BEFORE THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

DAWN ARMSTEAD, Employee, v. DELAWARE CLAIMS PROCESSING FACILITY, Employer.	)	Hearing No. 1383199

ORDER ON COURSE AND SCOPE OF EMPLOYMENT

This matter came before the Board on October 25, 2012, for a legal hearing. On May 31, 2012, Dawn Armstead ("Claimant") filed a Petition to Determine Compensation Due alleging she sustained injuries on March 15, 2012, as a result of a slip and fall while entering her place of employment as a claims reviewer for the Delaware Claims Processing Facility ("DCPF"). On September 20, 2012, DCPF filed a motion to dismiss Claimant's pending claim on the basis that she was not within the course and scope of her employment at the time of the alleged work accident. *See* Del. Code Ann. tit. 19 § 2301(18).

The parties agreed prior to the start of the hearing that Claimant was an employee of DCPF, and she was walking to the Nemours Building in Wilmington, where DCPF was a tenant, at approximately 6:50 a.m. when she fell and twisted her left ankle. In addition, the employer submitted a memorandum of law in support of its motion for dismissal.

SUMMARY OF THE FACTS

Claimant testified that she has been employed as a claims reviewer for one year for DCPF and reports to its office in the Nemours Building, at 10th and Orange Streets in

Wilmington. Her job started at 7 a.m. on weekdays. On March 15, 2012, she had parked her car at 6:45 a.m. at a nearby lot, and was walking to the office while it was still dark outside. As she was crossing the semi-circular entrance area at the Nemours Building, she slipped and fell on a dip in the asphalt injuring her left leg.

On cross examination, Claimant identified photographs (Employer's Exhibit # 1A to 1E) taken of the location where she fell. She marked an "x" on the exact location of the fall on one of the photographs, which was adjacent to the "Sugarfoot" cafe entrance, by the valet parking area.

Upon entering the building entrance, which was manned by security, she normally took the escalator or steps to her office on the second floor. The DCPF human resources office was located on the ground floor of the building. Claimant pays for her own parking but as an employee of DCPF she is reimbursed at the rate of $60.00 per month for parking.

Kimberly Maguire, the human resources director for DCPF, testified the claims reviewer job that Claimant performed is a sedentary duty position processing claims forms. Her shift normally started at 7 a.m. and ran to 3 p.m. DCPF is one of nine tenants in the Nemours Building. The company has 330 employees and occupies four floors in the building. Claimant's office was on the first floor above street level. As a tenant, DCPF has nothing to do with maintenance or security, inside or outside the building. All DCPF staff persons receive a monthly transportation stipend.

On cross examination, Ms. Maguire explained that there is no parking garage attached to the Nemours Building, but there is valet parking available that any employee can use for a fee. The lease for the location includes maintenance care and amenities inside the building.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to receive workers' compensation benefits, Claimant carries the burden of proof and must demonstrate, by a preponderance of the evidence, that she suffered a personal injury from an "accident arising out of and in the course of employment." Del. Code Ann. tit. 19, §§ 2301 (18), 2304; *see also Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965). An accident is an incident "with a definite referral to time, place and circumstance." *Faline v. Guido & Frances DeAscantis & Sons*, 192 A.2d 921, 924 (Del. 1963), *overruled on other grounds by Duvall v. Charles Connell Roofing*, Del. Supr., 564 A.2d 1132,1134 (1989)(abandoning "unususal exertion" rule).

"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.*, Del. Super., 668 A.2d 782, 786 (1995)(citing *Dravo Corp. v. Strosnider*, Del. Super., 45 A.2d 542, 543 (1945)), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, Del. Supr., 676 A.2d 906 (1996). This term 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. The Workers Compensation Act, Del. Code Ann. tit. 19 ("Act") codifies this principle by providing that for an employee to be considered covered, he or she must be "engaged in, on or about the premises where the employee's services are being performed . . . or while the employee is engaged elsewhere in or about the employer's business where the employee's services require the employee's presence." 19 *Del. C.* § 2301(18)a. In short, "in order to be compensable, the injury must have been caused in a time and place where it would be reasonable for the employee to be under the circumstances." *Rose*, 668 A.2d at 786. The "employee does not have to be injured during a job-related

activity to be eligible for worker's compensation benefits." *Tickles v. PNC Bank*, Del. Supr., 703 A.2d 633, 637 (1997). Acts incidental to employment, such as "eating, drinking, smoking, seeking toilet facilities and seeking fresh air, coolness or warmth" are all considered to be within the course of employment. *Tickles*, 703 A.2d at 637.

