

NATURE AND STAGE OF THE PROCEEDINGS

On October 5, 2007, Scott Vautard ("Claimant") filed a Petition to Determine Compensation Due seeking acknowledgment that his August 18, 2007 leg injury occurred within the course and scope of his employment with the State of Delaware ("the State") as a volunteer firefighter with the Magnolia Volunteer Fire Company. Claimant is also seeking payment of his medical expenses in the amount of \$4,089.11, as well as total disability benefits from August 18 to 26, 2007 and September 28 to October 4, 2007. The State acknowledged that Claimant's medical treatment and total disability periods have been reasonable and necessary, but argues that Claimant was outside of the course and scope of his employment when he was injured during a charity softball game. On April 21, 2008, the Board conducted a hearing on Claimant's petition and this is the Board's decision on the merits.¹

SUMMARY OF THE EVIDENCE

Claimant, thirty-three years old, testified about his accident, medical condition, and job duties as a volunteer firefighter. Claimant works full-time for the Kent County Levy Court as a building inspector, earning \$984.80 per week as of August 2007. Claimant is also a volunteer firefighter with the Magnolia Volunteer Fire Company.

Claimant jointed the Fire Company in August 1990 at age sixteen and is currently the Second Assistant Fire Chief. He has 117 hours of training on record with the Delaware State Fire School, plus in-house trainings of approximately fifteen to twenty hours per year. Claimant responds to approximately eighty fire calls per year and spends approximately 100 to 125 hours

¹ Normally, decisions are to be issued within fourteen days of a hearing. *See Del. Code Ann.* tit. 19, § 2348(k). Because of workload demands and other time restraints, it was necessary to take an extension of time to issue this decision in accordance with title 19, section 2348(k) of the Delaware Code.

per year working with the Fire Company. As part of his duties as a volunteer firefighter, Claimant has an obligation to participate in social activities in order to maintain his membership.

Training in the Fire Company is very important and Claimant trains with the other firefighters. Teamwork is extremely important as lives depend on it. On the application that Claimant completed to join the Fire Company as a volunteer in 1990, Claimant agreed that junior members must attend all Fire Company activities, which includes parades, fund raisers, bingo nights, and softball games. In the application for membership of current firefighters, there is a requirement to support the operations of the Fire Company by attending at least four social functions per year, such as the crab feast, parades, or other activities as stated by the Chief. A firefighter must meet those requirements in order to maintain membership as an active volunteer firefighter.

In the spring or summer of 2007, Claimant received a call from Adam Gillespie, the Magnolia Fire Chief. Chief Gillespie said that he was looking for people for the charity softball tournament and that he had already signed Claimant up for the event. Claimant did not sign himself up for the event. The charity softball tournament was hosted by the Seaford Fire Company for the benefit of the Chester-Crozer Burn Center, which is where burn victims and firefighters from Delaware are treated. The Seaford Fire Company invited fire departments from all over Delaware to participate in the charity event. Each team had to pay an entrance fee of approximately \$250.00. The Magnolia Fire Company paid the entrance fee for its team after approval for it at a meeting. The Magnolia Fire Company also provided a t-shirt for all of the players with a number on the back and "Magnolia Volunteer Fire Company" written on the front. Claimant did not pay for the t-shirt.

Twenty-eight teams participated in the charity softball tournament in 2007. The tournament was a three-day double-elimination event and there were more than one hundred games played during those three days. There were nearly one thousand spectators at the event and there was no fee charged to attend. The Seaford Ladies Auxiliary sold food at the tournament. It is very common for the Ladies Auxiliary to serve food at fire company events and fire hall events. The Ladies Auxiliary hosts fundraisers annually, such as craft sales and basket bingo. At the charity softball tournament, the proceeds from the food sales went to the Chester-Crozer Burn Center.

Participation in the charity softball tournament promoted goodwill, teamwork, and fire prevention, and put the Magnolia Volunteer Fire Company in the public eye for future donations. The Fire Company passes out smoke detectors twice a year in order to promote public awareness of fire hazards and prevention. The Fire Company needs donations to operate. Heightened awareness of fires and fire prevention will help to prevent fires.

It is important for members of the Fire Company to keep physically fit in order to fight fires. The charity softball tournament and the practices beforehand helped with that goal. The softball charity event was part of Claimant's four required events for that year in order to maintain his membership in the Fire Company.

