Ia040010

BEFORE THE INDUSTRIAL ACCIDENT BOARD

OF THE STATE OF DELAWARE

Hospital expenses rejected

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| BRENTON ROBINSON, | ] | |
| | ] | |
| Employee, | ] | |
| | ] | |
| v. | ] | Hearing No. 1237367 |
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| WILMINGTON HOUSING AUTHORITY, | ] | |
| | ] | |
| Employer. | ] | |

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant w due notice of time and place of nearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on February 23, 2004, at the hearing room of the Board in New Castle County, Delaware. The Board extended the time to publish its decision on March 8, 2004.

PRESENT:

LOWELL L. GROUNDLAND

GARRETT L. WILSON

Kristopher T. Starr, Esquire, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Frederick Freibott, Attorney for the Employee

Christopher Logullo, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On September 17, 2003, Brenton Robinson ("Claimant") filed a Petition to Determine Compensation Due, alleging that injuries he received as the result of being lowered to the floor, while seated in a chair, by a co-worker on January 9, 2003, arose out of the course and scope of his employment with Wilmington Housing Authority ("WHA"). There is no dispute that Claimant was injured as a result of the accident. In fact, WHA stipulated to the submitted medical evidence, but WHA denies that the injuries arose out of the course and scope of Claimant's employment. Instead, WHA maintains that-Claimant's injuries were the result of horseplay.

A hearing was held on Claimant's petition on February 23, 2004. The only question before the Industrial Accident Board ("the Board") is whether Claimant was injured in the course and scope of his employment or as the result of horseplay. This is the Board's decision on the merits.

## SUMMARY OF THE EVIDENCE

Claimant testified that he was employed as a first class mechanic for WHA. He alleged he was a member of the coffee club initiated by those working in WHA. The coffee club ("club") members would be entitled to eat breakfast and drink coffee from food purchased with club funds before as their shift started. Each club member would contribute ten dollars per month to the club. Club members prepared meals and ate them on WHA time. The club stored their food in a company refrigerator and flyers would be passed around about club dues.

On the date of his accident, Claimant was late for work. Apparently, he procured a cup of coffee from the club's supply. Claimant's supervisor, Efram Jorge, observed Claimant drinking club coffee and told him not to do so. Claimant and Jorge exchanged words about this issue. Claimant sat in a chair in the WHA shop and the next thing he knew, he was laying on the floor. James Smith, Claimant's co-worker, had pulled Claimant back in his chair and lowered him to the floor. During this episode, Claimant felt a pop in his back and complained of immediate pain. Claimant was not kidding with his co-workers, did not feel the incident was amusing and had heated words with his co-workers about the coffee club. Claimant reported the incident to Jorge and requested he fill out an accident report. Jorge refused to do so.

On cross-examination, Claimant admitted he gave an incident statement about the accident to WHA the day after it occurred. He admitted that WHA did not run the club. Claimant indicated that heated words were exchanged between Claimant and his co-workers over the club at the time of the incident. He admitted that he was not slammed to the floor but that he was forced to the floor while seated in the chair. Claimant was seated in the chair when he hit the floor and then rolled out of the chair.

The testimony of Dr. Matthew Eppley, Claimant's neurosurgeon, was admitted into evidence. The parties stipulated to the doctor's medical findings and his reports. Dr. Eppley's findings were not contested and his causal opinions are not at issue.

James Smith testified on behalf of WHA. Smith works as a first class mechanic for WHA. He is a member of the club. He pays five dollars per month in dues. Fourteen or fifteen WHA employees are in the club. The club is not sponsored by WHA. Smith indicated that Claimant is not a member of the club but could not explain how he arrived at this conclusion. He pulled Claimant back in a chair at which time Jorge told him the Claimant has a bad back. Smith lowered Claimant to the floor in the chair. Smith felt that he was joking with Claimant and that no yelling or heated words were exchanged between them. He indicated that after Claimant was lowered to the floor, Claimant got up and went into the other room to talk to Jorge.

