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BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

PHIL MINION,)
)
 Employee,)
)
 v.)
)
 FELTON MILLS & ATLAS VAN LINES,) -
)
)
 Employer.)

Hearing No. 1421868 & 1418086

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

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 Wednesday July 1, 2015, in the Hearing Room of the Board, in New Castle County, Delaware.

PRESENT:

JOHN D. DANIELLO

ROBERT MITCHELL

Eric D. Boyle, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Tara E. Bustard, Attorney for the Employee

Andrew J. Carmine, Attorney for the Employer

NATURE AND STAGE OF THE PROCEEDINGS

On December 29, 2014, Phil Minion (“Claimant”) filed a Petition to Determine Compensation Due, alleging that on June 30, 2014 he was assaulted by a co-worker in the course and scope of his employment with Felton Mills (“Employer” or “Mr. Mills”).¹ Claimant was stabbed multiple times and seeks acknowledgment of his injuries as compensable. Employer denied compensability and argues that the assault was not in the course and scope of Claimant’s employment. A hearing was held on Claimant’s petition on July 1, 2015. This is the Board’s decision on the merits.

SUMMARY OF THE EVIDENCE

Claimant testified on his own behalf. He testified that he worked for Felton Mills off and on for approximately eight (8) years. The company is a professional moving company that does residential and commercial jobs. Claimant testified that he normally worked about 40 hours a week and was paid on a flat rate, at first between \$100 and \$130 a day flat rate, then \$100 per day flat rate. Claimant testified that he was good friends with Felton Mills. Prior to the time that Mr. Mills hired Alan Foote Claimant had six coworkers. This included Tim Mills, Steve Robinson, and Bernard Mills. Claimant testified that he got along with all his coworkers. Mr. Mills did tell Claimant that he knew Mr. Foote and that Mr. Mills was going to hire him. Mr. Mills also told Claimant that Alan Foote had been incarcerated and was locked up for assault. Alan Foote had the nickname of “get em up” because he would hold up (rob) card games.

Claimant testified that Mr. Foote was not familiar with moving work and didn't know what was expected of him. He was not experienced with packing and lifting and this was a problem with the other coworkers. Mr. Foote also had a problem with his breathing and

¹ Felton Mills works as a subcontractor for Atlas Van Lines and Hopkins & Sons with the arrangement that those companies provide worker’s compensation insurance coverage. Petitions were filed separately against each employer and were consolidated.

sometimes couldn't finish his sentences. He had an asthma inhaler with him but he also smoked. Eventually the other employees got tired of Mr. Foote's on the job mistakes. Claimant testified that this included breaking items that they were moving and issues with driving the van. Claimant would be the one to initially try to fix an item that was broken during a move. Claimant testified that Mr. Foote worked with Employer for about six or seven months prior to the incident on June 30, 2014. Claimant testified that Bernard Mills, Felton's son, did not like Alan Foote. The other employees would make fun of him behind his back about his mistakes. Claimant noticed that Mr. Foote would get frustrated and walk off if something didn't go right.

Claimant testified that he had a working relationship with his coworkers and didn't really socialize with them. He did go to Mr. Foote's house once to help him move a freezer. On occasion Mr. Foote would give Claimant a ride to work. As time went on Mr. Foote got more standoffish and he looked like he was ready to explode. Claimant tried to make him feel better. On one occasion when Mr. Foote was supposed to pick Claimant up and give him a ride to work he didn't show up. Claimant was docked half a day's pay on this occasion. On June 30, 2014 Claimant was supervising on a job that involved Tim Mills, Alan Foote and Steve Patterson as well as himself. They had two trucks and Claimant and Mr. Foote were in one of the trucks together. Mr. Foote would usually do the driving. Claimant and Steve were inside the house preparing items for moving by breaking them down and wrapping them. Mr. Foote would then take the prepared items and load them into the truck.

On the ride over to the job site they had a normal social conversation. They were on the site for about an hour before Mr. Foote attacked Claimant. Claimant denied that they had any personal arguments that day and prior to that day. The residents showed him the house and the items that needed to be packed and moved. Steve, Tim and Claimant were in the house preparing

furniture for moving. Claimant was dismantling furniture which included a sofa table. Before he was completed dismantling it Mr. Foote came in and grabbed the table and carried it outside. One of the pieces broke and even though Claimant told him he would fix it, Mr. Foote came back and asked Claimant why he [Mr. Minion] didn't tell him that the piece was not completely dismantled. Mr. Foote came back in and said "I am through with this shit". Claimant went back to preparing and wrapping items for moving when Mr. Foote came up behind him and pushed him forward. Claimant then turned around and they began fighting. He put his fists up in a protective guard and eventually realized that Mr. Foote had a box cutter in his hand. He cut Claimant on one arm and on his chest. Steve and Tim eventually pulled them apart. Claimant did not realize that he had been cut until Steve told him that he was bleeding. Mr. Foote then took off down the street. Claimant now has scars on his lower back, right arm and chest. Claimant indicated that if an item is broken and not fixed the money would come out of the mover's pocket. He was not aware of any reason for this assault and he still has no idea to this day why Mr. Foote assaulted him.

