



Delaware Industrial Accident Board

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Ross v. The Wood Company, <http://www.delawnet.com>, Delawnet# Ia990035 (IAB)

BEFORE **THE** INDUSTRIAL ACCIDENT BOARD

OF **THE** STATE OF DELAWARE

CRYSTAL ROSS,]	
]	
Employee,]	
]	
v.]	Hearing No. 1122347
]	
THE WOOD COMPANY,]	
]	
Employer.]	

*Horseplay
defense
repeated -
hi-jinx among
food prep
workers*

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 March 8, 1999, in **the** Hearing Room of **the** Board, New Castle County, Delaware.

PRESENT:

LOWELL L. GROUNDLAND

JANE E. MITCHELL

Joan Schneikart, Workers' Compensation Hearing Officer, for **the** Board

APPEARANCES:

Kenneth Carmine, Attorney for **the** Employee

Cassandra F. Kaminski, Attorney for **the** Employer

NATURE AND STAGE OF **THE** PROCEEDINGS

On April 3, 1998, Crystal Ross ("Claimant") filed a Petition to Determine Compensation Due against MBNA and **The** Wood Company ("Wood") seeking total disability and partial disability benefits along with medical expenses related to a work accident on March 30, 1998. Claimant alleges she sustained injuries to her back, neck, head and legs when she slipped on a wet floor while working as a food preparer. Claimant withdrew her claims against MBNA on May 22, 1998. Wood denies compensability on **the** basis that Claimant was engaging in horseplay at **the** time of **the** accident. After **the** presentation of all evidence, **the** parties stipulated that, if compensability is found, **the** period of total disability runs from March 31 until May 19, 1998, at **the** wage rate of \$6.50 an hour for a forty hour work; a period of partial disability, based on a ten hour work week at **the** same wage rate, runs from May 20 until May 31, 1998; and a period of partial disability, based on a twenty hour work week at **the** same wage rate, runs from June 1 until June 5, 1998.

SUMMARY OF **THE** EVIDENCE

Claimant presented **the** deposition testimony of Charles Case, M.D. **The** parties stipulated to his qualifications as a board-certified physician specializing in **the** field of family practice. Dr. Case first saw Claimant on March 31, 1998. She told **the** doctor that she had suffered a fall while at work **the** day before and had sustained back pain, neck pain and headaches. She had gone to **the** emergency room on **the** day of **the** fall, was given a non-steroidal agent and was instructed to follow-up with Dr. Case. Based upon his physical examination Dr. Case determined that Claimant was suffering from musculoskeletal pain related to **the** fall at work. He prescribed rest, Flexeril, a muscle relaxant, and took her off work for two weeks. At a follow-up

visit two weeks later she continued to complain of low back pain, which restricted her from lifting her eleven-month old baby. According to his examination, her pain was getting worse. While Dr. Case opined that it is not unusual for a patient who had suffered a fall within two weeks to become worse, tighten up and show a reduced range of motion, he believed she needed a specialist involved in her care and referred her to Delaware Back Pain & Rehabilitation. **The** doctor saw her again on April 28 and continued to restrict her from working through May 4.

After she saw Dr. Beneck on April 20, he advised against performing her regular duty job but told her she could return to work in a light or sedentary job with no lifting, pulling, or pushing greater than five pounds and no repetitive bending or lifting. Dr. Case agreed with those restrictions as of April 28.

Claimant presented **the** deposition testimony of Stephen M. Beneck, M.D. **The** parties stipulated to his qualifications as a board certified physician with a specialty in physical medicine and rehabilitation. Dr. Beneck first saw Claimant on April 20, 1998, upon referral from Dr. Case, her primary care physician. She was a thirty-six year old food service worker who presented with complaints of low back pain, left lateral and anterior thigh pain, and left arm, forearm and hand pain. She related her symptoms to her slip and fall at work on March 30. Upon physical examination, Dr. Beneck determined that Claimant had lumbosacral sprain and strain, neck pain due to a cervical sprain and strain, left arm pain due to contusion and left anterior thigh and groin symptoms from her low back or left hip region. Dr. Beneck related Claimant's symptoms to her fall on March 30 based upon **the** emergency room records and **the** information from Claimant. He continued her prescriptions and ordered a formal rehabilitation program.

As of April 20 Dr. Beneck felt that Claimant was capable of working in a very light or sedentary duty capacity with restrictions as to lifting, pulling or pushing greater than five pounds, and no repetitive bending, lifting or twisting. **The** restrictions directly related to **the** findings caused by **the** fall.

