BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

STEVEN P. BROWN,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1264688
	)	
SUNDAY BREAKFAST MISSION,	)	
	)	
Respondent.	)	

Resident of the Sunday Breakfast Mission injured in a work therapy program is deemed an employee of SBM

DECISION ON EMPLOYMENT RELATIONSHIP

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 July 7, 2005, in a Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

APPEARANCES:

W. Christopher Componovo, Attorney for the Employee

Sean A. Dolan, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

Steven P. Brown ("Claimant") alleges that he suffered a hernia while working for Sunday Breakfast Mission ("SBM") on October 29, 2004. SBM maintains that Claimant was not its employee but, rather, was just a recipient of SBM's charitable services. A hearing was held on July 7, 2005, to determine the proper characterization of Claimant's relationship to SBM.[1]

The parties stipulated that the case could be heard and decided by a Workers' Compensation Hearing Officer, in accordance with title 19, section 2301B(a)(4) of the Delaware Code. When hearing a case by stipulation, the Hearing Officer stands in the position of the Industrial Accident Board. *See* DEL. CODE ANN. tit. 19, § 2301B.

SUMMARY OF THE EVIDENCE

Rev. Zenobia A. James testified that SBM has been in existence for about 110 years. Its business is to help the homeless and provide shelter and food (community meals), as well as run a community outreach program. It is a non-profit corporation that receives no support from tax dollars but rather is funded by private donations. People do not pay to be at SBM. Food and lodging is free. Participants at SBM are required to attend Bible study and eventually go to classes for reading and writing, as well as counseling for drug and alcohol addiction. SBM offers a program of "work therapy." A "consideree" for the work therapy program attends chapel twice a day and goes to classes. There is also recreational therapy. These activities comprise about thirty hours per week. In between these various sessions, a consideree will also do about thirty-five hours of actual work therapy.[2] Work therapy activities include doing warehouse work in SBM's warehouse and stocking the SBM store. The SBM store is open two

[1] SBM does not concede that Claimant was injured at SBM in any event. That issue, however, was not addressed at this hearing. If Claimant is not found to be an employee, the question of the injury would be moot as it would no longer be under the jurisdiction of the Industrial Accident Board.

[2] The quoted number varied from 32 to 35 hours. The three-hour difference has absolutely no bearing on the question of whether Claimant was an "employee" for purposes of the Workers' Compensation Act.

days a week and sells items. The proceeds from these sales help supplement the operation of SBM.

Rev. James stated that most of the people who come to SBM are homeless with no structure to their lives. SBM does not want them to just spend the day sitting around doing nothing. The work therapy program provides them with structure and teaches them how to do work on a regular basis, making them suitable for obtaining jobs. A participant in the program signs an agreement (Exhibit 1). This agreement provides, in part, that SBM may use "photograph information" in which the participant may be a subject; that SBM may release to appropriate agencies information concerning his social security number, date of birth, marital status and the like; that SBM may share health-related information with health care agencies; and that the participant will take part in Bible study, chapel "and all other programs recommended by my chaplain mentor." The agreement specifically states that the participant agrees "to take part in the work program which is a part of my therapy and not a job." Claimant signed such an agreement although there are only "Xs" next to items instead of his initials.

During the work therapy program, the participant is a resident at SBM. There are a total of about twenty-five men in the program, of which ten are in the initial "consideree" level. The program has four levels above the consideree level. That initial level lasts for thirty days. Level 1 involves an assessment of what the participant needs academically (such as reading, math skills, computer training) and the other programs from the consideree level are extended. This stage lasts for sixty days. At Level 2, the courses become more intense and involved, along with continuing with job training. This stage lasts from four to six months. A Level 3 participant can find outside employment. Level 3 does more intense preparation to get an outside job and lasts about four months. Finally, at Level 4, the participant is in "after care." In other words, after the

participant obtains outside employment, he is permitted to stay in residence at SBM for up to six months to save money to be able to go out and live on his own.

