

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

JEREMY BOTTOMLEY,	)	
	)	
Employee,	)	
	)	
	)	
v.	)	Hearing No. 1475360
	)	
	)	
ALSIDE SUPPLY CENTER,	)	
	)	
Employer.	)	

**DECISION ON COURSE AND SCOPE OF EMPLOYMENT**

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 May 21, 2019, in the Hearing Room of the Board, in New Castle County, Delaware.

**PRESENT:**

IDEL M. WILSON

VINCENT D'ANNA

Susan D. Mack, Workers' Compensation Hearing Officer, for the Board

**APPEARANCES:**

Nicholas Krayter, Esquire, Attorney for the Employee

Morgan A. Sack, Esquire, Attorney for Employer

## **NATURE AND STAGE OF THE PROCEEDINGS**

Jeremy Bottomley (“Claimant”) has alleged that he was injured in a work-related assault while employed with Alside Supply Center (“Employer”). Claimant filed a Petition to Determine Compensation Due against the Employer on August 27, 2018. The issue to be decided at this hearing is whether the injuries that occurred on August 3, 2018 when Claimant was assaulted as he arrived for work arose out of and occurred within the course of Claimant’s employment with Alside.

A hearing was held on Claimant’s petition on May 21, 2019. This is the Hearing Officer’s decision on the merits.

## **SUMMARY OF THE EVIDENCE**

Joint Stipulation of Facts: Claimant Jeremy Bottomley filed a Petition to Determine Compensation Due alleging he suffered compensable work injuries as a result of being assaulted while at work on August 3, 2018. Alside disputes that the injuries occurred within the course and scope of Claimant’s employment. The parties agree that Claimant was an employee of Alside on the date of the incident. The parties stipulate that the May 21, 2019 hearing will focus on whether the injuries occurred within the course and scope of employment. On the morning of August 3, 2018, Claimant drove to work and parked in the parking lot alongside the building where Alside is located. After getting out of his car and beginning to walk into Alside, Claimant was assaulted by three males. Claimant was assaulted with fists, feet, a baseball bat, and other unidentified objects. The three males fled the scene in a silver van after the assault. Master Corporal Shatley from the Delaware State Police investigated the assault but has been unable to verify the identities of the three males who assaulted Claimant. As a result of the assault,

Claimant has suffered serious injuries that have necessitated surgery and required extensive medical treatment.

Detective Raymond Shatley of the Delaware State Police testified that he was assigned to the major crimes unit at the time of the assault on Claimant Jeremy Bottomley. He had previously worked for 23 years as a road trooper. He has investigated many assaults over the years and was assigned to investigate the assault on Claimant. The incident was referred to the major crimes unit because of its severity. Det. Shatley confirmed that a document proffered by Claimant was the police report prepared regarding Claimant's assault. (Claimant's Exhibit 1) The report includes portions prepared by the responding troopers, the evidence technician, and himself. Det. Shatley confirmed that no DNA results helpful to the investigation were obtained. In the course of the investigation, Det. Shatley learned that there were some issues concerning Claimant at the workplace, in particular tension between Claimant and Eugene "Gene" Lockhart. The two had been involved in an argument at the warehouse about two weeks before the assault. Det. Shatley confirmed that a photograph proffered by Claimant showed the building where Alside is located and the adjoining parking area. (Claimant's Exhibit 2) Det. Shatley learned during his investigation that Claimant had parked on the left side of the building as usual on August 3, 2018. Alside is located on the right side of the building and another business is located on the left side. Claimant noticed a silver van parked nearby. Claimant exited his vehicle and was approached by a black male in a mask. Claimant threw his coffee at the man. Two more black males approached, and the three men beat Claimant severely. The assault occurred at about 6 a.m. Claimant crawled toward the door of the business on the left side of the building and called 9-1-1. The only other person present was an Alside employee who was inside the building at the time of the assault. Claimant was beaten with a baseball bat and a

