CHARLES R. JAMES, Claimant,
v.
DIAMOND STATE WAREHOUSING & DISTRIBUTION, Respondent.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1377939

Mailed Date: September 27, 2013
September 25, 2013

DECISION ON COURSE AND SCOPE

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 July 25, 2013, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

LOWELL L. GROUNDLAND

TERRENCE M. SHANNON

Christopher F. Baum, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Jonathan B. O'Neill, Attorney for the Claimant

Cassandra F. Roberts, Attorney for the Respondent

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NATURE AND STAGE OF THE PROCEEDINGS

Charles R. James ("Claimant") was working as a truck driver for Diamond State Warehousing & Distribution ("Employer) on December 11, 2011, when he was stabbed multiple times with a knife by a co-worker (Michael Brock). While this occurred during Claimant's scheduled work shift, Mr. Brock was not scheduled to work at the time of the altercation. The altercation did occur on Employer's premises.

Claimant filed a Petition to Determine Compensation Due seeking benefits on November 14, 2012. Employer questions who was the aggressor in the altercation and whether Claimant's injury was in the course of his employment and arose out of (*i.e.,* in the scope of) that employment.

A hearing before the Industrial Accident Board was held on this limited issue on July 25, 2013. This is the Board's decision on that issue.

SUMMARY OF THE EVIDENCE

Corporal Timothy Harach of the Delaware State Police testified that he investigated an assault on Employer's premises. The assault occurred on December 11, 2011, and he responded at 12:45am on December 12. Claimant was the victim of the assault and Michael Brock was the suspect. A witness was also identified, namely Lourico ("Rico") Nelums.

Cpl. Harach interviewed Claimant a few days later. He stated that he was getting a truck ready and had started to pull out when Mr. Brock pulled in. Claimant stated that he had to slam on the brakes and he beeped his horn to get Mr. Brock out of the way. A fight ensued. Mr, Nelums stated that Mr. Brock had taken a knife away from Claimant and that that is when the fight broke out. Cpl. Harach stated that there was blood evidence around the truck but he did not find the knife that was used. Mr. Brock had fled the scene in his personal vehicle after the

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assault. He was stopped by a trooper and he attempted to dispose of an empty knife sheath and a flashlight sheath. Amongst Claimant's property was a folding knife, but it was not the knife used for the assault. There was no blood on Claimant's knife and, in any event, the blade of the assault weapon had broken off in Claimant's body. Claimant told a trooper that he would have

killed Mr. Brock if he had been the one with the knife.

Cpl. Harach reviewed the tape of the 9-1-1 call. Mr. Nelums stated on that that Claimant had tried to stab Mr. Brock but that Mr. Brock got the knife away from him and stabbed Claimant. On the recording, Cpl. Harach heard Claimant ask Mr. Nelums if he had stashed the knife. At the time, the police did not know that the knife was missing.

Cpl. Harach stated that Claimant also mentioned a previous September incident, but the corporal did not investigate that event. Claimant stated that he had called the police on Mr. Brock back in September.

Cpl. Harach also spoke with Mr. Brock, who stated that he had gone to Employer to get money from Rico Nelums. He was collecting a debt. In fact, Mr. Brock did have five $100 bills on him when arrested. Mr. Brock also stated that Claimant had previously spat in his face, after which Claimant received a one-week suspension from Employer.

Corporal Regina M. Stevens of the Delaware State Police testified by deposition. She investigated the December 11, 2011 assault. She arrived at the scene about ten minutes after the event. When she arrived, Mr. Brock's pickup truck was parked on the roadway in front of the business. Mr. Brock was next to his vehicle in handcuffs and Cpl. Russo was next to him. Mr, Brock was then placed in Cpl. Stevens patrol vehicle.

Cpl. Stevens stated that Mr. Brock spoke to her and told her that Claimant had called him and stated that he had $500 that he owed Mr. Brock and for Mr. Brock to come to the business to

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pick up the money. Once he got there, Mr. Brock dropped something and bent over to pick it up. When he stood up, Claimant was right up on him and he asked Claimant why he was right up on him. Claimant then took a swing at him with a knife in his hands, but that Claimant then dropped the knife and they started to scuffle. Mr. Brock then stated that he picked up the knife and stabbed Claimant multiple times.

