

BEFORE THE INDUSTRIAL ACCIDENT BOARD  
OF THE STATE OF DELAWARE

KIM BROWNING, )  
 )  
 Employee, )  
 )  
 v. ) Hearing No. 1468187  
 )  
 STATE OF DELAWARE, )  
 )  
 Employer. )

**ORDER  
REGARDING 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 February 5, 2020, in the Hearing Room of the Board, Dover, Delaware.

**PRESENT:**

WILLIAM HARE

PATRICIA MAULL

Julie G. Bucklin, Workers' Compensation Hearing Officer, for the Board

**APPEARANCES:**

Joseph D. Stanley, Esquire, for the Employee

Keri L. Morris-Johnston, Esquire, for the Employer

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

On November 15, 2019, Kim Browning ("Claimant") filed a Petition to Determine Compensation Due seeking workers' compensation benefits from the State of Delaware ("the State") for multiple injuries stemming from a January 24, 2018 fall into a sinkhole. During a preliminary evidentiary hearing, Claimant seeks acknowledgment that her accident occurred within the course and scope of her employment. The parties reserved the right to investigate Claimant's average weekly wage, the nature, type and extent of her injuries, and the benefit entitlement pending the outcome of the Board's decision on the issue of course and scope of employment.

The State does not dispute the occurrence of Claimant's fall into a sinkhole on January 24, 2018. The State argues that Claimant was outside of the course and scope of her employment when she was injured, since the accident occurred before work hours while Claimant was not on her employer's premises because she was not yet at the Kent County Courthouse. The State argues that the "going and coming rule" applies in this case, making the accident outside of the course and scope of employment.

On February 5, 2020, the Board entertained a hearing on Claimant's Motion Regarding Course and Scope of Employment and this is the Board's decision.

## **SUMMARY OF THE EVIDENCE**

Claimant testified about her job duties and the January 24, 2018 accident. She worked as a bailiff in Superior Court in the Kent County Courthouse for fourteen years. Her official title changed from bailiff to Judicial Assistant I over the years, but the job duties remained the same. Bailiffs became Peace Officers in 2006. Joe Sanchez is Claimant's supervisor.

Claimant's job duties included protecting the judges, jury, and visitors in the courtroom and controlling the courtroom. She also pulled the assignments every morning to see what was scheduled on the calendar. She set up the courtroom for the judge and logged in visitors. Sometimes, she had to run outside to get a person who left who was supposed to be held and occasionally walked jurors to their cars.

Peace Officers have authority to arrest. Claimant wore her uniform on a daily basis and if she saw something happen, she would react and make an arrest, if possible.

There is public parking on the streets around the Courthouse. Jurors typically park on Water Street in Dover, but whoever gets to the Courthouse first gets to park closer to the Courthouse. Bailiffs park on Federal Street, in the back of the Courthouse, or on the streets around the Courthouse. Generally, employees of the courthouse know if someone parks in a particular spot and they honor it. Claimant usually parked on Federal Street by the bell alongside of the Courthouse.

On January 24, 2018, Claimant parked on Federal Street, got out of the car, and walked behind the car. When she stepped with one foot onto the grass, the dirt moved, but there was no hole. When she stepped up with the other foot onto the grass, the ground opened up into a sinkhole. Claimant's right leg went behind her and left leg went into the hole up to her waist. There was a woman who works for the Supreme Court parked in the car in front of Claimant. No one could see Claimant because she was behind her car, so she screamed for help when she saw the woman get out of her car. The woman ran for help and an ambulance arrived. Three police officers helped Claimant get out of the hole. Claimant reported the accident to the State. The parties presented photographs of the parking on the streets around the Courthouse and the

drain on Federal Street in a joint exhibit and Claimant presented additional photographs of the area as another exhibit.

Claimant has to be at work inside the Bailiffs' Office inside of the Kent County Courthouse by 8:00 a.m. She is considered late to work by 8:01 a.m., although there might be a policy to allow employees time to get through security. She has to go through security when entering the building. She does not have a punch card for starting or leaving work. The Bailiffs' Office is located approximately forty to fifty feet from the parking spot. When Claimant arrived at 7:55 a.m., she would be on time for work.