chain. Road troopers responded to the 9-1-1 call. Nothing was stolen from Claimant during the assault, including his wallet and cellphone, so Det. Shatley concluded that attempted robbery was ruled out. He also concluded that Claimant was targeted for the assault, because the van was waiting for Claimant to arrive at the parking lot. Claimant indicated that the men did not say anything during the assault. Claimant may have said "so this is how it is." A nearby surveillance camera showed a silver van pulling into the parking lot a few minutes before 6 a.m. and then leaving after the time of the assault. The van drove down Route 9 afterwards. The camera did not reveal a license number or show the people inside the van. Claimant was found in the parking lot and reported that he had been jumped about five minutes before. Det. Shatley interviewed Natalie Wamba, who stated that Claimant had been complaining about his co-workers, Gene and Stevie. Wamba denied that anything occurred outside of work that would explain the assault. She and Claimant went to Delaware Park, where Claimant played the penny slots, but Det. Shatley found no evidence of a gambling issue that could have precipitated the assault. Det. Shatley interviewed Michael Smulski. Smulski did not believe that Gene or Stevie were behind the assault but acknowledged that Gene would have the means and connections to arrange such an assault. Smulski also confirmed that Claimant had been involved in multiple arguments at work. Det. Shatley interviewed Bill Wilson, who stated that there was tension at work before the assault. The tension disappeared after Claimant left. Wilson stated that Eugene Lockhart was the most likely person at Alside to order an assault of someone, but Wilson had no direct knowledge that Lockhart had done so. Secdrick Pyatt told the detective that he thought the attack was an inside job arranged by Eugene Lockhart. Det. Shatley testified that all of the Alside employees interviewed were willing to take a polygraph except for Eugene Lockhart. The detective confirmed that employees always referred to work-related issues when describing

the reasons for the arguments between Claimant and other employees at Alside. The state police attempted to get DNA from the chain used in the assault, but they were not able to obtain any useful evidence this way.

Detective Shatley testified that he did not have enough evidence to prove beyond a reasonable doubt that Eugene Lockhart arranged for the assault on Claimant, so Lockhart was not charged with a crime. However, Det. Shatley believes that enough evidence exists that Lockhart more likely than not conspired to assault Claimant. Det. Shatley does not believe it was a random event.

On cross-examination, Det. Shatley testified that he concluded Claimant was targeted in the assault and Eugene Lockhart was involved in the assault due to the time of day the attack occurred, that the assailants knew where Claimant parked and probably knew no cameras were located on that side of the building, the tension at work between Claimant and Lockhart, and the fact that only Lockhart said he would not take a polygraph. Det. Shatley acknowledged that Mike Smulski was not certain that Lockhart was involved in the assault. Also, Lockhart had worked at the company for about twenty years and there had been tension and problems between Lockhart and Claimant since Claimant began working there two years before. The detective never discovered information about who actually assaulted Claimant. Bill Wilson indicated that he thought the assault was an “inside job” because people did not get along with Claimant; however, Wilson had no direct knowledge of who did the assault or arranged for it. Det. Shatley admitted that he did not believe he had probable cause to make an arrest in the case.

On re-direct, Det. Shatley testified that he wanted to be pretty sure that a charge could be proven beyond a reasonable doubt before making an arrest. Det. Shatley agreed that a refusal to take a polygraph was not admissible evidence at court. Lockhart had told Det. Shatley that he

had an attorney or was going to talk to one, so the detective did not think Lockhart would agree to a polygraph.

Under questioning by the Board, Det. Shatley explained that Smulski runs the company and Lockhart was the warehouse manager. Claimant was a driver who made deliveries. Ms. Wamba reported that, a few weeks before the assault, Claimant told her that he cut off a silver truck while driving and the truck followed him to work. Det. Shatley did not believe this “road rage” incident was related to the assault, because that event involved a truck not a van, and typically road rage results in immediate confrontation. The detective also noted that the driver in the road incident would not know when Claimant typically arrived at work and other information the assailants appeared to know. The detective recalled that someone he interviewed told him that Claimant said “so this is the way it’s going to be” as he threw coffee at the person who attacked him. Smulski did not think Lockhart would have arranged the assault. Wilson thought it was an inside job because people did not get along with Claimant. The fact that Lockhart refused to take a polygraph pushed the detective “over the edge” to believe Lockhart had arranged the assault. Det. Shatley thought that the argument two weeks before provided a motive and witnesses had stated that Lockhart had the means and connections to make it happen. Wilson also stated that, if the assault was an inside job, Lockhart was most likely the one involved. The detective acknowledged that nobody had direct evidence that Lockhart was involved in the assault.