Rev. James stated that participants below Level 3 are not permitted to get outside employment. The participant needs to go through the program and get structure in his life first. Over ninety-five percent of the men who come to SBM are substance abusers and have major life issues. SBM wants to get them stabilized and settled before sending them back out into the work world. Most have never worked or have only done so sporadically, so they are unable to do even simple tasks well. The purpose of the work therapy program is to provide job training to prepare them to go into the regular job market.

Rev. James explained that most participants need to be physically fit to perform work therapy in the warehouse or to stock the shelves. SBM has no doctors or nurses on the premises. If program participants have physical restrictions, then that is taken into consideration in what SBM has them do. SBM does help those with disabilities. Rev. James was aware that Claimant alleges that he had an incident at SBM that resulted in a hernia and surgery. She believes that he left the program before the surgery. She could not recall exactly why he left, but she denied that it was because of the hernia or the workers' compensation claim.[3]

Rev. James agreed that participants in the work therapy program receive $8.00 per week from SBM. She denied that this money is pay for work performed. Each participant in the program receives it at least until that person is receiving income from an outside job (as a Level 4 participant would). The money is an allowance. SBM provides people with food, clothing and shelter. The $8.00 is to give the person a sense of independence and to enable him to get personal items (such as cigarettes) or even just to pay outstanding court fines and the like.

[3] The workers' compensation petition was not filed until March 3, 2005, long after Claimant had left the SBM program.

Claimant testified that he is fifty-two years old and homeless. He has been homeless for a couple years and has been an alcoholic for about fifteen years. He last held a job about six months before he came to SBM, when he was still living in North Carolina. He only has an eighth-grade education and, when he was in school, he was in special education classes. He wanted to get off of alcohol and he learned of the SBM program. He signed up for the program and got in it the same day. It was his understanding that he had to be able to work to participate in the program. He believed that if he was unable to do physical labor, SBM would get rid of him from the program. He received this impression from talking to other men in the program.

Claimant confirmed that he did receive the $8.00 allowance while he was at SBM. He agreed that he signed the agreement mentioned by Rev. James, although he does not read well. He just signed the paper and did not make the "Xs" on it. He wanted to be in the program and so he signed it without reading everything on it.

Claimant stated that, while at SBM, he did such tasks as operate a forklift in the warehouse, help to waterproof the ceiling and clean the rest rooms. He also attended classes and did Bible study, but he spent more time working on the SBM property. It was when he was in the warehouse that he felt a pull in his groin while moving a bale of clothing. He was told that he had a hernia and he subsequently had surgery performed at St. Francis Hospital in October or November of 2004. He agrees that he was released from the SBM program before the surgery, but he thinks that it was because he could no longer perform physical labor. He knows of no other reason why he would have been released from the program. He also believes that he is no longer permitted on SBM property because of his workers' compensation claim.

Claimant stated that, since his hernia surgery, he has tried to work in a construction job, but he stopped after two days because of having pain in his groin. He now gets light work

assignments from Labor Ready, but he gets pain when doing physical labor. He currently lives in a make-shift tent under a bridge.

Rev. James was recalled for rebuttal testimony. She stated that people are not generally dismissed from the program for having a hernia. Usually it is for abusive behavior, or because the person was inebriated or used "aggressive" language. However, she admitted that she does not know why Claimant is not still in the program.

Rev. James also commented that, after Claimant's surgery, SBM would not have had the facilities to care for the wound, so it could not have cared for him then. She remembers that Claimant did come to SBM after he had been drinking and he tried to get in. She does not recall telling him that he could not come in. However, if a person is barred from SBM for behavioral infractions, the bar can last for thirty, sixty or ninety days. The only permanent bar would be if the police had to be called. She did not have the official log with her at the hearing, but as it has been more than ninety days since Claimant was last there she did not think that he was currently barred from overnight shelter or meals at SBM. However, he would not be allowed back into the work therapy program.