Claimant played in one and a half games during the softball tournament. On August 18, 2007, Claimant fractured his leg when he was sliding into second base. He underwent surgery and stayed overnight at Kent General Hospital. He only missed one week of work at the Kent County Levy Court immediately following the injury and surgery. Later, Claimant had a stroke and only missed three days of work because it happened on a Friday, so the weekend was part of his five-day recuperation period.

Volunteer firefighters receive a pension if they are members for long enough. For every year as a firefighter, Claimant gets a pension of \$5.00 per month up to a maximum of \$125.00 per month for the remainder of his life. In order to qualify for the pension, Claimant must be an active firefighter and must pay \$60.00 per year for twenty-five years towards the pension. The Magnolia Volunteer Fire Company will pay the \$60.00 fee per year for the firefighters, if they participate in the events. If Claimant participates in thirty events in a year, then the Fire Company will pay \$30.00 of the \$60.00 fee. If Claimant participates in sixty events during the year, then the Fire Company will pay the entire \$60.00 fee. The events include the fundraisers, such as the crab feasts, bingo nights, bake sales, mailings, and assisting the Ladies Auxiliary. The events also include public events, such as parades, smoke detector events, and the "Safe Summer Day" event that includes a booth with education materials and promoting the Magnolia Volunteer Fire Company's public image. Participating in the charity softball tournament was another event that was part of Claimant's duties as a volunteer firefighter. He is obligated to meet the requirements every year in order to maintain his membership as a volunteer firefighter and to qualify for the pension. In 2007, Claimant was in attendance for sixty-three alarms for fire calls, most of which were done before the injury.

Claimant has incurred medical bills in the amount of \$4,089.11 related to his broken leg, not including the bills from Dr. Lawrence Piccioni. Claimant took vacation time from his job with the Kent Count Levy Court for his injury. He only missed one week of work initially following the injury and surgery and then he returned to work at a desk job at his regular pay rate. Claimant is now working in a full duty capacity. He was released to full-duty work in late December 2007 or early January 2008.

Ralph Saterfield, the Director and Officer of Pensions and Insurance with the Magnolia Volunteer Fire Company, testified on behalf of Claimant. Mr. Saterfield has been a fireman for approximately forty-eight years, forty of which have been with the Magnolia Volunteer Fire Company. Currently, he is taking a year off as the Director of the Fire Company, but is still the Officer of Pensions and Insurance.

The Ladies Auxiliary Members work with the Fire Company. They host fundraisers such as bake sales and bingo nights. They also bring food to fire sites and to the Delaware State Fire School.

There are three different classes of members at the Magnolia Volunteer Fire Company. Associate members are non-firefighters and belong to the ambulance side of the Company; junior members are under eighteen years old; and active members are regular firefighters. Claimant is a regular, active member of the Fire Company and has been a member since 1990.

There are requirements for membership in the Fire Company. Members have to attend fire school and participate in at least four social functions per year. Social functions include bingo nights, fundraisers and whatever other events the Chief so designates. If a member does not attend the minimum number of social functions as required, then the member loses his or her position as an active member and becomes an associate member.

The Fire Company bylaws and constitution indicate that the members must attend at least four social functions per year. The requirements apply during the probationary period and are encouraged of regular active members. If a regular active member fails to participate in the required events, then the Fire Company does not waste money on training that person and the member will become an associate member.

In August 2007, Chief Gillespie was putting together a softball team for a charity event, which counted as a social event for the Fire Company. The Fire Company provided t-shirts with "Magnolia Volunteer Fire Company" on it for the players and the Fire Company paid the registration fee. The event was not advertised in the newspaper, but all the fire companies were supposed to spread the word about it. It was the twenty-seventh year of this annual event, so everyone in Seaford and the surrounding area knew about it. There were twenty-six teams of fire companies from across Delaware that participated in the event and their families and friends were spectators.

The Fire Company had several reasons for participating in the softball tournament. It was good for the morale of the firefighters, it promoted goodwill in the community, it raised money for the Chester-Crozer Burn Center, and it promoted teamwork within the Fire Company. The Fire Company relies on charitable donations in order to operate and hosts several fundraisers each year including the hall rentals, as well as bingo nights and Texas hold-'em games. The Ladies Auxiliary hosts bake sales and tries to cater for the hall rental events. The Fire Company participates in community events including parades, handing out smoke detectors, and visiting schools.