Michael Smulski testified that he has been the branch manager at Alside for four and a half years. He worked with both Claimant and Eugene Lockhart. Smulski was the general manager for the facility while Lockhart managed the warehouse and drivers. Lockhart had been at Alside for many years. Lockhart was the direct supervisor for Claimant Jeremy Bottomley.

Claimant had worked for Alside for about two years as a driver. Smulski confirmed that tension existed between Claimant and Lockhart that was related to work activities. They had been involved in a previous confrontation at work and also bickered a lot. Smulski acknowledged that Lockhart was difficult to work with. He would change his mind about where things should go in the warehouse. Smulski recounted that Claimant finally stood up for himself in a confrontation with Lockhart a few weeks before the assault took place. Smulski talked to Lockhart about the confrontation, and Lockhart downplayed the significance of the interaction. A few co-workers confirmed to Smulski that there had been a heated verbal confrontation between Claimant and Lockhart. The relationship between the two had been contentious throughout Claimant's time working at Alside. Smulski agreed that the difficulties were all related to work.

Smulski arrived at Alside on the morning of August 3, 2018 and parked his car on the right side of the building. He marked his parking spot with an "M" on Claimant's Exhibit 2. He heard Claimant calling as he walked to the front of the building. Smulski found Claimant in front of the door of the business that adjoins Alside to the left; he marked the location he found Jeremy Bottomley with a "J." Smulski recognized that Claimant was in bad condition and called 9-1-1. Claimant told Smulski that he had been assaulted by three African American men. Claimant was not able to identify who they were. Smulski confirmed that nothing was stolen from Claimant. Claimant's wallet and cellphone were scattered on the ground. Smulski helped Claimant collect his personal belongings.

Smulski testified that Claimant is permitted to park on the left side of the building. That is the side used by the trucks Claimant drives. Smulski told the detective investigating the assault that Lockhart had the means and money to order an assault. Smulski also told him it was less likely that Steven Beachum was involved in the assault. Smulski confirmed that Claimant

had some friction in his relationship with Beachum, but he did not believe it was to the same degree as the friction with Lockhart. Smulski described Alside as a rough place to work. He had no knowledge of any disputes or debts Claimant had outside of work. Smulski also insisted that he did not know who assaulted Claimant or if it was an “inside job.” Out of the workers at Alside, he felt that Lockhart would have been the most likely one to be involved. Claimant had never been aggressive toward Smulski or others at Alside other than the one verbal confrontation with Lockhart.

On cross-examination, Smulski testified that he had the authority to fire employees. Lockhart did not have that authority. Smulski did not know of any previous physical confrontation between Claimant and Lockhart. Smulski did not write up Claimant for the verbal confrontation with Lockhart a few weeks before the assault, because Lockhart told Smulski he did not feel threatened and did not think it was a big deal. Claimant had come to Smulski to tell him about the verbal confrontation. Smulski expressed doubt that Lockhart would have arranged the assault, because Lockhart was an older man and established at Alside. Smulski had been in yelling matches with Lockhart himself and nothing came of it. Smulski had heard that Lockhart hit a driver from another company years before Smulski began working at Alside, but he had no direct knowledge of that incident.

Under questioning by the Board, Smulski agreed that tension had existed between Lockhart and Claimant for a while and he had talked to them before about it. He told them they needed to work together. Smulski acknowledged that Lockhart could micromanage the workers sometimes. Claimant is the one who told Smulski about the recent verbal confrontation. Claimant told Smulski that he had been the aggressor by standing up for himself. Lockhart told Smulski it was not a big deal, so Smulski took no further action. Smulski did not view



Claimant's actions as insubordinate. Smulski also had no knowledge that Lockhart actually took action to retaliate against Claimant.

