BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

GORDON COLEMAN,	)	
	)	
Employee,	)	
	)	
v.	)	
	)	Hearing No.: 1295468
T.C. ELECTRIC,	)	
	)	
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 13, 2007, and continued on October 22, 2007, in the Hearing Room of the Board, New Castle County, Delaware. An extension of time for issuance of the decision was taken, pursuant to DEL. CODE ANN. tit. 19, § 2348(k).

PRESENT

LOWELL L. GROUNDLAND

ROMAYNE SEWARD

Lydia C.F. Anderson, Esquire, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Michael R. Ippoliti, Esquire, for the Employee

Eric D. Boyle, Esquire, for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Gordon Coleman ("Claimant") alleges that he was injured on May 23, 2006, while working for T.C. Electric ("TCE"). On May 11, 2007, he filed a Petition to Determine Compensation Due, seeking recognition of a work injury. A hearing date of September 13, 2007 was set and, at the start, the parties presented a joint application to bifurcate the hearing, because several witnesses[1] who had been subpoenaed did not appear. The parties addressed only the issue of compensability. TCE argued that Claimant was a voluntary participant in horse play when he was struck in the eye with a paintball. Claimant argued to the contrary, that he was ambushed while working. The Board granted a thirty day continuance so that a key witness could testify.

The hearing continued on October 22, 2007. This is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant, age 32, testified that he is married and has two children. He started working for TCE in the fall of 2001, as an electric helper. He would get wire and assist in installing the wiring and clean out the truck at the end of the day. In 2006, Claimant became an electrical mechanic. He did electrical wiring of houses in developments so that the work was in compliance with code provisions and passed inspections. TCE was a subcontractor, working in a development under construction by Zeccola Builders in Smyrna, Delaware. At 6:15 a.m., Claimant arrived at the shop to gather materials and he arrived at the worksite around 7:00 a.m. to start work. On May 23, 2006, he and a helper, Marc Peterson, began the rough-in work at a house. They did so without incident until his return from lunch. Around 12:20 p.m., they started work again on the second floor of the framed-in house. Claimant was pulling wires from one outlet to the next when Peterson noticed two guys, James Way and James Kennedy, pulling up

[1] Those absent included James Kennedy, the paintball shooter who hit Claimant in the left eye.

to the house. They were not assigned to be at that site. In fact, they were assigned to a job site in another county. Way and Kennedy came running toward the house shooting paintball guns. Claimant jumped from the second floor and ran for cover in the work van, which was parked in the driveway. A number of shots were fired before Claimant was hit in the left eye. He fell to the ground holding his eye and was transported to the hospital. Claimant eventually underwent two surgeries, but was unsuccessful in retaining vision in the eye. He can only see a faint light at the bottom of the eye and shadow movement, if the light is bright enough. He has a 98% loss of vision in the left eye.

Kennedy was identified as the person who shot Claimant. While Kennedy worked for a heating and air conditioning subcontractor, he and Claimant worked on job sites at the same time. They have a friendly relationship without conflict or disputes. They had two prior paint-ball exchanges at another site. A shot was taken at a personal truck, but not at an individual, testified Claimant. They continued to have friendly conversations. Since the incident, Kennedy has attempted to contact Claimant to see how he was fairing. Kennedy seems sorry for the injury. Claimant has not heard from Mr. Way.

Claimant stated that paintball became his hobby a few years ago. He and his cousin went to dedicated ranges. Claimant had his equipment with him because they often went to the range immediately after work. They wore protective head gear to prevent injury. A paintball could travel 50 feet at full velocity.

On cross-examination, Claimant stated that he had his paintball gun and mask in the truck, but he was not trying to get them. He was trying to get away. Kennedy and Way wore protective goggles while they were shooting into the van. Claimant had gotten into the rear of

the truck, but his mask was in the cab, which is separated by a cage. Claimant exited the van, believing Kennedy and Way had gone away, and that is when he was hit in the eye.

James John Catherman, a field supervisor with TCE, testified. He oversees workers, mechanics, and helpers, about 35 to 60 people. He works out of the Claymont office and is involved in scheduling, getting materials, and checking quantity and quality at the sites. Catherman goes to the job sites three times a week. He arrived at Claimant's worksite after the paintball incident occurred.

The next day, Catherman saw the truck which was shot up on the side and towards the back, with some hits on the front. There were 25 to 30 marks or more. Peterson reported to Catherman what occurred, describing how he and Claimant were ambushed. Catherman referred to previous warnings and wrote an official reprimand to Peterson regarding the event.