Michael E. Smith testified that he has worked at SBM since March of 2004. He is the Support Services Director. He is in charge of warehousing, transportation and maintenance of the facility. He schedules assignments for the work therapy program in those areas. If the person is physically capable of doing the tasks, they will be assigned to do such things as cutting the grass, sweeping, mopping and waxing. Maintenance, including such things as patching the roof, can be done by the program participants. Mr. Smith stated that if the maintenance was something more than he could do, he would call in professionals to do it. Mr. Smith confirmed

that Claimant performed such tasks as cleaning the SBM store, cleaning the tool shed, working in the warehouse and patching the roof.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Compensability

The basic facts are not in dispute. Claimant came to SBM for food and shelter and he signed up to be a consideree for the work therapy program. The parties agree with the basic functions Claimant performed as a consideree. He attended classes and Bible study and he also performed work tasks around the SBM premises. The issue is whether this is sufficient to make Claimant an "employee" for purposes of the Workers' Compensation Act ("Act").

Certainly, it cannot be said that a participant in the program is an employee with respect to every aspect of the program. It would be an unacceptable leap of the imagination to state that a person who is attending Bible study or the instructional classes is somehow "employed" to do that. Otherwise every act of charity would create an employment relationship, with the recipient performing the "work" of receiving the charity in exchange for the provider giving it. Claimant does not press his argument so far. He maintains, however, that when he was performing work services for SBM, such as warehouse tasks, stocking of shelves and maintenance work, he was functioning as its employee.

The starting point for the analysis is the statutory definition of "employee." The Act defines the term as meaning "every person in service of any corporation (private, public, municipal or quasi-public), association, firm or person, . . . under any contract of hire, express or implied, oral or written, or performing services for a valuable consideration." DEL. CODE ANN. tit. 19, § 2301(9).

The Act also lists several classifications of people who are *not* considered employees. It is, therefore, prudent to consider whether Claimant's situation falls within one of those exclusions. One exception is available for the "spouse and minor children of a farm employer." DEL. CODE ANN. tit. 19, § 2301(9). Claimant is clearly not that.

Another exception is for "any person whose employment is casual and not in the regular course of the trade, business, profession or occupation of his employer." *Id.* This exception presumes that an employment relationship of some sort exists. The Act goes on to state that the term "casual employment" means "employment for not over 2 weeks or a total salary during the employment not to exceed $100." *Id.* While it is arguable that Claimant's "salary" (however that is defined) might not exceed $100, what is clear is that his services under the program exceeded two weeks. Even just as a consideree, the program participation was for thirty days. If all the levels of the program were combined the period of program participation would be for something close to a year. Thus, if participation in the program is "employment," Claimant cannot be classified as a "casual" employee as that term is defined under the statute.

A third exception is for "persons to whom articles or materials are furnished or repaired, or adopted for sale in the worker's own home, or on the premises not under the control or management of the employer." *Id.*[4] No materials or articles were furnished to Claimant, thus this provision does not apply to his case.

The final exception pertains to "[i]nmates in the custody of the Department of Correction or inmates on work release who participate in the Prison Industries Program or other programs sponsored for inmates by the Department of Correction" unless the inmate "is employed by an employer other than the State or a political subdivision thereof." *Id.* This provision was

[4] The exact meaning of this provision is opaque. As section 2301(9) is written, it may be that this phrase is actually intended as a further limitation on the concept of casual employment. I need not decide that here as, in any event, it does not apply to Claimant.

specifically added to counteract the effect of the ruling in *Barnard v. State*, 642 A.2d 808 (Del. Super. 1992), *aff'd*, 637 A.2d 829 (Del. 1994). The *Barnard* case will be discussed in more detail below for its analysis of what constitutes "employment." For purposes of this particular statutory exception, however, it is sufficient to observe that Claimant is not an inmate participating in a work release program. Thus, he does not fit under this exception to the definition of "employee," either.