On a follow-up visit of May 4, Dr. Beneck's impressions remained **the** same. He changed his restrictions to no lifting, pulling or pushing greater than ten pounds, and limited her standing and walking to a two-hour period in an eight hour shift. On June 1, **the** doctor discontinued her formal rehab program and increased her work hours from two to four hours per shift through June 5, and released her to full duty without restrictions as of June 8. **The** doctor believed that **the** period of rehabilitation was reasonable, necessary and related to **the** work accident.

Dr. Beneck next saw Claimant on November 2. She had a flare-up of her low back injury. On November 30, **the** doctor recommended that Claimant get an MRI of her low back to rule out any underlying disc problem.

On cross examination, Dr. Beneck admitted that at no point did he deem Claimant totally disabled. He also agreed that as of April 20, Claimant had essentially no objective findings. Over **the** course of his treatment from April through June, **the** doctor decreased **the** nature of Claimant's work restrictions. There were no hand complaints in Dr. Case's notes from April 14 and April 28. Dr. Beneck opined that it would be uncommon for **the** March 30 fall to create **the** problems that she is now having with her ulnar nerve and carpal tunnel symptoms unless she fell directly on her elbow and that she cannot recall if that happened or not. Ulnar neuropathy is not always related to trauma and can be idiopathic.

Claimant testified on her own behalf She started working for Wood in August 1997. Her duties involved preparing and cleaning

vegetables for food service located in an MBNA building. She worked eight hours a day, five days a week in March 1998. **The** prep area for her duties was located by **the** refrigerators where produce was kept. She periodically needed to wash her hands at a sink located by **the** refrigerators. Sometime after her lunch on March 30, she was walking to **the** refrigerator when she slipped and fell on water located on **the** floor by **the** sink. There was a bucket by **the** sink and a worker had been washing **the** stainless steel walls but no one was standing there when she fell. Carl Zambini, another employee, came off an elevator, right after Claimant fell and helped her up. Claimant's shirt was wet after she fell. She didn't trip or kick **the** bucket over when she fell. She does not believe anyone else saw her fall. She believes she was on **the** floor for several minutes because she was stunned and her back and legs hurt. She reported **the** incident to Erica Porter, a manager, but wasn't given any paper work to fill out. She tried to continue to work but left early at 1:30 p.m. when her mother picked her up and took her to **the** Wilmington Medical Center. She later sought treatment from Dr. Case and Dr. Beneck.

When Dr. Beneck released her to light duty work she contacted Wood but Cindy Lorine told her there was no light duty work available. However, Wood called her for a light duty job in late June or early July. Wood later terminated her for cause unrelated to **the** work accident. She was never given a disciplinary warning or suspended concerning **the** fall. She continued to look for work in **the** summer and fall of 1998 and eventually took a position with Helia's Kitchen in January 1999. She continues to feel pain in her back, legs and neck.

Employer presented **the** deposition testimony of Jerry L. Case, M.D. **The** parties stipulated to his qualifications as an orthopedic surgeon. Dr. Case examined Claimant on October 2,

1998. Claimant reported a slip and fall incident on a wet floor while at work. She had returned to work as a school cafeteria food service worker on September 9, 1998. She had minimal complaints of a little soreness in **the** lower back occasionally. Upon physical examination Dr. Case's diagnosis was lumbar strain by history, resolved. **The** doctor saw no need for work restrictions or for continued medical treatment. Based on her medical records, he did not expect that she would have been totally disabled for more than a short period of time.

On cross examination Dr. Case admitted that he did not see Claimant until approximately six months after her injury. He agreed with Dr. Beneck's release to light duty work on April 20, 1998.

Employer presented **the** testimony of Lucinda Lorine. She has been employed by Wood since May 1996 and was made Director of Operations at **the** MBNA cafeteria in March 1998. She is responsible for investigating work accidents. **The** chef informed her of Claimant's accident on March 30. She is required to complete an accident report within twenty-four hours of any accident and asked Erica Porter, a supervisor, to discuss **the** incident with Claimant. Lorine talked with Claimant directly by telephone on February 2, 1998. Claimant needed **the** insurance company contact to present bills for medical attention she received related to **the** slip and fall. Lorine told Claimant that she heard horseplay was involved in **the** incident. Claimant told her that Sonja Brode, another food service employee, had challenged Claimant to kick up her leg. Claimant also said that no one saw her fall.

On cross-examination Lorine confirmed that she was not a witness to **the** accident. Erica Porter actually completed **the** Safety Action Plan/Work Related Injury form (Claimant's Exhibit

No. 3) that day and sent it to **the** appropriate persons. It is a well-known general safety policy that employees are required to clean up any water or debris on floors.

On May 4 she had a doctor's note releasing her to light duty work with lifting of no more than ten pounds. Claimant returned to work from May 20 until June 18. She initially returned to a two-hour shift five days a week making \$6.50 an hour. From June 1 until June 5 she worked four hours a day, five days a week. On June 8 she returned to full duty work without restrictions.