Catherman recalled a prior visit when he raised some concern about paintball activity. Claimant was wearing a clear plastic face shield at work, as he is required to wear protective face gear. Claimant assured Catherman that he was not engaging in paintball activity at work. Not long afterwards, Catherman went to the job site and noted paintball splats on the inside of the front door. He saw green splotches other places on the house and driveway. Catherman warned Peterson, because his paint ball color is green. He did not say anything to Claimant, whose paintball color is pink.

On cross-examination, Catherman stated that when a truck was previously marked with ball paint, the workers reported that Claimant had done this. The paintball marks were pink. This occurred around the time that he warned the workers concerning paintball play. Catherman also noted that no one else should be at a worksite unless he has official reasons.

Katherine Encarnacao is the office manager for TCE. She did billing and payroll. She noted that the subcontractor agreement notified that no horseplay and drugs or alcohol were tolerated. TCE's policy was to include this warning in the new hire booklet. Claimant's wife called Encarnacao to notify that Claimant would not be at work on the day after the incident because he was in the hospital. Encarnacao did not talk with Claimant about the incident; they only spoke of insurance, e.g. short term and long term disability.

Robert Berry, Jr. works for another subcontractor of Zeccola Builders. He testified to having known Claimant for 3.5 to 4 years and found him to be pretty conscientious. Berry spoke with Claimant daily and was the site supervisor at Hunting Mills, where the paintball incident occurred. He noticed paint spots on dumpsters and the houses, but thought that kids were involved with such activity. This was not permitted at work. Berry sent a letter to the subcontractors indicating that such activity would not be tolerated. The subcontractors were threatened with being kicked off the work site. There are 40 houses in the development and at any time, there would be various workers on site. Jackson Heating and Air Conditioning was doing work somewhere on site. Berry could not recall if the HVAC Company was working at the site on the day of the incident. After six months, the schedule is discarded as obsolete. Every trade, including plumbers, has a rough-in period. They are scheduled two days apart, but a company may fall behind.

On cross-examination, Berry stated that he saw Claimant with a facial mask when he was working. Berry thought it was an enhanced safety mechanism, which seemed like a good idea because of its full facial protection.

James Kennedy, of James Precision Heating and Air Conditioning, testified. On the day in question, he was working at Marrows Point, in New Castle County. He also did work at

Hunting Mills in Smyrna, Delaware. Kennedy was familiar with Claimant and had known him for a little more than a year through work activities. He did not socialize with Claimant and he did not previously engage in paintball activities with Claimant.

Kennedy testified that Claimant shot at and actually hit him several times before the date of the incident. While Kennedy did not have a paintball gun on those times, he acquired one just three to four days before May 23, 2006. Kennedy and another worker left their jobsite at Marrows Point and went to Hunting Mills around lunch time. Kennedy was not assigned to go to Hunting Mills that day, but he decided to engage in a paintball battle. Claimant was working in a house there and Kennedy shot at him. Claimant ran, jumping from a second story window, and got into the back of a van. He came out of the van and engaged in a paintball battle. Claimant was hiding around the truck, ducking and shooting. He did not have a mask on, but he shot at Kennedy and at Way, who was in the garage. When Claimant ran off across the yard, Kennedy followed, shooting at him. Then, Claimant stopped running, held his eye, and screamed, "My eye, my eye!" Kennedy got a medical kit and washed out Claimant's eye.

Kennedy testified that Claimant still had his paint gun with him. While there is a cage between the van and cab of the truck, there is access from the rear to the cab.

On cross-examination, Kennedy could not recall the distance between them when Claimant ran across the lawn. Kennedy did not intend to shot Claimant in the face. The gun is not accurate. A slight wind will knock the ball off course. The hopper of the gun holds over 50 balls, but Kennedy did not reload. He noted that Claimant previously told him to get a paint gun, but he refrained in an attempt to keep a professional atmosphere. No supervisor said anything about the paint, which washes off with soap and water, so Kennedy "went and got his own gun."

Compensability: The employer is bound by statute to pay compensation for personal injury or death by accident arising out of and in the course of employment. 19 *Del. C.* § 2304. This standard is normally met when the injury occurs on the employer's premises. The question here is whether Claimant was engaged in activity that was in the course and scope of his employment when he was injured. There is no dispute that Claimant was injured during a paintball battle, which occurred on the work premises. But, did the injuries arise from his employment as an electrician with TCE? Claimant has the burden of proof by a preponderance of the evidence on his petition seeking recognition of a work injury. For the reasons stated below, the Board finds that Claimant has not met his burden.