Claimant, therefore, does not fit under any of the explicit exceptions to the term "employee." The Act also provides an "exception to the exception" in creating a specific classification of people who are considered to be employees. This class is "everyone assigned to work under §§ 901-905 of Title 31." DEL. CODE ANN. tit. 19, § 2301(9). This reference is worth a closer look with respect to the current case because it deals with a person who receives public aid and, in exchange, participates in work or work training. Sections 901 to 905 of title 31 of the Delaware Code pertain to work assignments for recipients of public assistance. Specifically, the Code provides that "employable" persons who receive "assistance from the Department of Public Welfare in the categories of general assistance or aid to families with dependent children" are "required" to "perform such work as shall be assigned to them by the Department of Public Welfare and/or shall be required to attend and participate in any training project designed to improve employability to which they may be assigned by said Department." DEL. CODE ANN. tit. 31, § 902. Pursuant to title 19, section 2301(9) of the Delaware Code, quoted above, as well as title 31, section 907, these aid recipients who are given work or work training are to be considered as "employees" for purposes of receiving workers' compensation protection. The similarities to the current case are striking. However, Claimant does not fit this provision either

because he was not receiving aid through the Department of Public Welfare, but rather through SBM.

Thus, it still remains to be decided if Claimant qualifies under the basic definition of "employee." As the Superior Court observed in *Barnard*, the statute provides two separate avenues under which a person may be found to be an employee. *Barnard*, 642 A.2d at 814, 817. One avenue is if he is found to be a person that was under a "contract of hire, express or implied, oral or written." The second avenue is if he is found to be a person "performing services for a valuable consideration." DEL. CODE ANN. tit. 19, § 2301(9).

Contract of Hire: The Court in *Barnard* discusses three separate approaches used to analyze contractual relationships. These are the "Common-Law Test," the "Relative-Nature-of-the-Work Test," and the "*Spikes* Test."

The Common-Law Test is the most familiar. Generally speaking, Delaware law recognizes four elements in determining the existence of an employment relationship. *Unlimited Construction v. Almond*, Del. Super., C.A. No. 02A-06-011, Silverman, J., 2003 WL 558518 at *3 (February 27, 2003). "These are (1) who hired the employee; (2) who may discharge the employee; (3) who pays the employee's wages; and (4) who has the power to control the conduct of the employee when he is performing the particular job in question." *Lester C. Newton Trucking Co. v. Neal*, 204 A.2d 393, 394-94 (Del. 1964)("*Newton*"). *See White v. Gulf Oil Corp.*, 406 A.2d 48, 51 (Del. 1979)(quoting same). "Each particular case must . . . depend on its own facts, and ordinarily no one characteristic of the relation is decisive. All of the characteristics must be considered." *Gooden v. Mitchell*, 21 A.2d 197, 201 (Del. Super. 1941).

The common-law test, however, is designed primarily to determine which of several possible employers is the appropriate one for purposes of payment of workers' compensation

benefits to an injured worker. *See Barnard*, 642 A.2d at 815. Indeed, the "words 'hired' and 'discharge' presuppose that there is an employment relationship between an employee and one of several employers." *Patterson v. Blue Hen Lines*, Del. Super., C.A. No. 84A-FE-3, Bush, J., 1986 WL 2274 at *1 (January 28, 1986). The common-law test is also useful to some extent in distinguishing between an independent contractor and an employee. *See, e.g., Hering v. Grain*, Del. Super., C.A. No. 98A-10-002, Ridgely, J., 1999 WL 463707 at *2 (March 10, 1999); *Horsey v. Contractual Carriers, Inc.*, Del. Super., C.A. No. 86A-FE-10, Bifferato, J., 1988 WL 4741 at *1 (January 14, 1988). Again, though, it presupposes that there is an employment relationship that is either as an independent contractor or an employee. Thus, the common-law test is of limited use when the question is whether there is any employment at all.