Part of Lorine's job responsibilities included handling discipline actions. **The** Wood policy for disciplining violations included a progression from verbal warning, written warning, unpaid suspension and discharge.

On redirect examination Lorine stated that Wood had a policy of no practical joking or horseplay. Claimant received a copy of this policy upon hiring. (Employer's Exhibit No. 2) After **the** work accident Carl Zampini, Don Budren and Ms. Lorine verbally counseled Claimant about horseplay.

Upon questioning from **the** Board, Lorine defined horseplay as anything unsafe and not related to work duties. It is a manager or supervisor's duty to assure that any water on **the** floor is cleaned up promptly. There is a manager or supervisor on each level at all times. In addition, every employee is aware of **the** general policy of keeping floors clean and safe. A worker was responsible for cleaning down **the** stainless steel walls of **the** tall food warmers in **the** kitchen on **the** day that Claimant fell. Lorine observed a wet floor sign near **the** location where Claimant fell sometime after **the** incident. She believed that Claimant had kicked over a bucket while falling.

Wood presented **the** testimony of Sonja Brode, a catering chef who worked in **the** same kitchen as Claimant. Brode believes that

the floor near **the** sink where Claimant fell was dry. Brode had exited her office to enter a walk-in refrigerator and had kicked her leg up to waist height to stretch her hamstring muscle when she heard Claimant say "Oh, I can do that" and then heard a thud. She assumed that Claimant had been imitating her. She helped Claimant up from **the** floor to her feet. Claimant was crying and laughing with embarrassment.

On cross examination Brode admitted that she wasn't facing Claimant when she fell and did not see what happened. Large stainless steel food warmers were being cleaned around **the** area where Claimant fell. This is normally done everyday at that time. Later in **the** day Erica Porter interviewed Brode about **the** incident. She also discussed **the** incident with Deborah Alexander and Ceilla Feriam, other employees.

Wood presented **the** testimony of Deborah Alexander, an office assistant who was working at a computer in **the** kitchen office on March 30. **The** kitchen office walls are all glass. She saw Brode walking around **the** kitchen and kicking her leg up and squatting down. Claimant was giggling and yelling something about I can do that. She next heard a commotion. **The** chef, Carl Zampini, came over to help Claimant up. After **the** incident Brode told her that Claimant was trying to imitate her.

On cross examination Alexander could not recall exactly when **the** incident happened. When **the** large stainless steel food servers are washed daily, wet floor easels are put up. It is Wood policy that signs are put up whenever **the** floor is wet. Alexander did not directly observe **the** area around **the** sink after Claimant fell.

Claimant testified on rebuttal. She stayed at work for about an hour more after she fell. Only Erica Porter and Carl Zampini talked to her after her accident. Debbie Alexander was

at lunch and Sonja Brode was not around. After **the** accident, she never talked to Lucinda Lorine in person about **the** incident but did talk to her on **the** phone at a later date. At that time she only discussed insurance matters but not horseplay with Lorine. A worker had been washing **the** tall stainless steel food warmers around **the** time she fell. **The** worker was not present when she fell. When Carl Zampini assisted her up he asked about **the** water on **the** floor. Someone got a mop and put a sign up. **The** sign was in place when Claimant left work. Claimant never discussed **the** accident with Deborah Alexander. Claimant received no written warning or other discipline action after **the** accident. Claimant received **the** Wood policy on progressive discipline from Lorine or Porter when she was hired.

Immediately prior to **the** accident Claimant kicked up her leg about a foot off **the** floor, took three steps forward, and then fell on **the** wet spot on **the** floor. Brode had challenged her to kick her leg up when she passed by. Claimant did not fall when she was kicking her leg up.

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 a personal injury which resulted from an accident occurring within **the** course and scope of her employment. *Johnson v. Chrysler Corp.*, Del. Supr., 213 A.2d 64, 66 (1965). Wood does not contest **the** causation of Claimant's physical injuries, her medical expenses, or **the** periods for total and partial disability benefits. Wood disputes that **the** injuries sustained by Claimant on March 30, 1998, were "arising out of and in **the** course of **the** employment."

19 Del. C 2301 (15), 2304. 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, 621 A. 2d at 342; Collier v. State of Delaware, Del. Super., C.A. No. 93A-06-022, Del Pesco J. (July 11, 1994). Under this legal standard, **the** Board finds Claimant's actions on March 30, 1998, did not constitute horseplay and that her injury was work related.