Secdrick Pyatt testified that he has worked at Alside as a driver for four years. He knew Claimant when he worked at Alside. Pyatt was aware that Claimant and Gene Lockhart argued frequently. Pyatt described Lockhart as confrontational with lots of other people at Alside as well. Lockhart wanted things done his way and was not shy about telling people what he thought. Pyatt witnessed a verbal confrontation between Claimant and Lockhart where they were yelling at each other. Pyatt walked away because they were always yelling at each other. He assumed their arguments were related to work. Pyatt recalled talking to Det. Shatley about the assault of Claimant. He told the detective he would take a polygraph if requested. He also told the detective that, if the assault were an "inside job," the likely insider who would have been involved was Gene Lockhart. Pyatt said this because Lockhart and Claimant had many verbal confrontations. Pyatt thought the assault was meant to send a message, because it occurred at such an early hour, on the side of the building where Claimant was known to park and where there were no cameras, and no one else parked there at that time. Pyatt believed only someone at Alside would know all these things.

On cross-examination, Pyatt acknowledged that he had no knowledge that Lockhart was involved in the assault. He also confirmed that Lockhart had issues with a lot of people at work but Pyatt had no knowledge of Lockhart attacking anyone else.

Under questioning by the Board, Pyatt described Lockhart as moody, so he would avoid him. Pyatt also had his "moments" with Lockhart. Pyatt did not notice anything different between Lockhart and Claimant after the verbal confrontation before the assault.

Natalie Wamba testified that Claimant Jeremy Bottomley has been her boyfriend for seven years. They have lived together for most of that time. Wamba talked to the police officers after the assault on Claimant. Wamba believed the assault was related to a series of events at Claimant's work. She did not believe there was anything in Claimant's personal life that could explain the attack. Wamba testified that Lockhart made Claimant's work life difficult and this resulted in a lot of conflict between them. A few weeks before the assault, Claimant confronted Lockhart in the warehouse after Lockhart pushed a pallet into Claimant's pallet. Claimant would not back down that time. Wamba insisted that escalating confrontations led up to the attack on August 3, 2018. Wamba encouraged Claimant to tell Mike Smulski what was going on between Claimant and Lockhart as the confrontations and frustrations increased. Outside of work, Claimant led a mellow life with Wamba. Wamba insisted that Claimant was never aggressive or involved in fist fights or other conflicts outside of work. Claimant played the penny slots at Delaware Park but did not have any gambling problems. The police officers who interviewed Claimant at the hospital pushed her hard to think of any other possible reasons for the assault. She told them about a recent incident where Claimant cut someone off while he was driving, and the silver truck involved followed Claimant to work and then left. She believes that Claimant described a different vehicle than the one seen at the attack. Wamba believes the attack was related to the escalating problems at work, not the road rage incident. Wamba was not present at the assault.

Claimant Jeremy Bottomley testified that he had been working at Alside for one year and nine months as of August 3, 2018. He worked as a driver delivering materials to various companies and customers. He had a contentious relationship with Gene Lockhart. He estimated fifteen to twenty confrontations or incidents between them. He brought these conflicts to Mike

Smulski's attention. All the incidents were related to work activities. Lockhart wanted things done a specific way or he would "mess with you." Lockhart would do things such as hide forklifts, hide keys to the truck, hide Claimant's safety vest, and put pallets into parking spots. Claimant did not know why Lockhart did these things to him. Lockhart admitted what he did to Mike Smulski, at one point. Lockhart would yell at Claimant in front of other employees. Claimant insisted that none of his other relationships at work were as contentious. On the day of the big verbal confrontation with Lockhart, Lockhart aggressively grabbed a pallet, slammed it at Claimant's pallet, and got in Claimant's face. Claimant stood there face to face with Lockhart and would not back down. Lockhart kept yelling at him and calling him names. Usually Claimant would walk away from a confrontation like this and just tell Smulski what had happened. This particular confrontation occurred about two weeks before the assault. Claimant told Smulski about the incident and told Smulski he was going to leave early. Claimant did not see Lockhart much after that incident.