Proceeding with the common-law test with this understanding, I note that SBM is the one who selected Claimant to participate in the program and it retained the ability to discharge him from that program. These actions resemble the power to hire and fire. Similarly, Claimant received some benefit, including a small financial benefit, from SBM for participating in the program. This could be said to resemble "wages." Finally, it is clear that SBM did control Claimant's conduct as a participant in the program. SBM told him when to do work therapy and what tasks to do. Thus, applying the common-law test, it appears that the work therapy program shares elements similar to employment.

The second test discussed in *Barnard* is the "Relative-Nature-of-the-Work Test." This test "explores the relation between the claimant's work and the employer's work to ascertain whether an employment relationship is feasible." *Barnard*, 642 A.2d at 815. The Court noted that, like the common-law test, this one, too, is "helpful primarily in distinguishing between two possible employers." *Barnard*, 642 A.2d at 815. In that sense, it is of only limited use with

respect to deciding if any employment relationship exists. However, it should be noted that SBM's main business is in operating a homeless shelter. In connection with this, it operates a store to help finance the operation and it also operates a warehouse. Maintenance of the property and operation of the warehouse and store functions, if not done by the participants in the work therapy program, would be done either by people, such as Mr. Smith, who are regular employees and paid regular wages or by outside contractors that SBM would have to pay. Thus, Claimant's work services in the warehouse and in maintenance of the facility are connected to SBM's business in such a way that employment is feasible. In other words, if Claimant did not do it, SBM would have to hire either an employee or an independent contractor to do the work.

The final test discussed in *Barnard* is the "*Spikes* Test," named after the decision in *Spikes v. State*, 458 A.2d 672 (R.I. Supr. 1983). This test is specifically designed for determining when a prison inmate can be considered an employee. This, in fact, was the issue in *Barnard*, which dealt with a prison inmate injured in an off-grounds work program operated by the Department of Corrections.[5] Obviously, as Claimant is not a prison inmate, the decision does not directly apply to him. Nevertheless, the requirements used for finding an employment relationship in a prison situation are instructive. They consist of (1) requiring the inmate's services to be voluntary; (2) wages to be paid, and (3) both parties consenting to the relationship. *Barnard*, 642 A.2d at 816.

In *Barnard*, the inmate volunteered to participate in the off-grounds work program. He was initially paid $0.16 per hour ($6.40 per week) and, after six months, this was raised to $0.30 per hour ($12.00 per week). The State division that offered the program was not compelled to accept the inmate. Therefore, there was a mutual consent to the relationship. *Barnard*, 642 A.2d

[5] As mentioned earlier, the prisoner exception in the definition of "employee" in section 2301(9) was designed to change the result in *Barnard*, which found the inmate to be an employee of the State.

at 816. The State argued that it never intended to enter into an employment contract, but the Court observed that, when dealing with contracts, personal or individual intent is secondary to the obligation attached by force of law to the actions of the parties. *Barnard*, 642 A.2d at 816 (citing *Hotchkiss v. National City Bank*, 200 Fed. 287, 293 (S.D.N.Y. 1911)). Having had a voluntary agreement by the inmate to perform services, a consent by the division to use the services, and the payment of compensation, the Court found that an employment contract existed even though the State had not intended to create such a contract.[6]

By comparison, in the current case, it is clear that Claimant voluntarily agreed to perform work services for SBM. SBM also consented to him performing these services. Claimant received valuable consideration for the services. While there was no express written contract of hire and SBM even had Claimant sign an agreement acknowledging that the work program was therapy and not a job, the indicia of the relationship bear substantial similarities to employment. SBM received services from Claimant in the form of operation of the warehouse and maintenance. Claimant received valuable consideration for those services. He was exposed to the risk of injury from those services. Following the *Barnard* analysis, this would create an implied contract of hire.