Claimant was wearing her uniform on January 24, 2018, when she was injured. There are no locker rooms for changing into or out of her uniform in the Courthouse. There is a closet with extra uniforms, if needed. All of the bailiffs wore their uniforms to work, but Claimant is not sure whether there is a rule requiring them to do so.

There is no rule as to where Claimant has to park. She can park on the streets anywhere near the Courthouse and parking is available on a first-come first-served basis. Claimant received a letter from Travelers' Insurance Company, on behalf of the City of Dover, indicating that the location where she fell into the sinkhole is owned by the State of Delaware, not the City of Dover.

Claimant fell around 7:50 a.m. on January 24, 2018. She had not crossed over to the Courthouse premises yet or gone through security at the Courthouse. Although there are times when Claimant has to chase a subject out of the Courthouse or walk jurors to their cars, she was not doing either of those activities when she fell into the sinkhole.

There are other buildings in the area and the employees from those buildings also park on the streets in the same area. If someone parked in Claimant's typical spot, she would find

another parking spot. She can park anywhere around the area. There is no requirement for Claimant to drive to work; she could take a bus or walk, but she lives approximately fifteen to twenty minutes away by car.

There are times when parking is restricted on Federal Street and around the Courthouse, such as when there are ceremonies at Legislative Hall. When that happens, Claimant has to find another place to park and she could not complain to anyone at the Courthouse about it. Sometimes jurors, attorneys, or visitors take her usual parking spot.

Some employees, including judges, judges' secretaries, and supervisors have assigned parking spots in the garage underneath of the Kent County Courthouse. Bailiffs, such as Claimant, do not have designated parking spots or locations; they have to find parking on the public streets around the Courthouse.

Joseph Sanchez, Chief Security Officer for Superior Court in the Kent County Courthouse, testified on behalf of the State. Mr. Sanchez was Claimant's supervisor in January 2018. Bailiffs do not have written employment contracts. There are no rules for employees regarding parking, other than certain employees with assigned parking in the garage. Bailiffs do not have assigned parking, so they park on the public streets around the Courthouse.

On-street parking is restricted around the Courthouse when Legislative Hall hosts an event or when the City of Dover hosts an event on the weekends on The Green. When that occurs, "No Parking" signs are posted for certain times on Fridays. No one at Superior Court can trump that decision. Resident Judge Witham will allow employees to leave early on those occasions in order to clear the streets. The Court does not maintain Federal Street or the other streets around the Courthouse. Superior Court cannot ticket the cars parked on the public streets

around the Courthouse; ticketing is under the City of Dover's purview. People visit the other buildings in the area and park on the public streets around the Courthouse.

The Courthouse opens to employees in the loading dock area at 7:00 a.m.; it opens to employees in the lobby at 7:30 a.m., which is when the security screeners start; and, it opens to the public at 8:15 a.m. The Courthouse opens to employees first in order to allow employees time to get to their offices quickly before the public arrives. Capitol Police handle the screening with the metal detectors as people walk into the Courthouse. The line can back up when the public is present, depending on how many people are there, which is why the employees arrive earlier than the public.

Although Claimant believes she will be considered late to work at 8:01 a.m., there is technically a seven-minute window before being deemed late. Employees keep their own timesheets, which they give to their supervisors on Friday afternoons. Good employees arrive before 8:00 a.m.

A clerk from the Supreme Court was parked in front of Claimant on January 24, 2018. It is typical for all Courthouse employees to park near each other. There is no rule or policy saying employees have to park in close proximity to the Courthouse, but human nature leads people to park nearby. There is a two-hour parking limit on Water Street, so it is hard for employees to park on that street and work all day.

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

### **Course and Scope of Employment**

In order to be eligible for workers' compensation benefits, Claimant must prove that the injury she sustained on January 24, 2018 was "by accident arising out of and in the course of

employment." DEL. CODE ANN. tit. 19, § 2304. For the following reasons, the Board finds that Claimant has not met her burden of proof.

The employment connection focuses on two aspects: whether the injury was "in the course of employment" and whether the injury arose out of that employment ("scope"). "[Q]uestions relating to the course and scope of employment are highly factual. Necessarily, they must be resolved under a totality of the circumstances test." *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 345 (Del. 1993).

