BEFORE THE INDUSTRIAL ACCIDENT BOARD

OF THE STATE OF DELAWARE

ALFONSO SMITH,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1387093
	)	
UNITED WATER DELAWARE,	)	
	)	
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, by stipulation of the parties, came before a Workers' Compensation Hearing Officer on January 10, 2013, in a Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

Julie Pezzner,

Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Matthew Bartkowski, Attorney for the Employee
Cassandra Roberts, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On August 16, 2012, Mr. Alfonso Smith ("Claimant") was injured in a motor vehicle accident that occurred at approximately 3:57 p.m. on State Route 4 (Maryland Avenue) at the Westmoreland Avenue intersection. On September 11, 2012, Claimant filed an initial Petition to Determine Compensation Due, alleging that the motor vehicle accident occurred during the course and scope of his employment at United Water Delaware ("Employer"). Employer contends that Claimant's injuries are not compensable under the Workers' Compensation Statute because: Claimant's motor vehicle accident was outside the course and scope of his employment; Claimant's injury was caused by an idiopathic event; and Claimant forfeited any entitlement to workers' compensation benefits by his failure to wear a seatbelt.

An evidentiary hearing was held on Claimant's petition on January 10. 2013. The parties stipulated that this case could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with title 19 *Del.C.* §2301B(a)(4). When hearing a case by stipulation, the Hearing Officer stands in the position of the Board. *See* 19 *Del.C.* §2301B. This is the Hearing Officer's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on his own behalf. He has worked for Employer as a meter reader for three years. He described his work responsibilities. Claimant stated that he lives in Middletown, Delaware. His work schedule is from 8:00 a.m. until 4:30 p.m. He has a thirty minute lunch break and two fifteen minute breaks that he combines into one long break when he can. On a typical workday, he drives to the Employer's location at 2000 First State Boulevard, Wilmington, DE 19804 where he reports to work and obtains his schedule. The schedule lists the locations of the meters he must check; the schedule does not direct the specific route he must

drive to get to each location. Claimant testified that he is not permitted to end his work day before 4:30 even if he completes his responsibilities early.

Employer provides Claimant with a company Ford Ranger truck during working hours for him to travel his route. Employees are responsible for maintaining the company vehicles including changing the oil, washing the exteriors, and cleaning/vacuuming the interiors. Claimant estimated that in a typical year, he would wash the company truck five times and he would vacuum the interior of the truck fifteen times. To wash the company truck he used the car wash facility located on Employer's premises. Claimant testified that it was not until after the motor vehicle accident that he became aware that Employer also provides a wet-dry vacuum on the premises to clean the interiors of the company vehicles. Claimant had been using the vacuums at Five Points Car Wash that is located approximately 3.8 miles from Employer's location to vacuum the inside of the company truck. He never sought reimbursement from Employer for the expenses he incurred to use the equipment at Five Points Car Wash.

Claimant testified that on the day of the motor vehicle accident, he arrived at work at 8:00 a.m. He described his route for the day. He started reading meters in Wilmington and subsequently drove to Newark for the next set of meter readings. Claimant testified that he completed his route around 2:45 p.m. He went to a Mike's Famous Steaks and Subs ("sub shop") where he enjoyed a sit-down lunch. The sub shop is not located at Christiana Mall.

Around 3:30 p.m., he decided to drive to Five Points Car Wash to vacuum the interior of the company truck. Claimant stated he had no intention of washing the truck that day; he only intended to vacuum the interior and to return the company truck by 4:30 p.m. Claimant acknowledged that he passed Employer's location to drive to Five Points Car Wash. Claimant

also acknowledged that he passed several other car washes along the way to Five Points Car Wash.

Claimant testified that he does not remember much about the motor vehicle accident. He stated that he had been feeling fine. He was not tired. He had not been drinking alcohol. He did not take any illegal drugs or prescription medication. He remarked that he does not know why he fainted. He believes he was wearing a seatbelt.

Claimant testified that after regaining consciousness, he recalls a woman arriving at the scene. He had slid down his seat. The seatbelt remained fastened and was strapped across his neck. The woman removed the seatbelt. Claimant acknowledged that according to the Patient Care Report and the accident report, Claimant had indicated that he believed he fell asleep while driving. The form also indicates that Claimant was not wearing a seatbelt.

Mr. Keith Tjaden, Claimant's supervisor, testified on behalf of Employer. He has worked for Employer for thirty-four years. He verified Claimant's work shift. Mr. Tjaden recognized that Claimant's job has down time but he stated that if an employee completes the responsibilities early, the employee should request more work.