Felton Mills arrived on the scene as Claimant was sitting outside waiting for an ambulance. Claimant told him; look what "CC" did to me. (CC is another nickname for Mr. Foote). Claimant indicated that he was called to testify at Mr. Foote's criminal trial but he pled guilty so there was no trial. Claimant did work part time after the injury and was eventually put on light duty, but the moving job is not a light duty position.

On cross examination Claimant admitted that he stopped talking to Felton after filing for workers compensation. He admitted that Felton did pay him some compensation for time off after the incident. Claimant did return to work for Felton Mills afterwards. Claimant testified that he has been working doing side jobs for another friend. Claimant testified that he paid Mr. Foote

\$10 each time he picked him up for a ride to work. He would call him ahead of time on his phone. Mr. Foote had to be in Claimant's neighborhood to pick up another worker who was a family member anyway. Claimant did not know Mr. Foote's family or his wife and he only saw his child one time. He was not aware of Mr. Foote's other activities. He had no issues or confrontations with Mr. Foote prior to the June 30 incident. Mr. Foote did not travel in the same social circle as Claimant. Claimant testified that Felton knew Mr. Foote the best. Claimant testified that all the coworkers would have conversations and socialize at work.

Claimant admitted that he also did participate in the teasing and making fun of Mr. Foote. Claimant denied giving him any grief on June 30. Claimant confirmed that Mr. Foote would pick him up in his personal car not one of the moving vans. Claimant admitted he did not tell Felton and he thought Mr. Foote might snap or that he was ready to explode. Claimant confirmed that Felton Mills had three trucks. Claimant was not always on the team with Mr. Foote and usually rode with Felton. Claimant did do one out-of-town job in Maryland with Mr. Foote. He did not recall when that occurred. Felton Mills often worked on the jobs. Mr. Foote would show up for work regularly but he did break things. Claimant confirmed that he does not drive. Based on his experience he would be the supervisor if Felton was not on jobsite. On June 30 the owners were there but were outside in the garage when the assault occurred. Claimant described Mr. Foote as in his late 30s and weighing between 180 and 190 pounds. Claimant confirmed that the Felton Mills was not on the job site that day. Claimant confirmed that he did not personally know Mr. Foote prior to working with him in Felton Mills' company. Felton Mills informed Claimant about Mr. Foote and his history.

Felton Mills testified on behalf of Employer. Mr. Mills confirmed that on June 30, 2014 he was working for Hopkins and Sons. He is also a subcontractor for Atlas Van lines and Reed

moving. Mr. Mills confirmed that he does hire and fire employees but both Atlas and Hopkins require and perform background checks on all prospective employees. Mr. Mills has known Alan Foote since they were teenagers, 16 years old, and now he is 41. However Mr. Mills noted that he only saw Mr. Foote occasionally because Mr. Foote lived in Maryland. He only saw Mr. Foote when he came with his parents to visit Wilmington. Mr. Foote was working for Pathmark after getting married to a woman that Mr. Mills knows when he called him for a job. The most important part for Mr. Mills was that Mr. Foote had a license and could drive a van. Mr. Mills stated that Mr. Foote did do moving work with him in the 1990's Mr. Mills didn't hold it against him that he did time. Mr. Mills admitted that he did time himself. All the required background checks were performed and Mr. Foote was cleared to work. Felton Mills indicated that Mr. Foote is normally a calm person. Mr. Foote had no problem working along with Mr. Mill's son.

Mr. Mills testified that he was close with Claimant because in the moving business all the employees get close because they are riding around together in a truck for 15 hours every day. They do socialize outside of work as well. Most of his employees live near each other in Wilmington. Phil lived in Wilmington on Bennett Street and Tim lived a block away. They were often playing chess together in the neighborhood. They would get together to have fight parties, meaning that they got together to watch boxing matches on TV or to watch basketball games. Mr. Mills recalled that Allan Foote one time sent his wife to pick up Claimant to bring him to work when he couldn't come to work himself. He testified that the fight on June 30 caught him by surprise. Mr. Mills would go to different job sites if they were doing that on the same day. He was on route to the job site when Tim Dale called and said that Mr. Foote and Claimant were having a heated argument. He told Mr. Mills that they were yelling back and forth in the customer's house. Felton Mills said that this was unacceptable because it was conduct that had to

be reported to Hopkins and it was an issue for the customer. It took him about 10 min. from the time the call was placed to arrive at the site.

