BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

GORDON COLEMAN,	)	
	)	
Employee,	)	
	)	
v.	)	
	)	Hearing No.: 1295468
T.C. ELECTRIC,	)	
	)	
Employer.	)	

ORDER ON MOTION FOR RECONSIDERATION OR REHEARING

An Industrial Accident Board Hearing took place on September 13, 2007 and continued on October 22, 2007. A decision in the matter was rendered on January 23, 2008 (the "Decision"), denying a Petition to Determine Compensation Due filed by Gordon Coleman ("Claimant"), who sought compensation for injuries he sustained while working for T.C. Electric ("TCE"). Claimant received the Decision on January 30, 2008, and on February 15, 2008, he filed a Motion for Reconsideration or Rehearing, arguing that he was not an "armed" and voluntary participant in the paintball assault. On February 24, 2008, TCE filed its Response to the Motion, noting that it was untimely filed, in accordance with IAB Rule 22 [sic] and Superior Court Rule 6. TCE was aware that Claimant also sent the Motion via fax and the copy is marked February 13, 2008.

The Board disagrees that TCE's filing is untimely. The faxed copy clearly established a filing on February 13, 2008, as of 4:21 p.m., which is just before the close of business at 4:30 p.m. Apparently, counsel for TCE also received a copy of the motion around the same date and time. The Board considers Superior Court Rule 6 in the computation of time under IAB Rule 21. The Superior Court rule makes clear that when the time prescribed is less than 11 days, the intermediate Saturdays, Sundays, and legal

holidays are excluded in the computation. With the exclusion of the weekends, the last date for filing would be February 13, 2008, which Claimant accomplished.

With regard to the substantive question, Claimant argues that there is not substantial evidence to support the conclusion that he was a "willing participant in horseplay" during the encounter with Mr. Kennedy, which ultimately led to Claimant's left eye injury. There is no substantial evidence that he was armed with his paintball gun. Claimant testified that he was not in possession of his gun at any time during the course of the ambush. Also, both Mr. Kennedy and Claimant testified that he was fleeing away from Kennedy when Claimant was shot in the eye. In addition, Mr. Catherman, who investigated the scene after the incident, observed 25 -30 paintball "hits" on the van fired by Mr. Kennedy, but he did not report any fresh paintball "hits" that would have come from Claimant's gun. Finally, Claimant argues that no paintball gun was ever recovered on him or at the scene.

TCE counters, noting that the Board has discretion to accept or reject the testimony of any witness, so long as a rationale or basis for doing so is given. The Board determined that Mr. Kennedy was more credible in his version of the event than Claimant. Specifically, the Board accepted Kennedy's version that Claimant obtained his gun and returned fire. Also, the Board considered testimony and evidence regarding Claimant's previous paintball activities, which rendered his testimony "suspect." The history of incidents and contradictions weakened Claimant's testimony. Furthermore, the Board determined that Claimant did not tell the shooters to stop and he did not remain in the van. Instead, he left the safety of the van to run away, and the Board did not find that

testimony credible. It is within the Board's discretion to determine the credibility of witnesses.

The Board considered the arguments. As noted in the Decision, this case is fact driven. "The demeanor and credibility of witnesses and the weight to be accorded to their testimony is [sic] for the Board to determine." [1] "Even uncontradicted evidence need not necessarily be accepted as true, where there is evidence or circumstances from which a contrary inference may be drawn." [2] When rejecting evidence on the basis of credibility, the Board must provide specific relevant reasons for doing so, making references to the evidence of record that prompts disbelief.[3] Also, in making findings of credibility, the Board must also give relevant reasons for its adherence to the factual scenario it adopts.[4]