Mr. Tjaden additionally verified that employees are responsible for keeping the company vehicles neat and clean. On the premises, Employer provides employees everything needed to clean the exteriors and interiors of the vehicles. Employees are not charged a fee to use Employer's equipment. Mr. Tjaden acknowledged that despite the duration of Claimant's employment at Employer, it is possible that Claimant was not aware that Employer had a vacuum on the premises. He remarked, however, that the vacuum is highly visible.

Mr. Tjaden stated that he is not aware of employees going to other facilities to maintain and clean the company vehicles. He did not indicate that cleaning a company vehicle at a

location other than Employer is forbidden or that it is mandatory to use Employer's facility and equipment. He has never had an employee including Claimant seek reimbursement for the costs of cleaning a company vehicle at an alternative facility.

Mr. Tjaden testified that for Claimant to drive to Five Points Car Wash as Claimant contends he was going, Claimant would pass four or five other car washes. In other words, there were closer and more convenient car washes to which Claimant could have driven. Mr. Tjaden acknowledged that the motor vehicle accident occurred close to Five Points Car Wash and that Claimant was heading in that direction. Mr. Tjaden spoke to Claimant at the hospital. Claimant had reported leaving lunch at Christiana Mall before heading over to Five Points Gas Station. Claimant did not tell Mr. Tjaden that he ate at the sub shop.

Mr. Tjaden stated employees may choose where they have lunch so long as the lunch break does not exceed the thirty minutes allocated to a lunch break.

Mr. Tjaden testified that Claimant did not have the reputation for keeping the company truck clean. Mr. Tjaden acknowledged, however, that Claimant had never been reprimanded for not properly maintaining the company truck.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to be compensable, the injury must arise out of or be in the course of employment. 19 *Del. C.* § 2304. As this is the Claimant's Petition, Claimant has the burden to prove by a preponderance of the evidence that the injury was caused by a work accident. *Goicuria v. Kauffman's Furniture*, Del. Super., C.A. No. 97A-03-005, Terry, J., 1997 WL 817889 at *2 (Oct. 30, 1997), *aff'd*, 706 A.2d 26 (Del. 1998). The "but for" definition of proximate cause that is used in the area of tort law is the applicable standard for causation. *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. Supr.1992). Hence, the Claimant must

prove that "the injury would not have occurred but for the accident. The accident need not be the sole cause or even a substantial cause of the injury. If the accident provides the 'setting' or 'trigger', causation is satisfied for purposes of compensability." *Reese*, 619 A.2d at 910.

Course and Scope of Employment and Arising Out of Employment.

To be compensable, the injury must arise out of or be in the course of employment. 19 *Del. C.* § 2304; *see* § 2301(15). The Act provides that a

> "Personal injury sustained by accident arising out of and in the course of employment":
> a. Shall not cover an employee except while the employee is engaged in, on or about the premises where the employee's services are being performed, which are occupied by, or under the control of, the employer (the employee's presence being required by the nature of the employee's employment), or while the employee is engaged elsewhere in or about the employer's business where the employee's services require the employee's presence as part of such service at the time of the injury ...

19 *Del.C.* § 2301(18)(a).

"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. 1995)(citing *Dravo Corp. v. Strosnider*, 45 A.2d 542, 543 (Del. Super. 1945)), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676 A.2d 906 (Del. 1996). It 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. On the other hand, "[t]he term 'arising out of employment' relates to the origin of the accident and its cause." *Rose*, 668 A.2d at 786. "[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. "[T]here 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).

Both Claimant and Mr. Tjaden presented credibly. The following facts are undisputed. Claimant drives a company truck during his shift. Claimant is responsible for maintaining the company truck and that maintenance includes washing the exterior and cleaning and vacuuming the interior. Employer provides on the premises a facility and the equipment necessary to maintain the company vehicles. It is reasonable to maintain the company vehicles during working hours.

Claimant testified that he utilizes Employer's facility to wash the exterior of the company truck. He stated he was not aware until after the motor vehicle accident that Employer also provides a wet-dry vacuum on the premises free of charge. Claimant testified that he only uses the vacuum at Five Points Gas Station to vacuum the interior of the company truck. He explained that he preferred using the vacuum at Five Points Gas Station; he considers the vacuu, to be reliable and more cost effective than at other car washes.