By the time Mr. Mills arrived Tim had called an ambulance. Mr. Mills saw Claimant outside the house and checked him out, then he talked to the customer and called Hopkins to report the incident. After that he went to look for Alan Foote. He had Alan's cell phone number and called him. He went to meet up with Alan and take him back to the police. Felton Mills asked Alan Foote why he assaulted Claimant. Mr. Foote told him that Claimant owed him money for drugs. Mr. Mills testified that he is aware that Claimant does drugs and is an alcoholic. Mr. Mills has seen Claimant's drug use personally. Normally he minds his own business and doesn't care if the employees do that sort of thing as long as it doesn't affect their work. He felt that Claimant had a relationship with Mr. Foote because they're both from the Baltimore area. Mr. Mills testified that if something is broken during the move and they can't fix it Hopkins would send someone else to try and fix it. If it still can't be fixed than a claim would have to be made. He agreed that Alan Foote had a lot of claims when he first started working. He may have had 10 or 12 claims including a \$500 claim when he backed the truck into a building.

Mr. Mills testified that he did help Claimant while he was in the hospital by providing cash for the four days that he missed of work. Although Mr. Mills disputed the fact they always work 40 hours. Once Claimant brought him the doctors note he immediately gave him some work to do. He stopped doing it because Claimant started missing work. There was a job in Colorado that was posted by Atlas; however Hopkins gave it to another contractor. When Mr. Mills called Claimant about another job Claimant told him he was going to Colorado with this other contractor.

On cross examination Mr. Mills agreed that he has known Claimant for eight or nine years and he has known Mr. Foote for 25 years as they had been childhood friends. He agreed that he has nothing to do with the background checks, which are done by Atlas or Hopkins. Mr. Mills feels that everyone has a past and he did not know anything about Alan Foote's past. When Mr. Foote called Felton Mills for a job he was already working in Delaware and was no longer incarcerated. Alan Foote voluntarily told Felton Mills that he had been incarcerated. Mr. Mills then informed the other employees to ensure that everyone was comfortable working with Alan Foote. He did this because his employees are a close knit group and they have to work closely together. He admitted that his son complained all the time about Alan Foote but that is only because he's a 20-year-old and thinks he knows everything. Mr. Mills testified that everyone makes fun of everyone else on this sort of a job. He also testified that the 12 claims for broken items that Mr. Foote had was the normal amount of claims for new employee.

He agreed that Claimant was a good worker and that on June 30 he was the senior employee on the site. Mr. Mills testified that Claimant had gotten into an argument with Alan foot in the past in the moving yard. Claimant and Mr. Foote went outside the gate and he let them take care of their business. Mr. Mills did not know what that argument was about. When he arrived on June 30 he parked at the end of the block because there was no room for a second truck on the street by the customer's house. He didn't immediately go and address the issue or find out what happened because he felt that by the time he arrived the argument would've been over. He didn't have a conversation with other employees or Claimant, he only got Allen Foote's version of the incident. This conversation occurred whilst they were waiting for the police officer to come over and arrest Mr. Foote. Mr. Mills also heard what Foote told the police. Mr. Mills stated that an article on Delaware online that the assailant wasn't captured until later by police

officers was incorrect. He brought Mr. Foote in voluntarily and they were standing there waiting for the police, there was no chase. Mr. Mills agreed that Claimant's job performance was up to par. Mr. Mills elaborated on Alan Foote and drugs. He knew that Mr. Foote had a back injury and was selling his prescription medications. Mr. Mills didn't spend much time with Mr. Foote as he was driving a different van. When they were teenagers he only saw him periodically. Mr. Mills denied using drugs presently. He also elaborated on the average workweek as they might have work on a Monday and then not again for two weeks. He mentioned that his business was very seasonal. Mr. Mills admitted that Claimant was doing his job at the time and on the day of this incident.

Claimant was called to testify in rebuttal. Claimant denied buying drugs from Alan Foote and was not aware that he sold drugs. Claimant admitted that he has done drugs in the past and smoked marijuana as late as 2014. He would purchase these drugs from local dealers. He denied doing any drugs with Alan Foote. He did not smoke marijuana or do drugs around Alan Foote or any of the other employees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Course and Scope of Employment

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"). "Questions 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). However it should be noted that the Delaware Supreme Court has recently held that the analysis should start with the employment contract to determine whether that would resolve the scope of employment issue. *Spellman v. Christiana Care Health Services*, 2013 WL 1400429 at 5-6 (Del. April 8, 2013). In this case there is no evidence of any contract beyond verbal hiring and a background check, so this analysis is inapplicable.

