BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

State trooper playing in charity softball game ie in C&S

CHARLES DALTON, Employee, v. STATE OF DELAWARE, Employer.	)	Hearing No. 1237627

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 August 3, 2004, in the Hearing Room of the Board, Wilmington, Delaware. The Board extended the time to render its decision on August 17, 2004.

PRESENT:

ALICE MITCHELL

ANTHONY MUROWANY, JR.

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

APPEARANCES:

Thomas Roman, Attorney for the Employee

Dennis Menton, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Charles Dalton ("Claimant") filed a Petition to Determine Compensation Due on March 31, 2004. In his petition, Claimant requests a finding that his August 30, 2003, wrist injury occurred in the course and scope of his employment with the State of Delaware ("State"). State concedes that an injury occurred but denied that it was within the course and scope of Claimant's employment as a State Trooper. The only issue before the Board concerns whether Claimant's wrist injury is compensable as having occurred within the course and scope of his employment. What follows is the Board's decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on his own behalf. He is a Corporal in the Delaware State Police. His supervisor, Lt. Paul Taylor sent an email on the state police computer system requesting volunteers for participation in a charity softball tournament against the New Castle County Police Department. Claimant had volunteered in the past for the state police team and they wore state police softball uniforms. On the date of the tournament, Claimant climbed a fence to retrieve a ball. He fell and fractured his wrist. Claimant required surgery and had pins placed in his wrist.

On cross-examination, Claimant agreed he used his own softball equipment except for the uniforms. He did not place any sort of participation credit request letter in his file. He admitted that the town of Middletown runs the tournament. He felt obligated to play in the game to represent the state police.

Tom Brackin testified on behalf of Claimant. Lt. Brackin is vice president of the Delaware State Trooper's Association ("DSTA") and a command level officer in the state police.

He noted the DSTA participates in charitable events. He opined that the state police derive a substantial benefit from charity event participation.

On cross-examination, Lt. Brackin believed participation in the softball game was voluntary. He agreed that a trooper must document his community service hours to receive any kind of credit towards advancement.

Senior Corporal John Davison testified on behalf of Claimant. Cpl. Davison, a patrol trooper, played in the same softball game as Claimant. He believed that the state police derive a substantial benefit from community events and believed participation in these events is an obligation for a state trooper.

Trooper C[1] testified on behalf of Claimant. Trooper C is a corporal in the state police. The officer played in the softball game with Claimant. Trooper C believed participating officers represented the state police in the game.

On cross-examination, Trooper C did not believe that a trooper of Claimant's rank required community service or career development points to advance in rank.

Norman Cochran testified on behalf of Claimant. Mr. Cochran retired in 1982 as superintendent of the state police and as a colonel in the army national guard. He indicated that the state police is a paramilitary organization. He encouraged troopers under his command to coach ball teams and play sports. Col. Cochran opined that the state police received a substantial benefit from community activities like charity events. He expected troopers to participate when asked.

Lt. Paul Taylor testified on behalf of the State. He organized the charity softball game. Lt. Taylor sent troopers an email and placed a notice on the bulletin board requesting attendance

[1] Trooper C is a pseudonym used to protect the identity of the witness as the trooper works in an identity-sensitive assignment.

at the softball game. He requested that players who participated donate money to the charity. The state police had no financial commitment to the game organizers and received no monetary benefit. The softball game has been active for five or six years and was approved initially by state police command. The state police did not provide equipment. Lt. Taylor indicated that Middletown organized the charity event. He indicated that playing softball in a charity event does not contribute to rank advancement. He denied intimidating anyone to play in the game.

On cross-examination, Lt. Taylor agreed that he requested participation in his role as troop supervisor. His request was distributed via troop email. Participation in the game was authorized by Capt. Taylor (troop commander) and Maj. McDerby (New Castle Co. Operations Commander). He agreed that the state police benefits from the charity game. Lt. Taylor admitted he represented the state police at the event. He further admitted that when a troop supervisor requested participation from a subordinate, he expected compliance with the request.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Course and Scope

In this Petition to Determine Compensation Due, Claimant has the burden of establishing that his injury arose out of the course and scope of his employment with the State. *See Histed v. E.I. DuPont de Nemours & Co*, 621 A.2d 340, 343 (Del. 1993); *Taylor v. American Stores Co.*, 1994 WL 465542 at *2 (Del. Super.). The Workers' Compensation Act ("Act") states that an employee will be compensated "for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence." 19 *Del. C.* § 2304. The Act further provides that it

> [s]hall 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(15)a.

"[Q]uestions relating to the course and scope of employment are highly factual. Necessarily, they must be resolved under a totality of the circumstances test." *Histed*, 621 A.2d at 345. Furthermore, when interpreting the Act, it is the purpose and duty of the Board to "construe and administer it with reasonable liberality." *Histed*, 621 A.2d at 346. Construing the Act with reasonable liberality, the Board finds that Claimant has established that his injuries arose out of the course and scope of his employment.