A determination of this issue is fact driven. First, the Board considered Claimant's testimony that on May 23, 2006, he had just returned from lunch and was engaged in work activities at Hunting Mills in Smyrna, Delaware, when Kennedy and Way began shooting paintballs at him and Peterson. It appears that Claimant was ambushed, as Kennedy was not even scheduled to be at Hunting Mills and was actually scheduled to be at another site in New Castle County. Nonetheless, paintball was Claimant's hobby and, because he and his cousin often went to dedicated ranges after work, he kept his equipment with him. The Board next considered the facts supporting TCE's argument that Claimant's injury occurred while he was engaged in horseplay. The Board accepts Claimant's testimony that he had two prior paintball exchanges with Kennedy at another site and that they had a friendly relationship. Kennedy's testimony – that he did not have a paintball gun on those occasions, that Claimant urged him to get a gun, and that he obtained a gun just three days before the incident – was not contradicted.

Claimant's suggestion that Kennedy get a gun supports a finding that Claimant desired to continue and expand paintball activities.

Third, the Board considered Claimant's testimony that, during the ambush, he got into the rear of TCE's truck but he was not trying to get his paintball equipment. He was only trying to get away. Claimant made a point of telling the Board that his mask was in the cab, which was separated from the van portion of the truck, suggesting that he could not get to his equipment from the rear. He did not testify that he got his gun. At this point, however, Kennedy's testimony contradicts Claimant's. Kennedy testified that there is access through a cage separating the rear van from the cab of the truck and that Claimant got his gun and returned firing. The Board believes that it is more likely than not that Claimant got his paint gun and engaged in a battle, which he desired. Kennedy's testimony that Claimant shot at Way, who was in the garage, was not contradicted.

Claimant's testimony regarding his paintball activities is suspect. The evidence revealed other instances when he was less than candid about his participation. When Catherman, the field supervisor for TCE, noticed that Claimant was wearing a full plastic facial shield while working, Catherman raised concern about paintball activity. Claimant gave assurance that he was not engaging in such activity at work. Yet, according to Catherman, his truck was previously marked with pink ball splats and the workers informed that Claimant had done this. Claimant did not object to or contradict this testimony. Also, even after Catherman's inquiry regarding activity, Claimant's helper was subsequently warned about his activity involving green paintball splats. Claimant did not say that Peterson engaged in the activity alone. Such evidence raises questions about Claimant's credibility.

Finally, the Board notes that Berry, the site supervisor for Zeccola Builders at Hunting Mills, testified that he noticed paint spots on dumpsters and the houses under construction. He also noticed that Claimant wore a facial mask, which must have been different from the unusual, as Berry thought it was some kind of enhanced safety mechanism. Arguably, Claimant stayed ready to go on the offense or defense even while working.

While Berry testified that he sent warnings to subcontractors concerning paintball activity, it is unclear as to when he did so. What is clear is that Claimant was aware that such activity was unacceptable on the job. The Board accepts Encarnacao's testimony that TCE's policy is that horseplay, drugs and alcohol are not tolerated on the job. This warning is placed in the new hire booklet. TCE's action against Peterson in previous paintball activity also made clear that such activity was prohibited on the job.

The Board reviewed the case of *Seinsoth v. Rumsey Electric Supply Company*,[2] where the claimant appealed a decision of an Industrial Accident Board Hearing Officer, who denied recovery for injuries sustained during vigorous horseplay. There, Seinsoth was held to be a willing participant in wrestling at the jobsite and was outside the course and scope of his employment when he injured his left knee and ankle. The warehouse managers were unaware of the employee wrestling matches. A question arose as to whether the incident occurred before or during lunch, but the hearing officer held that the time was irrelevant in determining whether the injury was outside the scope of employment. The hearing officer found that Seinsoth's injury resulted from horseplay outside the scope of employment because (1) the wrestling matches were not a continued practice in the employment; (2) there was no intent to injure; (3) Seinsoth was an active participant when injured, rejecting his testimony that he told the attackers that he did not want to participate; (4) the matches were performed in kept secret; and (5) the employees knew

[2] 2001 WL 845661 (Del. Super 2001).