Cpl. Stevens stated that, when Cpl. Russo arrived at the scene, he saw Mr. Brock driving away in his pickup truck. Cpl. Russo went after the vehicle, at which point Mr. Brock turned around and came back to the business.

Cpl. Stevens testified that she allowed Mr. Brock to exit the patrol vehicle because he wanted to urinate. She noticed that he had a laceration on his pinky finger and she bandaged it for him. He then got very close to his own vehicle. He unbuckled his belt and Cpl. Stevens noticed something fall off the belt. Mr. Brock then kicked the object under his vehicle. He then moved away from the truck and urinated. He came back and re-entered the patrol vehicle. A sergeant on the scene then looked under Mr. Brock's truck and found a case for a flashlight and an empty knife sheath.

Cpl. Stevens never spoke to Claimant or to Mr. Nelums. She confirmed that Mr. Brock did have five $100 bills on him when he was arrested. There was some blood on the bills.

Claimant testified that he started working for Employer in February of 2011. He drove overnight routes that could go from Virginia up to the Canadian border. He was aware that Mr. Brock carried knives because Mr. Brock had previously showed him several of them.

Claimant stated that, in September of 2011, he was in a tractor-trailer and trying to leave the yard for a trip when Mr. Brock blocked the truck. Mr. Brock was upset about having to move out of the way to allow Claimant's truck to leave. He started cussing Claimant out.

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Claimant got out of the truck and Mr. Brock pulled a knife on him. Claimant left and called the

police about it. After that incident, Claimant made efforts to avoid Mr. Brock. He did not follow up on the charges and left it alone,

Claimant testified that, on December 11, 2011, he had a scheduled trip to Virginia. He arrived at Employer's yard between 11:30pm and midnight. He backed the tractor portion up to the trailer. At this stage, Claimant could not reach the handle to crank up the "landing gear." He just had to use the tractor to drag the trailer out a bit. As he was pulling it out, Mr. Brock came speeding back there in his personal vehicle with his lights off. In Claimant's estimation, Mr. Brock was driving about 30mph. Both of them slammed on their brakes and Mr. Brock had to swerve out of the way. He parked his car over by Rico Nelums' tractor. Claimant then got out of his tractor to crank up the "landing gear" on the trailer. At this time, Mr. Brock started yelling at him about the "near miss" accident and accused Claimant of trying to hit him. Claimant started towards Mr. Brock to tell him that he had been driving too fast in the parking lot and was driving without lights.[1] Mr. Brock told him to "call the police and tell them I have a knife." Claimant turned away and then turned back and saw that Mr. Brock was close to him and thought Mr. Brock had punched him. He shoved Mr. Brock away and then saw that Mr. Brock had a knife in his hand. Mr. Brock started stabbing Claimant. Claimant managed to get to the cab of the truck, got his phone and called 9-1-1.

Claimant stated that he did not pull a knife on Mr. Brock. Claimant does have a pocket knife, which he uses to cut shrink wrap with, but it was in his pocket. Claimant denied that he owed Mr. Brock any money, nor did Mr. Brock owe him money. Rico Nelums saw the stabbing but he did not try to help. Mr. Nelums and Mr. Brock are friends. While Claimant was making

his 9-1-1 call, he thought that Mr. Nelums was actually helping Mr. Brock to dispose of the knife. He called to Mr. Nelums that if he (Claimant) had had a knife he would have killed Mr. Brock.

Claimant agreed that he testified at Mr. Brock's trial. At that trial, he testified that Mr. Brock had been trying to get Claimant in "hot water" with the boss and had done so a few days earlier. Claimant thought Mr. Brock was trying to make Claimant seem reckless because he had just been in an accident up in Bangor, Maine.

Patrick J. Bastian, the vice president and co-owner of Employer, testified that drivers are not required to touch freight. It would be handled by the receiving company. There would be no need for a driver to cut shrink wrap from anything. A knife would not be needed by a driver in the normal course of the driver's duties. Employer has a policy against workplace violence and against carrying weapons on the premises. Mr. Bastian did not know that Mr. Brock carried knives.