A considerable amount of the testimony focused on the question of whether the state police derived a benefit from participation in the charity softball game. The evidence is undisputed that Claimant's injuries arose from a fall he suffered while playing in this game. The place of the injury was clearly not "in, on or about the premises" of Claimant's employment nor was it "occupied by, or under the control of" the State.

Therefore, because he was not on the employment premises, in order to prevail Claimant must establish that at the time that he was injured he was "in or about the employer's business where the employee's services require[d] the employee's presence as part of such service." 19 *Del. C.* § 2301(15)a. Claimant's counsel argues that Claimant's actions were taken in good faith to further his employer's interests. *See Riddell v. California Plant Protection, Inc.*, 1988 WL 67787 at **2 (Del. Super.). It is argued that Claimant's duties as a state trooper, as reflected in the testimony of all witnesses, extended to representation at charity and community events. It is

further argued that, Claimant's participation shed a positive community light on the state police and may have acted to deter crimes in the area and reflect well on the state police's services.

The Board agrees. In participating in the softball charity game at the request of his Lieutenant on a team comprised exclusively of fellow state troopers, Claimant was within the scope of his responsibilities for the State and went about the State's business by his participation. Claimant buttressed his argument by evidencing that participation in this event was sanctioned by state police command and was believed to benefit the state police and their image in the community. The Board is satisfied that Claimant, in participating in the softball game, intended to further the interests of the State. In fact, there is evidence that Claimant never sought to gain personally from his participation as he did not file for a recognition of community service for his personnel file. He was therefore "in or about the employer's business" at the time of injury.

To be compensable, an employee's injury must be reasonably related or incidental to the employer's business. "In other words, personal deviations from the employer's business which break the causal connection . . . do not arise out of the course and scope of employment," if the deviation is so great that an intent to abandon the job temporarily may be inferred or the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment. *Bedwell v. Brandywine Carpet Cleaners*, 684 A.2d 302, 305-06 (Del. Super. 1996)(citing *Ford v. Bi-State Development Agency*, 677 S.W.2d 899, 902 (Mo. Ct. App. 1984)). From the circumstances in this case, the Board concludes that, by playing in the charity softball game, Claimant was intending to further the business of the State.

Based on the factual circumstances viewed in totality and giving liberal construction to the Workers' Compensation Act, the Board finds Claimant has met his burden of proof in this matter. As such and for the reasons stated above, Claimant's petition is GRANTED.

Attorney's Fees

Pursuant to title 19, section 2320(g)(1) of the Delaware Code, a claimant awarded compensation is entitled to payment of a reasonable attorney's fee in an amount not to exceed 30% of the award or $7,857.50, whichever is smaller. Such fees are not awarded, however, unless counsel for Claimant submits an affidavit which complies with the factors listed in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

In the instant matter, counsel submitted an affidavit requesting the Board award such fees. The Board reviewed the request and finds that the affidavit complies with the factors established in *Cox*. Accordingly, the Board concludes that Claimant is entitled to his attorney's fees taxed as a cost against the State based on the factors set forth in *Cox*. The factors include:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fees customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and the length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) Whether the fee is fixed or contingent;
> (9) The employer's ability to pay; and
> (10)Whether fees and expenses have been or will be received from any other source.

See Cox, 304 A.2d at 57.

Consideration of these factors does not prohibit the granting of a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Ins. Co.*, 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home*, Del. Super., C.A. No. 96A-01-005, Cooch, J. (Aug. 9, 1996).

Pursuant to the factors listed in *Cox*, the Board finds as follows. Claimant's counsel submitted an affidavit reciting that he spent over three hours in preparation for the hearing. The hearing lasted about two hours. The affidavit lists September 26, 2003, as the initial contact date with Claimant. The issue in this case did not appear to have been particularly novel or difficult, nor was Claimant's counsel effectively precluded from accepting other employment because of this case. Any recovered fee is contingent and no special time limitation appears to have been imposed by either Claimant or the circumstances. He listed a customary rate as the customary contingency fee in these matters.

The Board finds that the State can afford to pay an award. Claimant's counsel has not received and does not expect to receive compensation from any other source.

Claimant's counsel has been a member of the Delaware Bar for twenty-seven years. Claimant received a benefit in this matter because of his counsel's efforts in that his injury was determined to be causally related to his work accident. Taking into account these factors, and the fees customarily charged in this area, the Board finds that an attorney's fee of $1,500.00, is appropriate for counsel's services in this case, if less than thirty percent of the total award.

STATEMENT OF THE DETERMINATION

For the reasons stated above, Claimant's petition is GRANTED. The Board awards an attorney's fee.

IT IS SO ORDERED THIS 30th DAY OF AUGUST, 2004.

INDUSTRIAL ACCIDENT BOARD

Alice Mitchell, III
ALICE MITCHELL

Anthony Murowany Jr.
ANTHONY MUROWANY, JR.

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: 8/30/04

OWC Staff