"The term 'in the course of employment' refers to the time, place and circumstances of the injury." *Rose v. Cadillac Fairview Shopping Center Properties (Delaware), Inc.*, 668 A.2d 782, 786 (Del. Super. 1995)(citing *Dravo Corp. v. Strosnider*, 45 A.2d 542, 543 (Del. Super. 1945)), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676 A.2d 906 (Del. 1996). 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 543-544. 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*, 668 A.2d at 786.

By comparison, the issue of "scope" (or "arising out of employment") "relates to the origin of the accident and its cause." *Rose*, 668 A.2d at 786. For the purposes of this prong, it "is sufficient if the injury arises from a situation which is an incident or has a reasonable relation to the employment." *Dravo*, 45 A.2d at 544. In other words, "there must be a reasonable causal connection between the injury and the employment." *Rose*, 668 A.2d at 786; *see also, Parsons v. Mumford*, Del. Super., C.A. No. 95C-09-031, Ridgely, J., 1997 WL 819122 at \*3 (November 25, 1997). However, an "essential causal relationship between the employment and the injury is

unnecessary. . . . [T]he employee does not have to be injured during a job-related activity to be eligible for worker’s compensation benefits.” *Tickles v. PNC Bank*, 703 A.2d 633, 637 (Del. 1997)(citing *Storm v. Karl-Mil, Inc.*, 460 A.2d 519, 521 (Del. 1983)).

The “course” and “scope” requirements articulated by the courts are, to a large extent, codified in the Workers’ Compensation Act, which provides that, to be considered covered, an injured employee must be:

engaged in, on or about the premises where the employee’s services are being performed, which are occupied by, or under the control of, the employer (the employee’s presence being required by the nature of the employee’s employment), or while the employee is engaged elsewhere in or about the employer’s business where the employee’s services require the employee’s presence as part of such service at the time of the injury....

DEL. CODE ANN. tit. 19, § 2301(19)a.

The Supreme Court in *Spellman v. Christiana Care Health Services*, 74 A.3d 619 (Del. 2013) clarified that the critical point in “course and scope” issues is the employment agreement. The Court stated that “the inquiry into whether an employee’s injury is sufficiently work-related to be compensable under the statute, should start with the terms of the employment relationship or contract. Normally, that will require the Board (or a reviewing court) to draw inferences from the ‘totality of circumstances,’ within the employment contract framework.” *Id.* at 626. The Court also explained that

If the evidence of the contractual terms resolves the issue of whether the injury arose out of and occurred in the course of the Claimant’s employment, then the Board’s analysis can end. If, however, the contract-related evidence is insufficient to resolve the ‘scope of employment’ issue, then the Board (and any reviewing court) may resort to secondary default presumptions and rules of construction that best further the statutory purpose. The ‘going and coming’ rule and its multifold exceptions are functionally speaking, examples of secondary default presumptions and rules of construction. They are not primary, first-resort, rules of decision.



*Id.* at 625.

In the case at hand, the contractual terms of Claimant's employment do not resolve the issue, so the Board must look to the totality of the circumstances to reach a decision. The "going and coming" rule "precludes an employee from receiving workers' compensation benefits for injuries sustained while traveling to and from his or her place of employment." *Tickles*, 703 A.2d at 636; *see Histed*, 621 A.2d at 343; *Devine v. Advanced Power Control, Inc.*, 663 A.2d 1205, 1210 (Del. 1995). Furthermore, as quoted above, the Workers' Compensation Act "[s]hall not cover an employee except while the employee is engaged in, on or about the premises where the employee's services are being performed." DEL. CODE ANN. tit. 19, § 2301(19)a. The rationale for the "going and coming" rule is stated clearly in *Histed*: "employees face the same hazards during daily commuting trips as does the general public. Such risks, therefore, are no different from those confronting workers on personal excursions." *Histed*, 621 A.2d at 343; *see also, Tickles*, 703 A.2d at 636. Injuries suffered on the way to work that occur on the employer's premises are compensable; however, injuries suffered off of the employer's premises on the way to work are not compensable. *Quality Car Wash v. Cox*, 438 A.2d 1243, 1245 (Del. Super. 1981), *rev'd on other grounds sub nom. Cox v. Quality Car Wash*, 449 A.2d 231 (Del. 1982).