"The term 'arising out of employment' relates to the origin of the accident and its cause." *Rose*, 668 A.2d at 786. For the purposes of this prong, 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. In relation to this, the Act specifically provides that a compensable injury does not include "any injury caused by the willful act of another employee directed against the employee by reasons personal to such employee and not directed against the employee as an employee or because of the employee's employment." 19 *Del. C.* § 2301(18)b. In other words, "there 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).

Whether a 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 v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del.1993); *Collier v. State of Delaware*, Del. Super., C.A. No. 93A-06-022, Del Pesco J. (July 11, 1994).

Based on the factual circumstances in this case, the Board finds that Claimant's injury arose out of and was in the course of her employment on March 15, 2012, because she was walking on her way to report for work and fell at a location that may be construed as part of the employer's premises.

The "coming and going rule" bars recovery for accidental injuries occurring during and employee's regular travel to and from work, *see Bernadette's Hair Designers v. Incollingo*, 1990 WL 105023 (Del Super. Ct. 1990). However, the later Superior Court holdings in *Jones v. Wendy's*, 1996 Del. Super. LEXIS 2 (Del. Super. Ct. Jan. 23, 1996) and *DelHaize America, Inc. v. Barkas*, 2007 Del. Super. LEXIS 246 (Del. Super. Ct., Aug.22, 2007) carve out exceptions that extended and expanded the concept of "premises liability." In *Jones*, benefits were awarded to an employee who slipped on ice as she was stepping from a mall parking lot onto the sidewalk owned by the employer. In *DelHaize*, benefits were awarded to an employee who was injured in a motor vehicle accident in the common parking lot, not owned by the employer, but which the employer acquired a right to use and over which it exercised control.

Also, the Delaware Supreme Court expanded the concept of "premises" in *Tickles* where the claimant sustained an injury while using an automated teller machine on the employer's campus, although she was doing so in a building separate and apart from the office location in which she worked. However, the *Tickles* holding focused on the claimant's conduct of using the automated teller machine, which the court construed to be a reasonably necessary act of personal convenience or comfort in preparation of her workday that occurred within a reasonable period prior to her scheduled time to start work.

In this case, following these legal precedents, the Board concludes that the semi-circular driveway area in front of the Nemours Building where Claimant fell constitutes the threshold to the landlord's "premises" for workers' compensation purposes. The location of the fall was within a parking semi-circle, where valet parking, an amenity offered by the landlord of the building is located. The semi-circle is adjacent to the public street, and there

was no evidence offered that the area was, in fact, an extension of the public street. Although DCPF did not own the building, as a tenant, it had a business relationship with the landlord to use the premises, including the adjacent semi-circular parking apron in front of the Nemours Building.

Claimant was in the process of arriving at work at her normal and customary time when the fall occurred. There is no dispute that she was engaged in any other act of personal comfort or convenience at the time. Furthermore, based on the testimony of Ms. Maguire, Claimant, as an employee, could have opted to use the valet parking at the Nemours building on the day she was injured, in which case there would likely be no argument from the employer that she had reached the DCPF premises at the time of the slip and fall.

For the above reasons, the Board concludes that Claimant's fall on March 15, 2012, occurred during the course and scope of her employment. Thus, the Board hereby DENIES the employer's motion to dismiss Claimant's pending petition.[1]

IT IS SO ORDERED this 4th day of December, 2012.

INDUSTRIAL ACCIDENT BOARD

John Daniello

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

Mailed Date: 12-5-12

OWC Staff

Brian Lutness, Attorney for the Employee
John M. Morgan, Attorney for the Employer

[1] A hearing on the merits on the pending petition is now scheduled for December 19, 2012. If necessary, the parties may file a request for a continuance of that hearing on the merits.