Another Delaware decision that has bearing on this issue is *Hale v. Delaware State Hospital*, Del. Super., C.A. No. 84A-JN-14, Stiftel, P.J., 1985 WL 188980 (March 6, 1985). In *Hale*, the claimant had been voluntarily committed to the Delaware State Hospital for treatment for mental problems. About three months later, he was released and received treatment as an out-patient, although he still lived on the grounds. He paid a rent of $20.00 a month for his

[6] In affirming the Superior Court decision in *Barnard*, the Supreme Court stated that "the pivotal factor in determining the 'employee' status of an incarcerated individual was the inmate's . . . *voluntary* decision to perform the work in question for valuable consideration." *State v. Barnard*, Del. Supr., No. 548, 1992 (January 3, 2004)(ORDER)(emphasis is original).

living quarters, a "bargain" rate that employees of the Hospital also paid. *Hale*, 1985 WL 188980 at *2. He participated in a "sheltered workshop program" as a laundry helper. He was paid $134.00 every two weeks, about half the federal minimum wage at the time. The sheltered workshop program "was primarily a rehabilitation program to help patients and ex-patients to develop positive work habits and attitudes." *Hale*, 1985 WL 188980 at *1. From there, some out-patients could be sent out to private industry and some moved into regular employment with the Hospital. The claimant was injured while working on the laundry truck. The Superior Court found that the claimant was an "employee" for purposes of receiving workers' compensation benefits. The Court noted that, while the sheltered workshop program "was established primarily to benefit the individual, nevertheless, it substantially benefited the Hospital also. Laundry work had to be done and even though the Hospital would not have employed someone else to do the work in the absence of the claimant . . . nevertheless, the Hospital benefited." *Hale*, 1985 WL 188980 at *2. The Court found that the Hospital made the decision to place the claimant in the position to do the work ("hire"); the Hospital could terminate or remove the claimant from the program if he did not perform as they wished him to perform ("fire"); the State paid the claimant's wages and he received one week's vacation ("wages"); and the Hospital controlled the claimant in the performance of his duties ("control"). *Hale*, 1985 WL 188980 at *2. Thus, the claimant fit under the four-part *Newton* test described earlier. "If the Hospital uses an employee for its benefit, he should be treated no differently than if the employee was being placed for rehabilitative purposes with a private company." *Hale*, 1985 WL 188980 at *2.

The parallels with Claimant's case and SBM's work therapy program are obvious. The program in both cases was primarily meant to help the individual to develop positive work attitudes and habits in preparation for obtaining meaningful employment in the general labor

market. However, in both cases, the program sponsor also received a benefit from the services performed. In *Hale*, that benefit was the laundry services that the Hospital needed to have done. In this case, it is the warehouse activities and maintenance work that SBM needed to have done. As mentioned earlier, if no program participant did the work, SBM would have had one of its regular employees or an independent contractor do it. In both *Hale* and this case, the program participant was exposed to the risk inherent in the work. In both cases, the program participant received compensation in some form. In both cases, the program sponsor controlled the performance of the participant. As the claimant in *Hale* was deemed to be an employee, there seems no substantive distinction that would justify a contrary result in this case.

Valuable Consideration: As noted earlier in this decision, the section 2301(9) definition of "employee" provides two avenues for finding employment. The "contract of hire" approach was the first avenue. The second is an even more flexible standard, namely whether the person performed "services for a valuable consideration." DEL. CODE ANN. tit. 19, § 2301(9). In many ways, this is very similar to the *Spikes* test discussed above, namely whether Claimant voluntarily performed services for SBM and, in exchange, received "valuable consideration" for it. It is clear that, in the work therapy, Claimant performed services for SBM at SBM's request. Throughout this decision, I have repeatedly stated that Claimant received compensation for his services. It is, therefore, important to discuss the issue of the "valuable consideration" he received. There seems to be three potential items of consideration. One is the room and board he received. The other is the $8.00 per week. The third is the training itself.