Mr. Tjaden testified that Claimant should have known about the wet-dry vacuum on Employer's premises because it is clearly marked. However, Mr. Tjaden also testified that it is possible Claimant may not have been aware of Employer's wet-dry vacuum even though Claimant had worked for Employer for three years. The latter acknowledgement by Mr. Tjaden carried great weight particularly in light of the duration of Claimant's employment; the acknowledgement also bolstered Claimant's representation that Claimant only used Five Points Gas Station to vacuum the interior of the company truck.

While it is more practical to clean the interior of a company vehicle at Employer's location, based on the evidence, cleaning a company vehicle at an alternative location was not

forbidden; cleaning a company vehicle only on Employer's premises was not mandated. Therefore, technically, an employee would have the freedom to seek an alternative location within reason. If an employee utilized an alternative location, Employer would not reimburse the employee for the associated incurred costs. Claimant testified that he never previously sought reimbursement for the costs he incurred to use the wet-dry vacuum at Five Points Gas Station nor did he intend to seek reimbursement on the day of the motor vehicle accident.

Five Points Gas Station is located less than four miles from Employer's location. According to Claimant, on the day of the motor vehicle accident, he completed his responsibilities around 2:25 p.m. and decided to take a late lunch break. Claimant testified that he finished eating lunch at approximately 3:30 p.m. and decided to vacuum the interior of the company truck at Five Points Gas Station. The motor vehicle accident was at a location not only close in proximity to Five Points Gas Station but Claimant was driving in the direction consistent with traveling to Five Points Gas Station.

I believe that on the day of the motor vehicle accident, Claimant was in fact driving to Five Point Gas Station to vacuum the interior of the company truck before returning it by 4:30 p.m. to Employer.[1] Claimant admittedly drove passed other facilities while heading to Five Points Gas Station where he could have vacuumed the interior of the company truck. However, Five Points Gas Station was Claimant's preferred location and was the only location that he used to vacuum the company truck. In the big scheme, to travel less than four miles from Employer to complete responsibilities affiliated with work particularly when Claimant was unaware that such task could have been performed at Employer's premises is not unreasonable; four miles under

[1] Employer questioned Claimant's credibility by referring to his conflicting account of where he ate lunch on the day of the motor vehicle accident and his conflicting and questionable account of wearing a seatbelt. While I recognize Claimant's inconsistent statements and that Claimant's elaborated account of wearing a seatbelt was questionable, in light of the totality of the testimony, Claimant's contention that he was driving to Five Points Gas Station to vacuum the interior of the company truck was credible.

these circumstances is not unreasonably far. Therefore, I find that Claimant was at a place where he could reasonably be expected to be during the time of his employment to perform a task that is part of his employment. I find that Claimant was in fact in the course and scope of his employment at the time of the motor vehicle accident.

Idiopathic versus Unexplained Falls

It is well established in Delaware case law that injuries sustained in an idiopathic fall can be found compensable if the employment contributes to the harm, such as by triggering the idiopathic condition. "A preexisting disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation if the employment aggravated, accelerated, or in combination with the infirmity produced the disability." *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992). An employer takes the employee as it finds him. *Reese*, 619 A.2d at 910. "If the injury serves to produce a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established." *Reese*, 619 A.2d at 910. On the other hand, Delaware case law has also recognized that idiopathic falls are not compensable when the reason for the fall is due to a medical condition unrelated to employment and not triggered by something related to employment. *Lecates v. Harrison House of Delmar*, Del. Super., C.A. No. 89A-AP1, Lee, J (September 28, 1990).

Employer contends that Claimant's injury is not compensable under the Workers' Compensation Statute because his injury is the result of an idiopathic fall that was not triggered by his employment. It was not an overly hot day. Claimant had just finished lunch so his thirst was quenched and his appetite was nourished.

In this case, it is unclear from the evidence whether Claimant fainted while driving or fell asleep while driving. What is important in this case, is that Claimant's temporary loss of

consciousness or sudden falling asleep has an unknown cause; the occurrence was not due to a medical condition that is personal to Claimant and is unrelated to his employment. Therefore, idiopathic fall doctrine would not apply in this case.