Based on the evidence presented, the Board finds that Claimant's January 24, 2018 fall into a sinkhole occurred outside of the course and scope of her employment with the State as it occurred while she was not even on the Courthouse premises before work hours began. The Board finds that Claimant was not working at the time of the accident. It is undisputed that, Claimant's standard work hours are from 8:00 a.m. until 4:30 p.m. and the accident occurred around 7:50 a.m. on Claimant's way to work.

Employees, such as Claimant, park on the public streets around the Kent County Courthouse and surrounding buildings on a first-come first-served basis. There is no requirement for Claimant to park in any particular area. Claimant was not on the Courthouse premises or in an area under the control of the Superior Court at the time of her fall into the sinkhole. She fell while on her commute to work and the “going and coming” rule precludes workers’ compensation benefits while the employee is traveling to and from work until reaching the employer’s property.

Claimant had not yet crossed the property line onto the Courthouse premises when she fell into the sinkhole. *See Saravia v. Cloudburst*, IAB No. 1408076, \*5 (July 16, 2014). Being in the mere proximity of the employer’s premises is not enough for the accident to be considered within the course and scope of employment and being on the sidewalks or streets around the premises is not the same as being within the premises. *Id.* at \*6, *citing* Arthur Larson & Lex Larson, *Larson’s Workers’ Compensation Law*, §13.02[2][e], at 13-29 (Desk Edition, 2014).

There are numerous cases wherein the claimant was injured in the employer’s parking lot where the employer has control of the property; however, this case differs from those cases. Claimant was not within the Courthouse parking lot or even in designated/assigned parking. Neither the Kent County Superior Court nor the Kent County Courthouse has any control over the streets surrounding the building. Although the State might own the property where Claimant fell, it is not the Kent County Courthouse property and it does not automatically mean that the accident occurred within the course and scope of Claimant’s employment. The only relationship is that both properties (Courthouse and public street) are state-owned, which is insufficient to bring the location of the accident within the Courthouse’s premises. *Garrett v. State of Delaware*, 2008 Del. Super. LEXIS 323, 2008 WL 4152743, 07A-04-004, Vaughn, P.J. (August

29, 2008). The Kent County Courthouse does not own or control the public street or sidewalk area where Claimant fell. *Saravia, supra*, at \*7-8. People working in the other buildings in the area and the general public park in the same area as where Claimant fell. *Id.*, at \*9-10. The Courthouse has no authority to issue parking tickets to cars parked on the public streets around the Courthouse. Likewise, the Courthouse has no authority to override the “No Parking” signs the City of Dover posts for special events. Claimant was not leaving the Courthouse to chase or escort someone when she fell; she was not yet working or on the Courthouse property.

Simply because Claimant was wearing her uniform, it does not mean her fall is automatically a compensable claim. She could have stopped at a store on her way to work and fallen and the injury would not be compensable. Likewise, she was not yet on the Courthouse premises when she fell into the sinkhole and sustained her injuries.

Based on the evidence presented and the totality of the circumstances, the Board finds that Claimant was not on the Courthouse premises or in an area within the control of the Superior Court or Courthouse and was not yet providing a benefit to the Court when she fell on January 24, 2018; therefore, the Board finds that Claimant was not within the course and scope of her employment at the time of her accident, as she was still traveling to work and, therefore, the “going and coming” rule precludes workers’ compensation coverage for the accident. In light of the Supreme Court’s decision in *Spellman* and the evidence presented, the Board finds that Claimant was not within the “course and scope” of her employment at the time of the accident; therefore, the analysis ends.

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

Based on the foregoing, the Board DENIES Claimant's Motion and finds that she was outside of the course and scope of her employment when she was injured on January 24, 2018.


IT IS SO ORDERED THIS 13<sup>th</sup> DAY OF FEBRUARY 2020.

**INDUSTRIAL ACCIDENT BOARD**


/s/ William Hare

/s/ Patricia Maul

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: 2-14-20

  
\_\_\_\_\_  
OWC Staff