On August 3, 2018, Claimant parked to the left of the building as usual, got out of his car, and was attacked by three black males with weapons. He noticed that a silver van was parked nearby. The only other person at the office already was Dave Farley. Claimant always parked in the same place. He was the only Alside employee who parked in that area. The three men were wearing masks. One man had a baseball bat. Claimant threw his coffee at the man with the bat. After that, things start to go blank. The attackers did not say anything to him. They hit him in the head, body, and face. He tried to run to the front of Alside but ended up in front of the adjoining business. Claimant recalled hearing one of the men whisper "we gotta go" and the assault stopped. Claimant's personal belongings such as his watch and phone were strewn about on the ground. His wallet was in his back pocket. The attackers did not try to steal anything.

Claimant testified that the attackers were never identified. After the attackers left, Claimant crawled to the sidewalk and waited for someone to come and help him. Eventually an ambulance arrived. On Claimant's Exhibit 2 showing a photograph of the building and parking lot, Claimant confirmed that an "X" marked the location he parked to the left of the building and confirmed that the silver van was parked at location "O." He also marked the locations of the three figures who attacked him when the assault began. The entrance to Alside is marked with an "A."

Claimant believes that Gene Lockhart orchestrated the attack and told the detective that. Claimant believes Lockhart did it because he would not back down at the most recent verbal confrontation. He thinks Lockhart wanted to send him a message and send a message to others not to stand up to Lockhart. Claimant recalled Lockhart talking about sending people to someone's house who did not pay for a side job Lockhart had done. Claimant thinks the attackers knew where he parked, when he arrived, and that no cameras were located on that side of the building. Claimant always arrived at 6 a.m. before anyone else, except for the salesman, Dave Farley. Lockhart was aware of Claimant's habits.

Claimant insisted he did not have any enemies outside of work or recall any confrontations outside of work. The only gambling he does is to play the penny slots at Delaware Park. The road incident with the silver truck occurred about two to three weeks before the attack. Claimant was driving on Route 9 and pulled out after stopping at a stop sign. A silver truck followed him into the industrial park but did not follow Claimant to his parking spot. There was no confrontation and Claimant never felt threatened. The driver of the truck would not have seen where he parked. He thinks the driver may have worked at the industrial park. He

does not know if the driver was male or female. He mentioned the incident to his girlfriend because they were watching a discussion about aggressive driving on the news.

On cross-examination, Claimant asserted that he does not have any debts or judgments against him. Claimant described the environment at Alside as always having some conflict, but the conflicts he had with Lockhart were much different. Claimant acknowledged some issues with Steve, but he insisted that they were not as significant. Claimant also heard a lot about Lockhart having conflicts with other employees at Alside, including a physical or “almost” physical confrontation. Claimant did not witness any physical confrontation involving Lockhart. Claimant told the police detective that he heard Lockhart talking about sending someone to a person’s house to collect money. Claimant believes the attackers were waiting for him on August 3, 2018.

Under questioning by the Board, Claimant testified that he has not returned to Alside since the attack. He does not really want to return to work there, but he needs a job. Claimant felt that Lockhart treated him differently than others at times. After Claimant reported incidents to Smulski, Smulski would say he would talk to Lockhart. Claimant insisted that it was a pickup truck, not a van, involved in the road incident. The truck did not follow him to work. The van at the site of the attack was a Toyota Sienna. He would not confuse this with a pickup truck. Claimant does not know if Lockhart still works at Alside.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Did an Industrial Accident Occur Within the Course and Scope of Employment?**

The issue presented to the Industrial Accident Board is whether injuries Claimant Jeremy Bottomley suffered as a result of an assault on August 3, 2018 arose out of and in the course of his employment with Alside Supply Center. *See Histed v. E.I. DuPont de Nemours & Co*, 621

A.2d 340, 343 (Del. 1993). The Employer denies that the assault arose out of Claimant's employment. 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." DEL. CODE ANN. tit. 19, § 2304. The requirements "arising out of" and "in the course of" employment are two separate requirements both of which must be met for workers' compensation to be available under the statute. *Stevens v. State*, 802 A.2d 939, 945 (Del. Super. Ct. 2002). Ultimately, whether a claimant's injuries arose within the course and scope of employment is a legal conclusion determined by the facts under a totality of the circumstances analysis. *Stevens*, 802 A.2d at 945; *Histed*, 621 A.2d at 342. See also *Spellman v. Christiana Care Health Services*, No. 315,2012, slip op. at 8, 12 (Del. Apr. 8, 2013) (en banc).