The Board finds Claimant's testimony to be credible that she slipped on a wet spot in a kitchen area while performing her duties as a food preparers While there were no eyewitnesses to **the** slip and fall, **the** Safety Action Plan/Work Related Injury form completed by Erica Porter, a Wood manager, immediately afterwards indicates that there was soapy water on **the** floor. This is consistent with Claimant's version of **the** events. Both Sonja Brode and Deborah Alexander, Wood employees, also testified that walls of large stainless steel food warmers were being cleaned around **the** time that Claimant's accident occurred. Claimant testified that after **the** accident her shirt was wet and that Carl Zampini ordered that a wet spot be mopped and that a warning sign be put in place. Unfortunately, Mr. Zampini did not testify before **the** Board. Lucinda Lorine corroborated that a sign had been placed near **the** incident site sometime after **the** fall but believed that **the** wet spot was due to Claimant's kicking a bucket of water when she fell. While it is not clear if a bucket was in fact in **the** area, **the** Board finds it more likely than not that wet spots on **the** floor existed given **the** cleaning status of **the** nearby food warmers.

Wood argues that Claimant was engaged in horseplay at **the** time of **the** fall because she had been imitating a co-worker by kicking her leg in **the** air. Whether initiation of horseplay is a

deviation from **the** course of employment depends on: 1) **the** extent and seriousness of **the** deviation; 2) **the** completeness of **the** deviation (i.e., whether it was co-mingled with **the** performance of duty or involved an abandonment of duty); 3) **the** extent to which **the** practice of horseplay had become an accepted part of **the** employment; and 4) **the** extent to which **the** nature of employment may be expected to include some horseplay. Mosley v. State of Delaware, I.A.B. Hearing No.899152 (January 9, 1991) citing JA Larson **The** Law of Worker's Compensation, Section 23.00. Based on her testimony, **the** Board believes that Claimant kicked her leg only one to two feet off **the** ground and that she resumed normal walking before she slipped on **the** wet spot. **The** Board does not find that this one instance of kicking her leg rises to **the** level of horseplay. It was not a serious deviation and was co-mingled with **the** performance of her job duties. Claimant was moving from one part of kitchen to another as was necessary for **the** performance of her duties and had not abandoned her job. Finally, while **the** Board agrees that kitchen areas can constitute a dangerous work environment, it should be expected that unskilled food workers might engage in some type of physical relief on occasion. Ms. Brode, in a higher job position than Claimant, testified that she often kicked her leg up for **the** purposes of relieving muscle strain in her leg.

Even if Claimant's actions did rise to **the** level of horseplay, they do not constitute **the** cause in fact or proximate cause of her injuries because Claimant had resumed her normal walking gait immediately prior to **the** fall. She testified that she took three steps after **the** kick and prior to **the** fall.

For **the** above reasons **the** Board finds that Claimant's injury occurred within **the** course and scope of her employment. As such

she is entitled to receive benefits for total disability, partial disability, and medical expenses, as stipulated to by **the** parties.

Attorney's Fees

Pursuant to 19 Del. C. 2320 (g)(1), whenever a claimant is awarded compensation, that claimant is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of **the** award or \$2,250, whichever is smaller." 19 Del. C. 2320 (g)(1). In determining an award of attorney's fees, **the** Board must consider **the** factors outlined in Jennings v. Hitchens, Del. Super., 493 A. 2d 307, 310 (1984), such as **the** time involved in **the** presentations, fees customarily charge in **the** locality, **the** nature and length of **the** professional relationship with Claimant, and **the** attorney's experience/reputation. Counsel for Claimant submitted an affidavit attesting that he spent 21.6 hours preparing for **the** evidentiary hearing held on March 8, 1999, which lasted approximately three hours. Counsel has been admitted to **the** practice of law in Delaware for since 1974 and his association with Claimant began in April 1998. **The** issues of partial disability and medical expenses were subsumed within **the** preparation and presentation of **the** issue to total disability. Based on these factors and on **the** benefits received by Claimant, **the** Board finds that attorney's fees in **the** amount of \$2,250.00 or 30% of **the** award, whichever is less are reasonable.

STATEMENT OF **THE** DETERMINATION

The Board hereby GRANTS Claimant's Petition to Determine Compensation Due to award Claimant total disability benefits for **the** period from March 31 until May 19, 1998, at **the** compensation rate of \$260.00 per week; partial disability benefits for **the** period from May 20 until May 31, 1998, at **the** compensation rate

of \$130.00 per week; and partial disability for **the** period from June 1 until June 5, 1998, at **the** compensation rate of \$86.67 per week. **The** Board also awards Claimant medical expenses and attorney's fees. Claimant's medical witness fees are taxed as costs to Wood.

IT IS SO ORDERED THIS 18th day of March 1999.

INDUSTRIAL ACCIDENT BOARD

LOWELL L. GROUNDLAND

JANE E MITCHELL

Mailed Date:

PW 3/19/99
OWC Staff

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