To the contrary, the doctrine that would apply to this case is the "unexplained fall doctrine" because the origin of the fall is neutral or unexplained. Under the latter doctrine, an employee can recover under the positional-risk theory. In other words, an employee can recover if the employment places the employee in a place and time of injury that substantially contributes to the employee injuring himself or herself at the time of the unexplained fall. *See* Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law,* § 3.05 (internet ed., accessed January 2012; <www.mathewbender.com>) ("An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of employment placed claimant in the position where he or she was injured."). The positional-risk theory has been applied in *Delaware Transit Corp. v. Hamilton*, Del. Super., C.A. No. 01A-03-003, Ridgely, J., 2001 WL 1448239 (October 31, 2001). In *Delaware Transit*, the claimant injured her back while stepping on a curb in performance of a work responsibility. Although the medical experts agreed in that case that the injury could have occurred anywhere and at a time unrelated to her employment, the court held that the employment placed the claimant at a time and place of injury thereby causing the employment to be a substantial contributing factor to the injury.

In this case, Claimant's injury did not occur strictly from falling asleep or from fainting. Claimant's injury occurred from being involved in a motor vehicle accident in which the company truck Claimant was driving struck a utility pole. As I found above, Claimant was driving the company truck at the time of the motor vehicle accident in the course and scope of his employment. Had Claimant not been driving at the time he either fainted or fell asleep, he

might not have been injured. Therefore, the conditions and obligations of Claimant's employment placed Claimant in a position where he was injured; the employment served as a substantial contributing factor to the injury. I find that Claimant's injury arises out of his employment.

Forfeiture

Employer contends that Claimant forfeited any entitlement to workers' compensation benefits by his failure to wear a seatbelt. Under 19 *Del.C.* §2353(b) "If any employee be injured as a result of ...the employee's willful failure or refusal to use a reasonable safety appliance provided for the employee or to perform a duty required by statute, the employee shall not be entitled to recover damages in an action at law..." Such section of the Delaware Code is inapplicable in this case as a result of the Seat Belt Safety Act. Under 21 *Del.C.* §4802(i):

> Failure to wear or use an occupant protection system shall not be considered as evidence of either comparative or contributory negligence in any civil suit or insurance claim adjudication arising out of any motor vehicle accident, nor shall failure to wear or use an occupant protection system be admissible as evidence in the trial of any civil action or insurance claim adjudication.

In other words, whether or not Claimant wore a seatbelt is inadmissible as evidence and therefore, cannot be deemed a failure or refusal by Claimant to use a reasonable safety appliance provided to the employee by the employer.

Attorney's Fee

A claimant who is awarded compensation generally is entitled to payment of "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 smaller...." 19 *Del.C.* § 2320(10)(a). At the current time, based on Delaware's average weekly wage, the maximum calculates to $9,675.20. The factors that must

be considered in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55 (Del. 1973). The Board is permitted to award less than the maximum fee. So long as the Board awards some fee and considers the *Cox* factors, the Board may grant a nominal or minimal fee in an appropriate case. *See Heil v. Nationwide Mutual Insurance Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.*, 251 F. Supp. 189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient evidence to make the necessary calculation.

Claimant's counsel submitted an affidavit enabling me to consider the necessary *Cox* factors. Claimant's counsel spent eight hours preparing for the hearing. The hearing lasted a little less than one hour. Claimant's counsel has been representing Claimant since August 28, 2012. He has been admitted to the Delaware Bar in 1994 and has seventeen years experience working in the area of workers' compensation. While the questions of law were straightforward, this case did involve questions of fact. Based on the type of case and the amount of time counsel expended preparing, counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although he could not work on other cases simultaneously with this case. Counsel normally charges $300.00 per hour for trial work and has agreed with Claimant to charge a contingency rate of one-third of the gross amount recovered plus costs. There is no evidence that counsel was precluded from accepting other employment because of his representation of Claimant although he could not represent the employer. Counsel does not expect to receive compensation from any other source with respect

to this litigation. There is no evidence that Employer lacks the financial ability to pay an attorney's fee.

Taking into consideration the fees customarily charged in this locality for this type of claim, the services that were rendered by Claimant's counsel, and the factors set forth above, I award an attorney's fee to be paid by Employer in the amount that is equal to the lesser of $2,700 or thirty percent of the value of the award.

STATEMENT OF THE DETERMINATION

For the reasons stated above, I find that Claimant's injury is causally related to a work accident and has arisen out of the course and scope of employment.

IT IS SO ORDERED THIS 23rd DAY OF JANUARY, 2013.

INDUSTRIAL ACCIDENT BOARD

JULIE PEZZNER
Workers' Compensation Hearing Officer

Mailed Date: 1-24-13

OWC Staff