On cross-examination, Smith admitted although he was joking with Claimant about being in the club, he did not actually know whether or not Claimant was a member. He indicated that they all joke around a lot. During his discussion with Claimant about the club, Smith faced Claimant. He admitted then going behind Claimant and rocking him back in the chair saying to Claimant "C'mon tell the truth" about being in the club. Smith indicated that he and co-workers have leaned each other back in chairs before. He agreed that accusing someone of taking other people's food, without paying for it, is not a joking matter. Smith did not place Claimant forward and back to a seated position because he thought it would be easier to lower him to the floor. He denied having heated words with Claimant. He agreed that Claimant and Jorge had a heated argument after the chair incident.

Efram Jorge testified on behalf of WHA. Jorge works as a superintendent for WHA. He supervises Claimant. The club is run by the members who pay in monthly dues. Jorge indicated that, on the date of Claimant's accident, there was talk back and forth with Claimant about whether he was a member of the club. He described this as "lighthearted" banter and denied that any heated words were exchanged. Jorge heard laughter and observed James Smith ease Claimant back in his chair. Jorge told Smith not to drop Claimant. Smith eased Claimant to the floor at which time Claimant got up and went to an adjoining room. Claimant became very angry and asked Jorge to write up the incident. Jorge indicated that Claimant and Smith had joked around before but he had never seen the joking become physical.

On cross-examination, Jorge admitted to being in the club. He paid dues to Kathy in the WHA office but said someone else in a supervisory capacity would occasionally collect dues. Jorge agreed that the collection practices were both formal and informal. He recalled someone saying to Claimant "you are not in the coffee club." Jorge knew Claimant had previously injured his back. He did not recall Claimant struggling during the incident but admitted Claimant told him that he was hurt afterwards.

During questioning by the Board, Jorge agreed that at least two people must engage in horseplay. He felt Claimant was so engaged but admitted that Claimant was seated in a chair at the time Smith lowered him to the floor.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Findings: Before addressing the legal framework, this Board will set out its factual findings. The Board accepts Claimant's position that he was injured after being pulled back in a chair by a co-worker during a disagreement over a workplace coffee club membership. The Board does not accept WHA's rebuttal that this incident occurred when Claimant and Smith were joking around. Claimant testified that he and Smith had an exchange of words over club membership. The words were heated. Smith then proceeded to go from facing Claimant to behind him and pulled Claimant back in his chair to the ground indicating to Claimant he should tell the truth about club membership. This evidence, added to the fact that Claimant had verbally just exchanged words with Smith convinces the Board that Claimant was injured during the fall to the floor and that he was not participating in a "horseplay" type behavior.

The Board finds wholly not credible the testimony of Messrs. Smith & Jorge who testified that this all occurred as a result of a joke. The Board finds credible the testimony of Claimant that he came in to work, got a cup of coffee and was harassed about his not paying for it by being in the club. The Board also finds, based on all the testimony, that the accusations tossed at Claimant would not give rise to a jovial or joking atmosphere. Smith and Jorge admitted accusing Claimant of taking their coffee while not being in the club. Smith admitted he told Claimant to tell the truth as he was pulling him back in a chair. The Board finds it unlikely that any person would consider this "joking around."

The Board finds it reasonable that Claimant felt Smith and Jorge were not joking with him.

Arguments: WHA asserts the argument that Claimant's petition should be denied because Claimant engaged in "horseplay" thus taking his injury outside the course and scope of employment thus barring his compensation. See 19 Del. C. § 2353(b).

Having made these findings of fact, the issue is the effect of horseplay on Claimant's claim. Delaware case law on the effect of horseplay is sparse. In General Foods Corp. v. Twilley, 341 A.2d 711 (Del. 1975), the Delaware Supreme Court stated that an injury at the workplace that resulted from "horseplay" was still considered compensable if the claimant was a non-participant in the activity. Twilley, 341 A.2d at 712. In that case, the claimant was injured by a hard aluminum-foil ball that hit her in the head while she was at her workstation. The evidence indicated that, while she had participated in such ball-throwing activity in the past, she was not participating at the time she was injured. Twilley, 341 A.2d at 711-12. In the above accident, the Board finds Claimant was not a participant in the chair incident.

Compensability: The Workers' Compensation Act ("the Act") is the exclusive remedy between employer and employee for "personal injury or death by accident arising out of and in the course of employment." 19 Del. C. §2304 (emphasis added). Thus, the employment connection focuses on two aspects: whether the injury was "in the course of employment" and whether the injury arose out of that employment.