In the present case, there is no apparent dispute that Claimant was "in the course of employment" at the time of the assault. "[I]n the course of" employment refers to the time, place and circumstances of the injury. *Stevens*, 802 A.2d at 945. "It 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 543-44. In short, "in order to be compensable, the injury must first have been caused in a time and place where it would be reasonable for the employee to be under the circumstances." *Rose v. Cadillac Fairview Shopping Center Properties, Inc.*, 668 A.2d 782, 786 (Del. Super. Ct. 1995), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676 A.2d 906 (Del. 1996). Claimant was an employee of Alside and had just parked in his usual parking spot outside the building where Alside is located, at the time he usually arrived for work at 6 a.m., and was starting to walk toward the building entrance when he was attacked. The site manager, Mike Smulski, confirmed that the Employer

condoned Claimant's use of the parking area to the left of the building to park his car while at work, although the entrance to Alside was on the right side of the building and another business occupied the left side. Thus, under Delaware law, Claimant was considered on the employer's premises at the time of the attack and engaged in acts preparatory to his employment with Alside when he was attacked. *See, e.g., Rose v. Cadillac Fairview Shopping Center Properties, Inc.*, 668 A.2d 782 (Del. Super. Ct. 1995), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676 A.2d 906 (Del. 1996); *Tickles v. PNC Bank*, 703 A.2d 633 (Del. 1997); *Cox v. Quality Car Wash*, 449 A.2d 231, 232 (Del. 1982). Based on the preceding evidence, the Board finds that Claimant was within the course of employment at the time of the attack, because the injury occurred in a time and place where it would be reasonable for Claimant to be under the circumstances.

Where the parties disagree is whether the assault on Claimant can be said to have arisen out of his employment. "[A]rising out of" (or "scope of") employment refers to the origin of the accident and its cause. *Rose*, 668 A.2d at 786. Most authorities "hold that an injury arises out of employment if it arises out of the nature, conditions, obligations or incidents of the employment, or has a reasonable relation to it." *Dravo Corp. v. Strosnider*, 45 A.2d 542, 544 (Del. Super. Ct. 1945). An essential causal relationship between the employment and the injury is unnecessary, so an employee does not have to be injured during a job-related activity to be eligible for workers' compensation benefits. *Stevens*, 802 A.2d at 945. "It is sufficient if the injury arises from a situation which is an incident or has a reasonable relation to the employment, and that there be some causal connection between the injury and the employment." *Dravo*, 45 A.2d at 544.

In cases involving a physical attack on an employee at work, the IAB and the courts have considered whether the attack arose from a personal dispute or from an employment-related

dispute when determining whether the attack “arose out of” employment and was therefore compensable. Injuries have been found to be non-compensable when the attack was personally motivated, for example, where a manager’s wife attacked an employee because the wife suspected an affair between the employee and the manager (*Brogan v. Value City Furniture*, C.A. No. 01A-06-002, 2002 WL 499721 (Mar. 27, 2002)) and where the assailants attacked the claimant after she accidentally bumped into them in a food court in the mall where she worked (*Lauria v. M.A.C.*, C.A. No. 05A-08-008, 2006 WL 1688118 (June 20, 2006)). In those cases, the attack was found to arise from a personal confrontation rather than having any nexus to work. In comparison, the Board has found injuries to be compensable where the dispute has been found to arise from work-related interactions or activity. For example, in *James v. Diamond State Warehousing & Distribution*, Del. IAB, Hrg. No. 1377939 (Sept. 25, 2013), the Board found the claimant’s injuries to be compensable where another employee stabbed the claimant as a result of antagonism connected to work. The Board in *James* found little evidence of a source of antagonism between the men that was unconnected to work. *Id.* at 11. The antagonism arose from a series of negative interactions in the workplace.

