BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

HERMO J. RIVERA,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1381770
	)	
WAL-MART,	)	
	)	
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 20, 2012, in the Hearing Room of the Board, New Castle County, Delaware. Pursuant to Del. Code Ann. tit. 19, § 2348(k), the Board concluded its deliberations on October 5, 2012, and required an extension of time to complete the decision.

PRESENT:

JOHN DANIELLO

OTTO MEDINILLA

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

APPEARANCES:

Timothy E. Lengkeek, Attorney for the Employee

Lauren C. McConnell, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On March 29, 2012, Hermo J. Rivera ("Claimant") filed a Petition to Determine Compensation Due alleging he sustained injuries on February 25, 2012, as a result of a motor vehicle accident occurring on an access roadway owned and controlled his employer, Wal-Mart. The employer contends that the accident occurred outside the course and scope of his employment as Claimant was on an unpaid lunch break. *See* Del. Code Ann. tit. 19 § 2301(18).

The parties submitted a joint Stipulation of Facts, pursuant to *Rules of the Industrial Accident Board of the State of Delaware* ("I.A.B. Rules") Rule 14(A). As the factual details are not in dispute, neither party submitted any witness testimony. However, each party submitted memorandum of law on the legal issue of course and scope of employment before the Board.

SUMMARY OF THE FACTS

The Board finds the following stipulated facts to be relevant to its legal determination below. On February 25, 2012, Claimant was working as a part-time inventory associate for Wal-Mart, with employment fixed at its Middletown store. His shift included a mandatory one-hour, unpaid lunch break for which he was required to use a clock-in device.

After clocking out for lunch on February 25, Claimant asked a co-worker to drive him off-site to his neighbor's residence where he picked up a motor vehicle for his private use. Claimant drove that motor vehicle back to Wal-Mart without making any stops or purchases. After he turned onto the access road at Wal-Mart, which was owned and controlled by Wal-Mart, he was heading towards the parking lot when he was involved a motor vehicle accident.

Claimant received back injuries as a result of the motor vehicle accident. However, he clocked in and returned to work to complete his shift that day.

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 he 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 injuries arose out of and were in the course of his employment on February 25, 2012, as he

was returning to work from his lunch break since he was on the employer's property when the motor vehicle accident occurred.

The Board agrees with Claimant's legal argument that "injuries occurring while [the employee] is going to and from work are compensable if they occur on the employer's premises." *Jones v. Wendy's*, 1996 Del. Super. LEXIS 2 (Del. Super. Ct. Jan. 23, 1996). The parties stipulated that "Wal-Mart owned and controlled the access road where the motor vehicle accident occurred. Here, Claimant was returning to work from his lunch break.

The Board finds Claimant's reasoning persuasive that an injury is compensable if it arises from a "situation which is an incident or has reasonable relationship to the employment, and there be a causal connection between the injury and the employment." *DelHaize America, Inc. v. Barkas*, 2007 Del. Super. LEXIS 246 (Del. Super. Ct., Aug.22, 2007). However, the *DelHaize* court further noted "there does no have to be an 'essential causal relationship' between the employment and the injury. Therefore, an employee does not have to be injured during a *job-related activity* to be eligible for workers' compensation benefits." *Id. (emphasis added).* The DelHaize court further explained that the phrase "in the course and scope of employment" would cover "those things that en 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." *Id.*

In this case, Claimant was returning to work at Wal-Mart following his lunch break when the motor vehicle accident occurred on the employer's premises. In fact, he completed the rest of his shift there after sustaining the injury from the motor vehicle accident. The Board finds it reasonable that an employee with an unpaid lunch hour may leave the employer's premises to conduct personal errands. Of course, during the time he is away from

the premises, he is at his own risk for injury. However, once he returns to the employer's premises with the intent to return to work, as is undisputed under the circumstances of this case, he would once again be afforded the protection of the Workers' Compensation Act.

While Wal-Mart is correct that 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), the later Superior Court holdings in *Jones* and *DelHaize* 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. In the present case, it is undisputed that Wal-Mart owned and controlled the access road on which Claimant's motor vehicle accident occurred.

Finally, Wal-Mart argues that Claimant's injuries from the motor vehicle accident should not entitle him to workers' compensation benefits as its circumstances had no reasonable relation to his employment at Wal-Mart as he was not performing any job duties at the time. *See Dravo Corp. v. Strosnider*, 45 A.2d 542,545 (Del. Super. 1945). However, the Board disagrees with Wal-Mart's position that Claimant's work accident did not arise out of his employment as the *DelHaize* court has determined "there does not have to be an 'essential causal relationship' between the employment and the injury," only that the situation involve '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." *DelHaize*,

LEXIS 246 (Del. Super. Ct., Aug.22, 2007), *Dravo Corp. v. Strosnider*, 45 A.2d 542,545 (Del. Super. 1945). Here, Claimant was returning to work form an unpaid lunch break and *on the employer's premises.* Furthermore, the Superior Court in *Rose v. Cadillac Fairview Shopping Center Properties (Delaware), Inc.* expanded an employee's hours of employment to include a reasonable amount of time before and after his or her actual work hours.