The Board found that the weight of the evidence was against Claimant. While Claimant argues that he was ambushed, it appears however that that is what he likely expected on more than one occasion. He was seen by both Mr. Catherman and Mr. Berry, on two different occasions wearing a clear plastic face shield or full facial mask, while he was working. The mask is apparently a piece of equipment used in engaging paintball battles. Kennedy's testimony that Claimant told him to get a paintball gun was not disputed. Since they do not socialize outside of work, one could only conclude that the paintball activity was to take place at work. In fact, Claimant had previously shot and hit Kennedy several times in paintball activity, even though Kennedy had not yet

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[1] *General Motors Corp. v. Cresto*, 265 A. 2d 42, 43 (Del. 1970).
[2] *Whaley v. Shellady, Inc.*, 161 A. 2d 422, 424 (Del. 1960).
[3] *Turbitt v. Blue Hen Lines, Inc.*, 711 A. 2d 1214, 1216 (Del. 1998).
[4] *Lemon v. Northwood Construction*, 690 A. 2d 912, 914 (Del. 1996).

acquired his own paintball gun. Claimant admitted to engaging in two prior paintball exchanges with Kennedy.

While Claimant and his helper, Marc Peterson, had been warned several times against paintball activity, as was evidence by splats of paint around the construction site, Claimant reportedly shot up Catherman's truck with pink paintball splats. Claimant admitted that he kept his equipment with him, protective face shield and gun, so that he and his cousin could go to a dedicated range after work. Claimant also admitted that he had his paintball gun and mask in the truck at the worksite, but he was not trying to get them when he entered the truck. Kennedy testified to the contrary, that Claimant actually obtained the paintball gun and returned firing. The Board did not find Claimant's testimony believable, because his prior actions reflect a desire to engage in paintball activities at work, despite warnings. Otherwise, it made no sense to have the equipment in the work truck, rather than his personal vehicle.

Claimant's credibility was also weakened when he specifically testified that he got into the rear of the truck, but his mask was in the cab and that was separated by a cage. That appears to be deliberately misleading, as Kennedy later testified that there is access from the rear to the cab, even with the cage between the van and cab. Claimant neither clarified his own testimony nor rebutted Kennedy's testimony. What was noteworthy is that Claimant did not say that his paintball gun was in the cab, which suggests that it may have been more readily accessible for use.

Claimant argued that Catherman investigated the scene and observed 25 to 30 paintball "hits" on the van, but none that could be attributed to Claimant. That is of no consequence, since there was no testimony that Claimant shot at the van too. More

importantly, however, Catherman testified that he arrived at the site after the incident. It is not clear how soon after the incident Catherman arrived. In any event, it was the next day that he saw the truck was shot up with 25 to 30 marks or more. It was not the same day as the event, as Claimant's reargument suggests.

It appears that Claimant was ambushed at the start of the paintball fight, but his subsequent activities -- jumping out of the second floor window, running into the back of the truck, exiting the truck, and then running across the lawn even with knowledge that Kennedy was still engaged -- pointed to his willing participation. Since Claimant's credibility is questioned, the Board will not rely on his version of the event, that he did not retrieve and use his paintball gun in the battle. It was Claimant's burden to demonstrate his disconnection from the horseplay. He could have stayed hidden in the truck until all was clear. He also could have offered, but did not offer, corroborating testimony from Peterson, who was on the site.

Claimant requested, in the alternative, opportunity to rebut Kennedy's testimony that Claimant exited the truck with a paintball gun. The Board notes that it granted a 30-day continuance so that Claimant could obtain Kennedy as a witness. Having done so and heard all of the evidence, the Board is satisfied that its determination is based on substantial evidence.

Claimant's Motion for Reargument is hereby **denied**.

IT IS SO ORDERED this 29th day of April, 2009.

INDUSTRIAL ACCIDENT BOARD

for LOWELL L. GROUNDLAND

ROMAYNE SEWARD

Lydia C. F. Anderson, Hearing Officer for the Board
LYDIA C. F. ANDERSON, ESQUIRE

Michael R. Ippoliti, Esquire, for the Employee
Eric D. Boyle, Esquire, for the Employer

Mailed Date: 4-30-09

OWC Staff