The other type of assault where injuries have been found to be compensable is where the attack on the employee is believed to be random and essentially “neutral.” In *Rose v. Cadillac Fairview Shopping Center Properties, Inc.*, Superior Court found injuries to be compensable where the employee was abducted from the parking lot adjacent to her workplace, as she arrived early for her scheduled work shift, and was raped by an unknown assailant. 668 A.2d 782. The Court found a reasonable relation between the attack and the claimant’s employment where claimant was required to arrive early for work and park in a certain area of the parking lot, and the conditions of her employment therefore increased the likelihood of an attack of this nature.



*Id.* at 790. The Court noted that the assault was by an unknown assailant who assaulted claimant for no personal reason, thereby placing the attack in the “neutral” category. *Id.* The Court found “[t]here existed a causal connection between plaintiff’s presence in the parking lot preparing to work and the attack; therefore, the injuries she suffered arose out of her employment.” *Id.*

The current case does not fall squarely into any of the fact patterns outlined above, although it shares a number of similarities to *Rose*. The facts here are similar to those in *Rose*, because the assailants are still unknown and the attack occurred in the parking lot as Claimant prepared to enter the workplace. Claimant was attacked by three unknown assailants as he arrived for work at Alside. As determined earlier in this decision, Claimant was in the course of his employment at the time of the attack because he was in a place he could be expected to be at a reasonable time before beginning work on August 3, 2018, that is, on the premises in the parking lot as he walked toward the front door of Alside. Despite an investigation by the Delaware State Police, the assailants were never identified and nobody was ever charged with the crime. This case is also similar to *Rose* in that the conditions of Claimant’s employment increased the likelihood of an attack of this nature due to the early hour of Claimant’s arrival at work, the relative isolation of the building in an industrial park, and the absence of any security camera to deter crime in the parking lot.

Nonetheless, this case differs from *Rose* in that evidence suggests the attackers in the current case specifically targeted Claimant, rather than the attack being purely random or “neutral” in motivation. As outlined by Detective Shatley, the circumstances surrounding the attack suggest that the assailants were waiting for Claimant to arrive at work and targeted him for attack, because the assailants were already parked nearby when Claimant arrived at work at his usual time at 6 a.m. and parked in his usual location to the left of the building. The assailants

immediately approached Claimant after he left his vehicle and started walking toward the building. In addition, the assailants did not speak to Claimant or rob him of any of his personal belongings such as his wallet or cellphone. Although the assailants were never identified and nobody was ever arrested for the assault, Detective Shatley shared his belief that, more likely than not, the attack had been arranged by Claimant's supervisor at work, Eugene Lockhart, based on the evidence uncovered during the investigation of the incident. He detailed evidence indicating that the attackers had "inside knowledge" about Claimant's work habits and the lack of a security camera in the parking area, and he recounted the well-known history of conflict between Claimant and Lockhart at work, including a particularly notable verbal confrontation about two weeks before the assault. All the witnesses who testified confirmed that the conflict between Claimant and Lockhart arose out of work activities, not any personal dispute or motivation. The co-workers who testified and Claimant agreed that Lockhart was the most likely person at Alside to have arranged the attack, although the site manager, Mike Smulski, did not believe Lockhart would have done so. The testimony from Detective Shatley, the co-workers at Alside, Claimant, and Claimant's girlfriend thus support a causal connection between the attack and the employment based on the work-related animus between Claimant and Eugene Lockhart. If this scenario were accepted by the Board, then Claimant's injuries would be compensable due to the work-related motivation for the attack. However, as Detective Shatley acknowledged, no direct evidence of Lockhart's involvement in the attack was ever uncovered. Given this lack of direct evidence of Lockhart's involvement in the attack and the absence of any testimony from Lockhart at the hearing, the Board is reluctant to find that Eugene Lockhart likely arranged for the attack on Claimant.