"The term `in the course of employment' refers to the time, place and circumstances of the injury." Rose v. Cadillac Fairview Shopping Center Properties (Delaware), Inc., 668 A.2d 782, 786 (Del. Super. Ct. 1995)(citing Dravo Corp. v. Strosnider, 45 A.2d 542, 543 (Del. Super. Ct. 1945)), aff'd sub nom. Rose v. Sears, Roebuck & Co., 676 A.2d 906 (Del. 1996). This term covers "those things that an employee may reasonably do or be expected to do within a time during which he is employed and at a place where he may reasonably be during that time." Dravo, 45 A.2d at 543-544. The Act codifies this principle by providing that, to be considered covered, an employee must be "engaged in, on or about the premises where the employee's services are being performed . . . or while the employee is engaged elsewhere in or about the employer's business where the employee's services require the employee's presence." 19 Del. C. § 2301(15)a. In short, "in order to be compensable, the injury must have been caused in a time and place where it would be reasonable for the employee to be under the circumstances." Rose, 668 A.2d at 786. The "employee does not have to be injured during a job-related activity to be eligible for worker's compensation benefits." Tickles v. PNC Bank, 703 A.2d 633, 637 (Del. 1997). Acts incidental to employment, such as "eating, drinking, smoking, seeking toilet facilities and seeking fresh air, coolness or warmth" are all considered to be within the course of employment. Tickles, 703 A.2d at 637.

"The term `arising out of employment' relates to the origin of the accident and its cause." Rose, 668 A.2d at 786. For the purposes of this prong, it "is sufficient if the injury arises from a situation which is an incident or has a reasonable relation to the employment." Dravo, 45 A.2d at 544. In relation to this, the Act specifically provides that a compensable injury does not include "any injury caused by the willful act of another employee directed against the employee by reasons personal to such employee and not directed against the employee as an employee or because of the employee's employment." 19 Del. C. § 2301(15)b. In other words, "there must be a reasonable causal connection between the injury and the employment." Rose, 668 A.2d at 786. See also Parsons v. Mumford, Del. Super., C.A. No. 95C-09-031, Ridgely, J., 1997 WL 819122 at *3 (November 25, 1997).

On the first prong, it is clear Claimant was injured in a time and place where it was reasonable for him to be under the circumstances. He was at the WHA shop, preparing to do his job during his normal work hours. Thus, he was "in the course of' his employment at the time that Mr. Smith pulled him back in the chair and caused his injury.

The more crucial question is whether Claimant's injury arose out of the employment. The exception from compensability embodied in 19 Del. C. § 2301(15)b requires two elements. First, the act by another employee against the injured employee must be "willful." Second, that willful act must be for personal reasons and not because of the employment.

An act is considered "willful" if it is "done intentionally, knowingly, purposely, and without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently." Stewart v. Oliver B. Cannon & Son, Inc., 551 A.2d 818, 823 (Del. Super. Ct. 1988)(citing Lobdell Car Wheel Co. v. Subielski, 125 A. 462 (Del. Super. Ct. 1924)). "Willful" is more than just a volitional act. Delaware Tire Center v. Fox, 411 A.2d 606, 607 (Del. 1980). In this case, there is evidence that Claimant had heated words with Smith about the club. Next, Smith pulled Claimant back in his chair, Jorge told Smith not to drop Claimant because of his back, and Smith pulled or lowered Claimant to the ground wherein Claimant hurt his back.

This does not suggest a willful frame of mind. Although, having been provoked by Claimant's coffee taking, Smith may have been acting negligently, heedlessly, carelessly or thoughtlessly, based on the evidence presented the Board finds that Smith's actions were not willful. He had no intent or purpose to cause injury.

The next question is whether that willful act was personal in nature or related to Claimant's employment. The Board finds that there is "a reasonable causal connection between the injury and the employment." Rose, 668 A.2d at 786. "Generally when the dispute arises outside of work and is not exacerbated by employment, the assault does not arise out of employment." Rullo v. Federal Express, Del. IAB, Hearing No. 819938 (November 8, 1991). In this case, the source of the antagonism between the two was rooted in the work relationship. Specifically, Smith accused Claimant of taking food

belonging to other WHA club members without paying for it. The club members collected money on WHA premises, stored, cooked and ate their food while on WHA premises before and during work. It was because of this food dispute at work that this incident occurred. While all forms of antagonism are "personal" to some extent, this particular antagonism was clearly causally related to the mutual employment. Indeed, as noted earlier, the food dispute arose out of a WHA-employee coffee club and had no connection aside from work.