Claimant is not required to participate in events or play softball because he is a volunteer, but such participation is strongly encouraged. The average volunteer works at the Fire Company approximately five hours per week. The volunteers are supposed to participate in at least four social events per year and the softball tournament was considered to be a social event that counted towards that requirement.

The Fire Company believes that Claimant was working within the course and scope of his employment as a volunteer firefighter when he was playing in the softball tournament; his

participation in the event is the same as when he attends meetings and other duties at the Fire Company. Since this case has gone into litigation, the other members of the Fire Company are hesitant to participate in activities other than the fire calls because they are not sure if they will be covered if they are injured. It has had a "chilling effect" on the member participation in Fire Company events.

Volunteer firefighters earn a pension after working for a number of years. They must pay \$60.00 per year in order to get \$5.00 per month up to a maximum pension of \$125.00 per month after twenty-five years of service. At the Magnolia Fire Company, if a member participates in sixty functions per year, then the Fire Company will pay the entire \$60.00 fee. In 2007, Claimant participated in more than sixty functions, despite his injury.

Robert Lane, a member of the Magnolia Fire Company, testified on behalf of Claimant. Members of the Fire Company are required to participate in at least four social events each year. The Fire Company agreed to participate in the softball tournament and part of Claimant's duties as a firefighter is to play in the softball tournament if he volunteered for it.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Course and Scope of Employment

In order to be eligible for workers' compensation, Claimant must prove that the injury he sustained on August 18, 2007 was "by accident arising out of and in the course of employment." 19 *Del. C.* § 2304. Although Claimant was not at the firehouse or putting out a fire when he was injured, Claimant argues that he was in the course and scope of his employment at the time of the accident. For the following reasons, the Board finds that Claimant has met his burden of proof.

The Board finds that Claimant is credible and accepts the testimony of Claimant, Mr. Saterfield and Mr. Lane that the volunteers at the Magnolia Fire Company are required to

participate in social events in order to maintain their position as an active member of the Fire Company and to maintain their eligibility for the pension. Participation in social functions helps the Fire Company raise awareness of fire safety in the community, as well as helping to raise money for the Fire Company.

The Board also finds that the softball tournament was considered to be a social event that counts towards Claimant's requirements to maintain membership in the Fire Company and toward the Fire Company paying his annual fee towards his pension. Chief Gillespie signed Claimant up to participate in the event, so Claimant did not really have much choice regarding his participation. Furthermore, the Fire Company paid the entrance fee for the team and provided t-shirts to the team members with "Magnolia Volunteer Fire Company" on the front. The softball tournament raised money for the Chester-Crozer Burn Center, which treats firefighters and burn victims from Delaware, which is an important charitable event for the Fire Company to support. Participation in the tournament helped promote goodwill in the community and among the fire companies which rely on each other for support when there are large fires.

Section 2312(d) of title 19 of the *Delaware Code* indicates that "volunteer fire company" and "volunteer firefighters" includes "junior members, Auxiliary members, paid employees of volunteer fire companies . . ." as being covered under the workers' compensation statute. In *Amy v. South Bowers Ladies' Auxiliary*, the State accepted compensability of an injury sustained by a member of the Ladies Auxiliary when she tripped and fell while serving food. Claimant argued that by accepting that claim in *Amy*, the State admitted that the person does not need to be fighting a fire in order for the injury to be compensable. The Board agrees that Claimant does not need to be injured while fighting a fire in order for his injury to be compensable, as long as that injury occurred while performing duties within the course and scope of his duties as a

volunteer firefighter. In the case at hand, the Board also agrees that Claimant's participation in the charity softball tournament was part of his duties as a volunteer firefighter, as stated above.