Mr. Bastian agreed that the containers are parked so close together that it is difficult to access the handle on the landing gear, so a driver would need to inch it forward to get to the handle, just as Claimant stated. However, when inching the container forward, the fastest that Claimant could have been going was two or three miles per hour and Mr. Bastian is not sure why Claimant would have felt the need to "slam on the brakes." He would have been moving at less than walking speed.

Mr. Bastian acknowledged that each driver is given a solo route and the drivers are scheduled independent of each other. Claimant would not be working directly with Mr. Brock. He and Mr. Brock had a contentious relationship and did not get along, but since they never had to work together, there was no need for them to get along with each other. Mr. Brock had told

Mr. Bastian about a "spitting" incident by Claimant in September and something about Claimant having a personal relationship or affair with Employer's safety manager that Mr. Brock was "offended" by on moral grounds. Mr. Bastian has no idea if any of that gossip was true.

Claimant was not disciplined for doing any spitting and Mr. Bastian was not aware of either Claimant or Mr. Brock being suspended from work for any reason.

Mr. Bastian stated that, at the time of the December incident, Mr. Nelums was just off the clock, having just completed a run.

Claimant testified further on rebuttal. He denied that he ever spat on Mr. Brock. He also believes that most truckers carry pocketknives. He agreed that his vehicle was not moving very quickly when he "slammed on the brakes."

The parties stipulated that, at Mr. Brock's trial, he was convicted of possession of a deadly weapon by a person prohibited. However, the jury acquitted him of first degree assault.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Course and Scope

The Workers' Compensation Act ("Act") is the exclusive remedy between employer and employee for "personal injury or death by accident *arising out of* and *in the course of* employment." DEL. CODE ANN. tit. 19, § 2304 (emphasis added). Thus, 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).

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"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.[2]

In the current case, there is no substantial dispute that Claimant was "in the course of employment" at the time of the assault. He was working, on Employer's premises, getting prepared to drive a truck, which was a normal duty of his employment. The injury happened at a time and place where it was reasonable for Claimant to be.

By contrast, 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

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25, 1997). To be compensable, an employee's injury must be reasonably related or incidental to the employer's business. The inquiry is "whether there is a sufficient nexus between [the] employment and [the] injury that it may be said that [the] injury was a circumstance of [the] employment." *Collier v. State,* Del. Super., C.A. No. 93A-06-022, Del Pesco, J., 1994 WL 381000 at *2 (July 11, 1994).[3]

The primary dispute in this case is whether the assault of Claimant can be said to have arisen out of the employment (i.e., in the scope of the

employment). Employer argues that the fight between Claimant and Mr. Brock arose not from the employment but rather from personal antagonism between the two men. In essence, Employer argues that the conduct of the two men should be characterized as a personal deviation from employment.

Certainly, it is well-established that a personal deviation from work duties may be so great that an intent to abandon the job temporarily may be inferred, so that the conduct cannot be considered an incident of the employment. Such deviations from the employer's business can break the causal connection so that the injury cannot be said to have arisen out of the scope of employment. *See Bedwell v. Brandywine Carpet Cleaners,* 684 A.2d 302, 305.-06 (Del. Super. 1996)(citing *Ford v. Bi-State Development Agency,* 677 S.W.2d 899, 902 (Mo. Ct. App. 1984)).[4]

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Employer argues that the assault in this case constitutes such a personal deviation, namely that Claimant was injured as a result of an assault by another employee that was personal in nature and in which Claimant was the aggressor.

The Act specifically provides that a compensable injury does *not* include "any injury caused by the wilful act of another employee directed against the employee by reasons personal to such employee and not directed against the employee as an employee or because of the employee's employment." DEL. CODE ANN. tit. 19, § 2301(18)b. The exception from compensability embodied in this "personal dispute exception" requires two elements. First, the act by another employee against the injured employee must be "wilful." Second, the act must be for personal reasons and not because of the employment. *Ward v. General Motors,* 431 A.2d 1277, 1279 (Del. Super. 1981).