As to the first, I am not persuaded that Claimant's room and board is properly considered as part of the consideration for his services. Certainly, room and board can theoretically be included as part of an employee's wages. *See* DEL. CODE ANN. tit. 19, § 2302(c). This theory,

though, must bow to fact. SBM provides shelter to the homeless and provides a community meal for them. Rev. James specifically testified that, while Claimant is no longer considered to be in the work therapy program, if he came to SBM he would still receive overnight shelter and a meal. This indicates to me that Claimant's free room and board was separate and distinct from his participation in the work therapy program. Therefore, it cannot be considered part of the consideration paid to him for his services.[7]

On the other hand, the $8.00 per week stipend, while minimal, is valuable consideration. While Rev. James did not view it as pay, she agreed that it was given to participants in the work therapy program. Non-participants in the program did not receive it. Indeed, those who advanced in the program to work outside of SBM do not receive it.[8] In appearance, therefore, the $8.00 per week is given to those people who participate in the work therapy program and provide services to SBM. While the stipend is primarily intended to give the participant a sense of independence and furthers the function of the program to give structure to a participant's life, it constitutes money paid for services rendered. It is valuable consideration for participation in the program.[9]

Finally, there is the training Claimant received. Claimant, by agreeing to participate in the work therapy program and to perform work duties for SBM in the warehouse and elsewhere

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[7] As a parallel case, the inmate in *Barnard* could, in a sense, be said to have been receiving "room and board" from the State, albeit in a prison cell. When discussing the consideration received by the inmate, the Court focused on the money paid to him. As here, the "room and board" in *Barnard* would have been provided to the inmate regardless of whether he was participating in the off-grounds work program. Therefore, it was not part of the consideration for his participation in the program.

[8] There also can be no doubt that those in Level 4 who work outside of SBM would be considered employees of the outside company that is receiving their services and is paying them for those services. Because participation in the work therapy program does not divest those people of employment status with respect to an outside company, it would be inconsistent for it to divest the employment status from a person who is doing actual work of benefit to SBM, incurring actual risk of injury and receiving actual consideration.

[9] The amount of $8.00 per week may appear minimal, but it is comparable to that paid to the inmate in *Barnard*, who started at $6.40 per week and advanced to $12.00 per week. The inmate also received "good time" credit for being in the program but, as will be discussed, Claimant similarly received non-pecuniary benefits from the program.

around the premises, received instruction (Bible study, classes) as well as basic training in performing job functions. It has generally been acknowledged that "[t]he element of payment, to satisfy the requirement of a contract for hire, need not be in money, but may be in anything of value" including training. Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 65.03[1] (internet ed.; accessed July 18, 2005) <www.matthewbender.com>. Thus, training such as is given to a student nurse or graduate student has been considered the equivalent of wages. *Id.*

The Board has previously addressed this very issue in a matter involving a student nurse. In *Burgess v. Christiana Care Health Systems (MCD)*, Del. IAB, Hearing No. 1120734 (September 9, 1998), the claimant was a student at Delaware Technical & Community College participating in a degreed program in histotechnology. In this program, she obtained an internship with Christiana Care. While at Christiana Care, she was injured. *Burgess*, at 2-3. The issue was whether she was an "employee" of Christiana Care at the time of the injury. The Board noted that Christiana Care selected the program participants ("hire"). It could dismiss a participant who failed to follow its policies and procedures ("fire"). It exercised direct supervision and control over the intern ("control"). The issue was whether the intern received consideration. *Burgess*, at 9-10. Reviewing case law from other jurisdictions, the Board concluded that Claimant received "valuable consideration in the completion of practical training that was required to complete a degree." *Burgess*, at 11. In so finding, the Board cited with approval the case of *Olson v. Nyack Hospital*, 598 N.Y.S. 2d 348 (N.Y. App. Div. 1993), in which the Court held that training and experience gained by a student intern at a hospital, which was required for graduation and licensure, was a thing of value and the equivalent of wages. The *Burgess* Board also cited *Betts v. Ann Arbor*, 271 N.W. 2d 498 (Mich. Supr. 1978) in which a

student teacher was found to have been compensated in the form of training, college credits towards graduation and receipt of the prerequisites for a state provisional certificate.[10]