Under the specific circumstances of this case, the Board concludes that it is reasonable for an employee, who leaves the work premises on an unpaid lunch break, to have legally returned to work when he enters the employer's premises, despite the fact that he has not clocked in. Thus, Claimant's motor vehicle accident, which occurred under such circumstances, constitutes an injury within the course and scope of employment for which he is entitled to receive workers' compensation benefits.

Attorney's Fees

The parties have stipulated to the indemnity benefits for a period of total disability beginning on March 16 and ending on May 21, 2012, that Claimant would receive if the Board grants his petition. Thus, since Claimant will receive an award as a result of this decision, he is also entitled to an 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 less. Del. Code Ann. tit. 19, § 2320.

When dealing with an award for a non-monetary benefit, such as a course and scope of employment issue, the Board must still value the award with reference to an actual monetary amount affected by the ruling, so that there is some actual number against which to apply the statutory 30% calculation. *See Scott v. E.I. DuPont de Nemours & Co.*, Del. Super., C.A. No. 97A-06-008, Lee, J., 1998 WL 283455, at **4(March 30, 1998). Since by this decision the

Board determines that Claimant sustained a compensable injury within the course and scope of his employment, which represents a favorable change in position, it must look to his resulting entitlement to workers compensation benefits. In this case, other than the closed period of total disability benefits, there was no claim or evidence for partial disability benefits and no medical bills were presented into evidence. As such, the Board may not have an accurate actual number in order to apply the 30% rule. Therefore, the Board assumes that other than the closed period of total disability benefits, medical expenses will be the only possible contested issue following the substantive decision, and will consider that factor in assessing an appropriate attorney's fee within the limits set forth in Section 2320.

In determining an award of attorney's fees, the Board must consider ten factors.[1] *See General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973)(applied to I.A.B. hearings by *Jennings v. Hitchens,* 493 A. 2d 307, 310 (Del. Super. 1984)); *Thomason v. Temp Control*, Del. Super., C.A. No. 01A-07-009, Witham, J., *slip op.* at 5 - 6 (May 30, 2002). It is an abuse of the Board's discretion to fail to give consideration to these factors. *Thomason* at 7. When claimants seek an award of attorney's fees, they bear the burden of establishing entitlement to such an award. *Downes v. Phoenix Steel Corp.*, Del. Super., C.A. No. 99A-03-006, 1999 WL 458797 at **4, Goldstein, J. (June 21, 1999)(the burden of proof in a workers' compensation case is on the moving party). Since the Board must consider the *Cox* factors when reviewing a request for fees, it follows that claimants must address these factors in their applications.

[1] The factors to be considered are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill needed to perform the services properly; (2) the likelihood (if apparent to the client) that acceptance of the employment would preclude other employment by the attorney; (3) the fees customarily charged in the locality for such services; (4) the amount involved and the results obtained; (5) time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the attorney; (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.

The failure to do so deprives the Board of the facts it needs to properly assess a claimant's entitlement to fees.

Counsel for Claimant seeks a fee up to the statutory maximum, and attested that he spent 15 hours in preparation of the hearing, according to his affidavit. The evidentiary hearing held on September 20, 2012, lasted approximately one hour. Counsel's association with Claimant began in March 2012. Counsel has a one-third contingency fee arrangement with Claimant. Counsel did not attest that the case imposed exceptional time limitations or that it precluded him from other employment. Counsel has been admitted to the practice of law in Delaware since 2001 and has previous experience handling workers' compensation cases. The employer did not object to the affidavit

Taking into consideration both the *Cox* factors as well as the reasoning for an inchoate award, the Board concludes that an attorney's fee award of $4,000.00 represents an appropriate attorney's fee award in this case.

STATEMENT OF THE DETERMINATION

Based on the foregoing, the Board hereby GRANTS Claimant's Petition to Determine Compensation Due to find Claimant sustained compensable injuries to the lumbar spine as a result of the February 25, 2012 work accident, which was within the course and scope of his employment for Wal-Mart. Thus, by stipulation of the parties, he is also awarded a closed period of total disability benefits from March 16 to May 21, 2012, at the compensation rate of $207.35 per week, and one attorney's fee award.

IT IS SO ORDERED this 7th day of November 2012.

INDUSTRIAL ACCIDENT BOARD

JOHN DANIELLO

OTTO MEDINILLA FOR:

I hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Joan Schneikart
Workers' Compensation Hearing Officer

Mailed Date: 11.8.12

OWC Staff