An act is considered "wilful" if it is "done intentionally, knowingly, purposely, and without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently." *Stewart v. Oliver B. Cannon & Son, Inc.,* 551 A.2d 818, 823 (Del. Super. 1988)(citing *Lobdell Car Wheel Co. v. Subielski,* 125 A. 462 (Del. Super. 1924)). The term "suggests more than a simple act of volition." *Delaware Tire Center v. Fox,* 411 A.2d 606, 607 (Del. 1980). It does not cover actions that, in a psychiatric sense, are considered "uncontrollable." *See Delaware Tire Center,* 411 A.2d at 607 (suicide not "wilful" when motivated by severe pain and despair); *Ward,* 431 A,2d at 1280 (inability to control actions because of psychiatric condition not "wilful").

There is certainly no basis to conclude that Mr. Brock's actions were uncontrollable or inadvertent. There is no evidence that he was delusional at the time. The stabbing of Claimant was clearly done with intent to injure. While Mr. Brock was acquitted of first degree assault, the

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standard is different between a criminal action and a civil action. The Board is satisfied that, more likely than not, Mr. Brock knowingly and intentionally stabbed Claimant. The stabbing of Claimant was "wilful."

This brings us to the second consideration, namely whether the act was done for a personal reason unrelated to the employment. For the personal dispute exception to apply, the injury must be "caused by conduct with origins outside of the work place." *Konstantopoulos v. Westvaco Corporation,* 690 A.2d 936, 939 (Del. 1996). However, "the mere fact that the setting for the injury was the time and place of employment" does not in itself make the employment the cause of the injury. *Ward,* 431 A.2d at 1280. The issue is whether "the motivation or causation of the assault was founded on reasons which were personal between the wrongdoer and the victim." *Id.*

Naturally, all forms of antagonism are "personal" to some extent, but the question is whether there is an employment relationship to

the antagonism between Claimant and Mr. Brock. Claimant testified that the ill-feeling between himself and Mr. Brock started in September, when Mr. Brock pulled a knife on him and Claimant reported him to the police. However, the uncontradicted reason Mr. Brock pulled the knife in September was the result of a work-related incident with Claimant wanting to leave the yard and Mr. Brock's vehicle blocking the way. In other words, there was a work-related connection to the antagonism between the two. It was the workplace incident that laid the foundation of the ill-will between the two men.

There is little evidence of any other source of antagonism between the men unconnected to work. Cpl. Stevens testified that Mr. Brock had told her that Claimant owed him $500.00 and that he came to collect it. However, this hearsay is in conflict with Cpl. Harach's testimony that he, too, spoke with Mr. Brock and Mr. Brock stated that it was Mr. Nelums who owed him the

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money. This inconsistency makes this potential basis of the December dispute between Claimant and Mr. Brock (a non-work dispute over a debt) less credible than Claimant's version. Similarly, other gossip related about Claimant is unsubstantiated. For example, Cpl. Harach testified that Mr. Brock had stated that Claimant had been suspended for a week for spitting at him. Mr. Bastian (a co-owner of the business), however, denied that Claimant had ever been suspended.

Accordingly, the Board finds that, more likely than not, the assault arose out of employment because the origin of the antagonism between Claimant and Mr. Brock was based on a work event. Similarly, the actual assault was rooted in a similar work event, namely Mr. Brock's vehicle again interfering with Claimant's effort to drive his truck in the yard.

This, however, does not end the analysis in this case. Even if the assault arose out of the course and scope of employment, Claimant's right to benefits might be forfeited if the injury was the result of Claimant's "deliberate and reckless indifference to danger" or because of his "wilful intention to bring about the injury or death . . . of another." DEL. CODE ANN. tit. 19, § 2353(b). Arguably, if Claimant was the aggressor in the fight, that might be considered as a deliberate and reckless indifference to danger and/or a wilful intention to bring about the injury of another. However, as mentioned earlier, the "magnified statutory phrase 'wilful intention' suggests more than a simple act of volition." *Delaware Tire Center,* 411 A.2d at 607. Mere stupidity is not sufficient. "The words 'wilful intent to injure' obviously contemplate behavior of greater deliberateness, gravity and culpability than the sort of thing that has sometimes qualified as aggression." Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law,* § 8.01[5][d]. "Profanity, scuffling, shoving, rough handling, or other physical force not designed to inflict real injury do not satisfy this stern designation." *Id.*

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Even accepting that Claimant got out of his truck and approached Mr. Brock, this hardly qualifies as making him the "aggressor" in the fight. Shouting at somebody or even engaging in shoving and pushing does amount to reckless behavior much less to a wilful intention to bring about the injury of another. This issue depends on the simple question of who drew the knife. If Claimant pulled a knife on Mr. Brock, then it could easily be said that he forfeited the right to benefits under Section 2353(b).