While Claimant in this case did not receive training as specialized as the training received by student nurses or student teachers, it does not change the fact that he received some training and education as part of his participation in a program which also required him to provide labor services to SBM. It is, therefore, a form of consideration.

As such I conclude that Claimant has received "valuable consideration" for his services to SBM under the work therapy program and, therefore, he qualifies as an "employee" for purposes of receiving workers' compensation benefits.

I will note that I am not pleased by this result. SBM is clearly performing a charitable act that is primarily for Claimant's benefit to get him back on the road to becoming a useful and productive member of society. I realize this ruling may have a chilling effect on the program and, thus, be a disservice not only to SBM but to other homeless people such as Claimant and to society at large. Perhaps, just as it did in response to the *Barnard* decision, the State legislature will consider including an exception in the Act for such charitable work therapy programs so that the providers of such programs will not be subject to suits for workers' compensation benefits.[11] For the time being, though, I am required to apply the law as it currently exists. In light of the case law precedent and the current phrasing of the statutory provision, I find that Claimant qualifies as an "employee" of SBM.

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[10] The *Burgess* decision on employment status was not appealed.

[11] Having said this, it should also be observed that in many cases dealing with employment relationships it is the business that is asserting that the injured individual *is* an employee, as a defense to a personal injury action. *See, e.g., Porter v. Pathfinder Services, Inc.*, 683 A.2d 40 (Del. 1996); *Wahl v. NACCO Materials Handling Group, Inc.*, Del. Super., C.A. No. 95C-01-244, Del Pesco, J., 1996 WL 769770 (November 6, 1996); *Warner v. Star Enterprises*, Del. Super., C.A. No. 91C-02-214, Herlihy, J., 1995 WL 411674 (June 21, 1995). Thus, in some situations, it may be an advantage to a business to be found to be an employer because it precludes a potentially more costly personal injury action.

Attorney's Fee

A claimant who is awarded compensation 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." DEL. CODE ANN. tit. 19, § 2320. The current decision, however, involves only a preliminary issue, namely whether Claimant can maintain his current action. He has not yet achieved an award of benefits. As noted earlier, SBM has not yet even conceded that he was actually injured while he was working there.

Attorney's fees must be based on an award of compensation. The Board is required to calculate an attorney's fee award, at least in part, with reference to the actual monetary amount affected by the ruling, so that there is some number against which to apply the thirty percent calculation required by section 2320. *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). At the current stage in these proceedings, no actual monetary amount has been affected by the ruling. Thus, it is not appropriate to award an attorney's fee at this time.

This does not mean that Claimant will never receive an attorney's fee for the effort spent on the current issue. The award of a fee is not denied, merely deferred pending the resolution of this case on the merits. Should Claimant be successful at a hearing on the merits on his Petition to Determine Compensation Due, the time and effort counsel spent with respect to the current issue will be includable in the attorney's hours spent in preparation for that hearing. This time spent will then be one of the factors considered in fashioning an appropriate attorney's fee award. *See General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973); *Jennings v. Hitchens*, 493 A.2d 307, 310 (Del. Super. 1984).

STATEMENT OF THE DETERMINATION

For the reasons set forth above, I conclude that Claimant was an employee of SBM when he was performing work duties as part of the work therapy program.

IT IS SO ORDERED THIS _____ DAY OF JULY, 2005.

INDUSTRIAL ACCIDENT BOARD

_____
CHRISTOPHER F. BAUM
Workers' Compensation Hearing Officer

Mailed Date:

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OWC Staff