment. As such she is entitled to receive benefits for total disability and medical expenses, as stipulated to by the parties.

Attorney's Fees and Medical Witness Fees

A claimant who receives an award is entitled to a reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is less. Del. Code Ann. tit. 19, § 2320.

In determining an award of attorney's fees, the Board or hearing officer must consider ten factors.[1] *See General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973)(applied to I.A.B.

[1] The factors to be considered are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill needed to perform the services properly; (2) the likelihood (if apparent to the client) that acceptance of the employment would preclude other employment by the attorney; (3) the fees customarily charged in the locality for such services; (4) the amount involved and the results obtained; (5) time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the attorney; (8) whether the fee is fixed or contingent; (9) the employer's ability to pay; and (10) whether fees and expenses have been or will be received from any other source.

hearings by *Jennings v. Hitchens,* 493 A. 2d 307, 310 (Del. Super. 1984)); *Thomason v. Temp Control*, Del. Super., C.A. No. 01A-07-009, Witham, J., *slip op.* at 5 - 6 (May 30, 2002). It is an abuse of the Board's discretion to fail to give consideration to these factors. *Thomason* at 7. When claimants seek an award of attorney's fees, they bear the burden of establishing entitlement to such an award. *Downes v. Phoenix Steel Corp.*, Del. Super., C.A. No. 99A-03-006, 1999 WL 458797 at **4, Goldstein, J. (June 21, 1999)(the burden of proof in a workers' compensation case is on the moving party). Since the Board must consider the *Cox* factors when reviewing a request for fees, it follows that claimants must address these factors in their applications. The failure to do so deprives the Board of the facts it needs to properly assess a claimant's entitlement to fees.

Counsel for Claimant seeks a fee up to the statutory maximum. Counsel submitted an affidavit attesting that he spent9 hours preparing for the evidentiary hearing held on September 9, 2004, which lasted approximately one and one-quarter hour. His association with Claimant began in January 2004. Counsel has a 30% contingency fee arrangement with Claimant. He has been admitted to the practice of law in Delaware since 1996 and has experience with workers' compensation matters. Counsel asserted he expected to receive no additional fees from any other source in this case. He also asserts that he was not precluded from working on other cases while representing the Claimant, and that the issues involved in the case were not difficult and did not involve burdensome time limitations. Wawa had no objection to the request for attorney's fees.

Taking into consideration the *Cox* factors set forth above, I conclude that an attorney's fee award of $2,562.50 (calculated at an hourly rate of $250.00 per hour times 10.25 hours) is appropriate.

STATEMENT OF THE DETERMINATION

Based on the foregoing, I hereby GRANT Claimant's Petition to Determine Compensation Due and find the she was within the course and scope of her employment when she sustained back injuries from an assault by another employee. Claimant is also awarded attorney's fees.

IT IS SO ORDERED this 23rd day of September, 2004.

Joan Schneikart
JOAN SCHNEIKART
Workers' Compensation Hearing Officer

Mailed Date: 9/23/04

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OWC Staff