The Board is satisfied that the evidence amply demonstrates, more likely than not, that Claimant did not pull out or wield the knife. First, the only direct evidence on this point comes from Claimant who denies that he had the knife. This is supported to some extent by the testimony of Cpl. Harach who stated that, at the site, Claimant told a trooper that "if he had been the one with the knife, he would have killed Mr. Brock. The implication is that he was not the one with the knife. Claimant did, in fact, have a pocket knife,

but it clearly was not the one used in the assault. As Cpl. Harach observed, the blade of the knife used in the assault had broken off in Claimant's body.

The remainder of the evidence is indirect, being statements recorded by the police officers of two people who are not present to be subject to cross-examination, namely Mr. Brock and Mr. Nelums. They both alleged that Claimant had the knife first and that Mr. Brock got it away from Claimant. However, this is not credible. For one thing, the knife is missing. Claimant was wounded in his truck and could not have hid it. The 9-1-1 call has him asking Mr. Nelums if he (Mr. Nelums) had hid the knife. This statement could be interpreted two different ways. First, it could be Claimant asking Mr. Nelums to hide the knife. Second, it could be Claimant accusing Mr. Nelums of having hid the knife. The first interpretation would be more likely if Mr. Nelums was trying to help Claimant cover up. However, he wasn't. As stated, Mr.

Nelums' story was that Claimant had the knife. If he was such a friend as to hide the knife for Claimant, it is highly unlikely he would have then told the police that Claimant had the knife. Thus, it is far more likely that the second interpretation is correct: that Claimant was accusing Mr. Nelums of hiding the knife to help Mr. Brock.

Added to these considerations, there is also the fact that Mr. Brock was observed trying to hide an empty knife sheath. The obvious implication is that he wanted to hide the sheath to disguise the fact that he had a knife.

Once again, the Board understands that Mr. Brock was acquitted of the criminal charge, but in the present hearing it need not be proved "beyond a reasonable doubt" that he had the knife. For purposes of this civil action, the Board finds that the preponderance of the evidence is clear. The fact that Mr. Brock was wearing an empty knife sheath and tried to get rid of that sheath, combined with the fact that the knife is missing and the fact that Mr. Brock initially fled the scene for a time, makes it more likely than not that Mr. Brock is the one who had the knife, drew the knife and assaulted Claimant. There is no credible evidence that Claimant was the aggressor who first drew the knife.

For these reasons, the Board is satisfied that Claimant's injuries were incurred in the course and scope of his employment and that he was not the aggressor- in the fight.

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.[5] An award of compensation for

purposes of granting attorney's fees is not "limited to contemporaneous financial gain," but refers to "any favorable change of position or benefit, as the result of a Board decision." *Willingham v. Kral Music, Inc.,* 505 A.2d 34, 36 (Del. Super. 1985), *aff'd,* 508 A.2d 72 (Del. 1986).

In this case, Claimant has obtained an inchoate benefit in the finding that he was in the course and scope of his employment at the time of his injury, making the injury compensable under the Act. This means that he would be entitled, at least, to compensation for payment of his related medical bills. He potentially had a limited period of disability as well. These constitute a monetary amount affected by the ruling. *See Scott v. E.I. duPont de Nemours & Co.,* Del. Super., C.A. No. 97A-06-008, Lee, 1, 1998 WL 283455 at *4 (March 30, 1998)(even when there is an inchoate benefit, Board must refer to some monetary amount affected by the ruling to calculate the thirty-percent figure). However, the Board was not provided with information concerning the precise amount of the medical bills incurred nor

any details as to any resulting period of disability. Thus, the Board cannot give a precise number to the amount of the award. Nevertheless, the award of an attorney's fee is appropriate.