In *State of Delaware v. Dalton*, 878 A.2d 451 (Del. 2005), the Supreme Court held that a state police trooper who was injured during a charity softball game was injured during the course and scope of his employment and that the injury was compensable. The Board finds that the facts and circumstances in *Dalton* are very similar to the facts and circumstances in the case at hand. The Court in *Dalton* looked to Larson's treatise on Workers' Compensation Law, which indicates that an injury that occurs during a "non-sponsored recreational activity" falls within the scope of employment if:

(1) it occurs on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.²

The Court in *Dalton* determined that based on the State's encouragement of the troopers' participation with charity work and the benefit of shedding a positive light on the state police in the community, that the State benefited from Mr. Dalton's participation in the charity event and impliedly required his participation in the event by soliciting volunteers through superior officers. *Id.* at 456. In the case at hand, the Board finds that the State, through the Magnolia Volunteer Fire Company, required Claimant's participation in the charity softball tournament when Chief Gillespie signed Claimant up to play in the event and told Claimant that he had done so. The Board also finds that the charity softball tournament was part of Claimant's duties as an active volunteer firefighter since the firefighters are required to participate in social events in

² *Dalton*, 878 A.2d at 455 (quoting Arthur Larson and Lex Larson, *Larson's Worker's Compensation Law*, ch. 22 (Lexis Publishing 2001) § 22.01).

order to maintain their active duty status and qualify for a pension and the additional attendance at social events goes toward having the Fire Company pay the annual fee for the pension registration. Furthermore, the Board finds that the State and Magnolia Volunteer Fire Company benefited from Claimant's participation in the charity event in that it raised awareness of fire safety in the community and it raised money for the Chester-Crozer Burn Center where firefighters and burn victims from Delaware are treated.

Based on the totality of the circumstances and giving liberal construction to the Workers' Compensation Act, the Board finds that Claimant was acting within the course and scope of his employment when he was injured on August 18, 2007, as he was participating in a charity event for the benefit of the Magnolia Fire Company and the Chester-Crozer Burn Center. Therefore, the Board finds that Claimant's August 18, 2007 accident is compensable. The State must pay for Claimant's medical expenses and total disability periods related to this industrial accident.

Attorney's Fee and Medical Witness Fees

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against the State in an amount not to exceed thirty percent of the award or ten times the average weekly wage, whichever is smaller. *Del. Code Ann.* tit. 19, § 2320. Claimant's counsel submitted an affidavit attesting to approximately twenty hours of preparation for this three hour hearing. This case was not novel or difficult and did not require exceptional legal skills to try properly. It was argued that acceptance of this case precluded other employment by Claimant's counsel. The Board considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. The Board also considered the argument that this case posed time limitations upon Claimant's counsel, the date of initial contact on October 2, 2007, and the relative experience, reputation, and ability of Claimant's counsel. It

was argued that the fee was contingent, that Claimant's counsel does not expect to receive compensation from any other source, and that the employer is able to pay an award. *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

The Board must consider the ten factors enumerated in *Cox* when considering an attorney's fee award or else it would be an abuse of discretion. *Thomason v. Temp Control*, Del. Super. Ct., C.A. No. 01A-07-009, Witham, J., slip.op. at 5-7 (May 30, 2002). Claimant bears the burden of establishing entitlement to an attorney's fee award and must address the *Cox* factors in the application for an attorney's fee. Failure to address the *Cox* factors deprives the Board of the facts it needs to properly assess the claim. The factors were addressed in the Affidavit Regarding Attorney's Fees.

In the case at hand, based on the results obtained, the information presented and the State's failure to argue that an attorney's fee award is not appropriate, the Board finds that one attorney's fee in the amount of \$2,500.00 is reasonable. *Del. Code Ann.* tit. 19, § 2320. This award is reasonable given Claimant's counsel's level of experience and the nature of the legal task. In accordance with § 2320(10)a, the attorney's fee awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement.

STATEMENT OF THE DETERMINATION

Based on the foregoing, the Board GRANTS Claimant's Petition to Determine Compensation Due and finds that the August 18, 2007 accident was a compensable industrial accident. Claimant is entitled to payment of medical expenses in the amount of \$4,089.11, as well as Dr. Piccioni's bill. Claimant is also entitled to payment of total disability benefits from August 18 to 26, 2007 and September 28 to October 4, 2007, at his compensation rate of \$656.53

per week. As there is an award, Claimant is also entitled to payment of an attorney's fee in the amount of \$2,500.00.

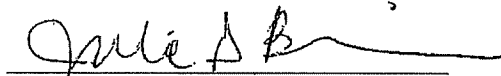
IT IS SO ORDERED THIS 13th DAY OF MAY 2008.

INDUSTRIAL ACCIDENT BOARD

/s/ Elaine Bowen

/s/ Mary Dantzler

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



Julie G. Bucklin
Workers' Compensation Hearing Officer

Mailed Date:

OWC Staff