This leaves the possibility that the attack was an “inside job” arranged by an unknown person at Alside or that the attack was motivated by personal reasons completely separate from Claimant’s employment. Bill Wilson told Detective Shatley that he thought the assault was an “inside job” because people did not get along with Claimant, and Claimant admitted that there was some tension between him and another employee at Alside. Mike Smulski described Alside as a rough place to work, suggesting an environment where tension was common. If the attack was an “inside job” by someone other than Eugene Lockhart, this would still provide the necessary nexus between the attack and employment for Claimant’s injuries to be compensable, since there is no evidence that Claimant had a personally motivated dispute with anyone at work. As for the possibility that the attack had a personal motivation completely separate from work, Claimant’s longtime girlfriend testified that Claimant led a quiet life outside of work, was not in debt to anyone, and was not an aggressive person prone to fighting or conflict. The only possible reason offered of a personal reason for the attack was a “road rage” incident about two weeks before the attack in which Claimant cut off someone while driving to work. The vehicle he cut off followed him into the industrial park. Claimant insisted, however, that the vehicle involved was a silver pickup truck and he never felt threatened or had any direct confrontation with the driver. He also testified that pickup truck driver would not have seen where he parked. He thought the pickup truck driver may have worked in the industrial park, too. Claimant asserted that he would not have mixed up the pickup truck with the silver Toyota Sienna that was used by the assailants on August 3, 2018. Detective Shatley considered the “road rage” incident as a possible motivation for the attack, but he discounted the likelihood of this event as the reason for the attack. He testified that, based on his experience as a state trooper, a road incident such as the one detailed by Claimant and his girlfriend would not usually lead to a confrontation two

weeks later. Road rage would result in an immediate confrontation, in his experience. The Board agrees with Detective Shatley that the “road rage” event was an unlikely reason for the attack that occurred on August 3, 2018, given the remoteness in time from the road event and the absence of any direct confrontation at the time, suggesting the event was relatively minor.

After weighing the evidence presented, the Board therefore finds that, more likely than not, there is a reasonable relation between the attack on Claimant on August 3, 2018 and Claimant’s employment with Alside such that the injuries Claimant suffered in the attack arose out of his employment with Alside and are compensable under the Workers’ Compensation Act. The conditions of employment at Alside increased the likelihood of an attack by the unknown assailants as Claimant arrived for work, and credible evidence exists of work-related tension that could have led to Claimant being a target for the attack. No similarly credible evidence exists of a personal motivation for the attack.

To summarize, after considering the totality of the facts and circumstances, the Board finds that Claimant’s injuries on August 3, 2018 arose out of and within the course of employment his employment with Alside Supply Center.

#### **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.” 19 *Del. C.* § 2320. At the current time, the maximum based on Delaware’s average weekly wage calculates to \$10,704.80.

In setting an attorney’s fee, the Board or Hearing Officer considers the factors set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). Claimant, as the party seeking the

award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation. As noted above, Claimant successfully proved he was involved in an industrial accident within the course and scope of employment on August 3, 2018. He can therefore anticipate certain workers' compensation benefits related to the accident. Claimant's counsel submitted an affidavit stating that he spent at least twelve hours preparing for the hearing. Claimant's counsel was admitted to the Delaware bar in 2006 and is experienced in the area of workers' compensation law. His office's first contact with Claimant was on August 10, 2018. This hearing was limited in scope because it precluded medical issues and the need for medical testimony. There were no unusual time limitations imposed by either Claimant or the circumstances. There was no evidence presented that accepting Claimant's case has precluded counsel from other employment. Claimant's counsel represents that he has a contingent fee arrangement with Claimant. Counsel also represents that no fees and expenses have been or will be received from any other source. There is no evidence that Employer would be unable to pay an attorney's fee.

Based on the factors set forth above and the attorney's fees customarily charged in this locality, the Board awards a reasonable attorney's fee in the amount of \$5000.

#### **STATEMENT OF THE DETERMINATION**

For the reasons stated above, the Board finds that Claimant suffered injuries in an industrial accident on August 3, 2018 that arose out of and occurred in the course of his employment with Alside Supply Center. The Board awards a reasonable attorney's fee in the amount of \$5000.

IT IS SO ORDERED THIS 19<sup>th</sup> DAY OF JUNE, 2019.

**INDUSTRIAL ACCIDENT BOARD**

Idel M. Wilson  
IDEL M. WILSON

for Robert Mitchell  
VINCENT D'ANNA

I, Susan D. Mack, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Susan D. Mack

Mailed Date: 6-20-19

bc  
OWC Staff