The factors that must be considered in assessing a fee are set forth in *General Motors Corp. v. Cox,* 304 A.2d 55 (Del. 1973). Less than the maximum fee may be awarded and consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *See Heil v. Nationwide Mutual Insurance Co.,* 371 A.2d 1077, 1078 (Del. 1977); *Ohrt v. Kentmere Home,* Del. Super., C.A. No. 96A-01-005, Cooch, J., 1996 WL 527213 at *6 (August 9, 1996). A "reasonable" fee does not generally mean a generous fee. *See Henlopen Hotel Corp. v. Aetna Insurance Co.,* 251 F. Supp.

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189, 192 (D. Del. 1966). Claimant, as the party seeking the award of the fee, bears the burden of proof in providing sufficient information to make the requisite calculation.

Claimant's counsel submitted an affidavit stating that he spent nine hours preparing for this hearing, which itself lasted about two hours. Claimant's counsel was admitted to the Delaware Bar in 2003 and he is experienced in workers' compensation litigation, a specialized area of the law. Claimant's initial contact with counsel's office was in November of 2012, so the period of representation has been for less than a year. There is no evidence that counsel or his firm has represented Claimant in anything other than in a workers' compensation context. This case involved a slightly unusual legal/factual issue concerning course and scope of employment. In the Board's estimation, it required average legal skill to present the case properly. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances. There is no evidence that counsel was precluded from accepting other employment because of accepting Claimant's case. Counsel's fee arrangement with Claimant is on a one-third contingency basis, but counsel notes that his normal hourly rate for trial work would be $275.00 per hour. Counsel does not expect to receive a fee from any other source. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of $3,000.00, or thirty percent of the award, whichever is less, is reasonable and appropriate in this case,

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STATEMENT OF THE DETERMINATION

For the reasons set forth above, the Board finds that Claimant was in the course and scope of employment at the time of his injury. Claimant is awarded a reasonable attorney's fee in the amount of $3,000.00, or thirty percent of the value of the award, whichever is less.

IT IS SO ORDERED THIS 25th DAY OF SEPTEMBER, 2013.

INDUSTRIAL ACCIDENT BOARD

/s/_____
LOWELL L. GROUNDLAND

/s/_____
TERRENCE M. SHANNON

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

/s/_____

Mailed Date: 9-27-13

/s/_____
OWC Staff

Notes:

[1.] In the transcript from the trial of Mr. Brock, an attorney suggested that when Claimant started toward him Mr. Brock was "50- to 75 yards from" where he was. At the trial, Claimant agreed to this estimate, but at this hearing Claimant noted that Employer's entire yard is barely 75 yards, so he could not have walked that far.

[2.] Consistent with this, the Act 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(15)a.

[3.] Recently, the Delaware Supreme Court has suggested that the "course and scope" analysis should start with "the terms of the employment relationship or contract" on the belief that this will "normally" resolve the "scope" issue. *Spellman v. Christiana Care Health Services,* 2013 WL 1400429 at *5-*6 (Del. April 8, 2013). In this case, there is no dispute that Claimant was present at Employer pursuant to his employment contract. He was "on the job." *See Spellman,* 2013 WL 1400429 at *6. However, in this case, the employment contract is useless to determine whether the injury in this case can fairly be said to have arisen in the scope of that employment (i.e., whether the injury can be said to have been a circumstance of that employment). The mere fact that Claimant was "on the job" at the time does not resolve that question.

[4.] For example, it is recognized that an employee who is injured as a result of horseplay is not within the course and scope of employment even if the injury occurred on the employer's premises. *See Seinsoth v. Rumsey Electric Supply Co.,* Del. Super., C.A. No. 00A-09-006, Herlihy, J., 2001 WL 845661 at *6 (April 12, 2001)(employee not in course and scope of employment when injured while engaged in prohibited wrestling during work hours on work premises), *aff'd,* 784 A.2d 1081 (Del. 2001). *See also Lomascolo v. RAF Industries,* Del. Super., C.A. No. 93A-11-013, Alford, J., 1994 WL 380989 at *2 (June 29, 1994)(an injury occurring on employer's premises, during work hours, while employee was in the work location he was scheduled to be is still not compensable when injury arises from prohibited horseplay).

[5.] At the current time, the maximum attorney's fee based on Delaware's average weekly wage calculates to $9,911.90.