The Board therefore concludes that the injury to Claimant "arose out of' and was "in the course of employment" as those concepts have been defined by Delaware law. The incident with Claimant was careless in nature and it had its causal roots in the employment.

Forfeiture: This does not end the analysis, however. Even though Claimant's injury arose out of and in the course of employment, the question remains whether he has forfeited his right to compensation pursuant to 19 Del. C. § 2353(b). That section provides that an employee is not entitled to receive compensation if the employee's injury resulted from "the employee's deliberate and reckless indifference to danger." 19 Del. C. § 2353(b).

There is no evidence to conclude that Claimant was behaving with a "deliberate and reckless indifference to danger." There is no evidence that Claimant initiated a conflict with Jorge or Smith. After the heated words between Smith and Claimant,

Claimant sat down in a chair. Such an action is not the action of a man showing either a deliberate or reckless indifference to the situation.

Accordingly, the Board concludes that Claimant has not forfeited his right to benefits. It is important to remember that one of the purposes of workers' compensation is to provide a scheme of compensation for work-related injuries without regard to fault. Duvall v. Charles Connell Roofing, 564 A.2d 1132, 1133 (Del. 1989); New Castle County v. Goodman, 461 A.2d 1012, 1014 (Del. 1983). "No question of negligence of the claimant ... or assumption of the risk ... is to be considered, for it was to obviate such questions that the statute was adopted." Dravo, 45 A.2d at 544-45. Unless Claimant falls within one of the exceptions contained in either Section 2301(15) or Section 2353, he is entitled to compensation. As discussed above, Claimant's situation does not fit within those statutory exceptions. Claimant's injury is, therefore, compensable.

Claimant presented evidence that his medical bills totaling $1,461.30, have gone unpaid. In accordance with the Board's decision, these expenses are compensable as being causally related to Claimant's work accident.

Attorney's Fee & Medical Witness Fee: A successful claimant is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or $7,602.10, whichever is smaller." 19 Del. C. § 2320(g)(1). The factors this Board must consider in assessing a fee are set forth in General Motors Corp. v. Cox, 304 A.2d 55, 57 (Del. 1973). Claimant's counsel submitted an affidavit stating that he spent

twelve hours in preparation for the hearing. The hearing itself lasted slightly over an hour. Claimant's counsel has been a member of the Delaware Bar since 1989. His initial contact with Claimant was on January 23, 2003. No special time limit appears to have been imposed by either Claimant or the circumstances, and there was no evidence to suggest that counsel was precluded from taking other cases because of accepting Claimant's case. There has been no suggestion that WHA lacks the financial ability to pay. The case addressed the issue of scope of employment and horseplay and, as such, was somewhat more complex than a case involving only typical causation issues.

Claimant's counsel requests a fee of $3,000.00 based on the rate of $250.00 per hour. Taking into consideration all the factors listed above as well as the fees customarily charged in this locality for such services as were rendered by Claimant's counsel, the Board finds this to be reasonable. However, the maximum fee that the Board is permitted to award under the statute is thirty percent of the award. The Board therefore awards to Claimant an attorney's fee of $3,000.00 or thirty percent of the award, whichever is less, in accordance with 19 Del. C. § 2320(g)(1).

## STATEMENT OF THE DETERMINATION

For the reasons stated, Claimant's petition is GRANTED. The Board finds Claimant was injured in the course and scope of his employment and that his medical bills are related and compensable. The Board further awards a medical witness and a counsel fee.

IT IS SO ORDERED THIS 18th DAY OF MARCH, 2004.

INDUSTRIAL ACCIDENT BOARD

LOWELL L. GROUNDLAND

GARRETT L. WILSON

I, Kristopher T. Starr, Esquire, Workers' Compensation Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board in this matter.

KRISTOPHER T. STARR, ESQUIRE

Mailed Date: 3/19/04

M.L.R.
OWC Staff

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