“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. In Claimant’s case, the injury happened during his normal work hours, and in a place that his employment required him to be, a customer’s house. Certainly, he was in a location where he could reasonably be expected to be and doing a task, prepping furniture for moving, that he could reasonably be expected to be doing. Therefore, the Board easily finds that Claimant was “in the course of” his employment when injured.

The more difficult question in this case is whether Claimant was properly within the scope of his employment at the time of the injury. 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)). So the question boils down to whether Mr. Foote’s assault and stabbing of Claimant was reasonably related to his employment, or whether it was a deviation sufficient to take the injuries out of the scope of employment.

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)). An assault may be an example of a personal deviation, depending on the source of the assault. Certain conduct may be so egregious so as to be considered a “personal detour” from employment. Delaware law has recognized a distinction between assaults that are personal in nature compared to those that are a result of the employment or are “neutral.” Thus, an injury is not compensable if it is the result of an attack directed against the employee for reasons that are personal to the victim, but would be compensable if the attack is directed towards the victim as an employee or because of the employment. *Ward v. General Motors Corp.*, 431 A.2d 1277, 1280 (Del. Super. 1981). The

question is whether the causal roots of the assault are found in the employment. In a nutshell this is the issue in the instant case.

The Board finds that Claimant has met his burden to prove that he suffered injuries in the course and scope of his employment with Felton Mills. In so doing the Board relies on Claimant's testimony and finds him to be a credible witness. Absent any other explanation, based on Claimant's version of the event it appears that Mr. Foote's assault was provoked by employment related factors. Claimant had some relationship with Mr. Foote, but it was limited to him providing Claimant with a ride to work. Arguably had they been fighting over that whilst on a customer's premises the injuries may still have been related to his employment. Claimant's version supports a finding of compensability because whilst Mr. Foote reaction was extreme, it was related to his performance on the job. At the core Mr. Foote was trying to load a piece of furniture and it broke, which he then attributed to Claimant's dismantling of the furniture or lack thereof. Directly after this incident he assaulted Claimant. Combine this with the fact that the other employees, including Claimant, teased him on occasion about his clumsiness on the job and you have evidence of an employment related incident.

In contrast Employer's response that the altercation was over a drug deal is based on hearsay. Granted the Board allowed Employer leeway by allowing Mr. Mills to testify about what a third party, Mr. Foote, told him, however; by its' nature this testimony is less reliable and uncertain.² Employer presented no corroborating testimony concerning Claimant's dealing with Mr. Foote or his alleged drug habits. Mr. Mills apparently made no effort to speak with the other employees on site, only Mr. Foote. The Board did not find Mr. Mills' testimony to be credible. On several occasions he referred to his preference to allow his employees to settle matters like

² Employer could have easily subpoenaed Allen Foote to testify and provide his version of the assault, without fear of incrimination since he already pled guilty. Certainly Employer would have had no difficulty finding him.

men, without his interference. He also testified that arguing in a customer's home was a serious offence which required him to send a report to the contracting moving company, Atlas or Hopkins. Yet he appeared to show no urgency when he arrived at the scene after another employee called him and told him about the heated argument between Claimant and Mr. Foote inside the customer's home. Mr. Mills confirmed Claimant's testimony that Mr. Foote had a number of incidents including an accident while driving one of the trucks. He also dismissed the teasing of Mr. Foote by stating that those things will happen in this business. That may well be true but it supports Claimant's assertion that Mr. Foote exploded from this type of behavior directed towards him by the other employees. Further both witnesses testified that if an item could not be fixed the repair bill would come out of the employee's pockets, a potential source of acrimony between Mr. Foote and the other employees. Felton Mills also testified that he has been friends with Mr. Foote since childhood, yet he claimed not to be aware of his incarceration until after Mr. Foote told him about it. The Board simply finds that this is not credible and it undermines his testimony.

Essentially there was a lack of credible evidence for a personally motivated *raison d'être* behind the assault. Claimant was on the job site and performing a job related task when he was assaulted. The issue of whether the assault was personally motivated and thus a deviation from employment comes down to the credibility of Claimant's testimony versus Felton Mills' testimony. The Board finds Claimant's testimony to be the more credible for the reasons stated above. Consequently, the Board is satisfied that the majority of the credible evidence presented leads to the conclusion that, more likely than not, the assault was related to Claimant's employment. Claimant's Petition to Determine Compensation Due is hereby **Granted**.

Attorney's Fee & Medical Witness Fee

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller." DEL. CODE ANN. tit. 19, § 2320. The 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 granting of 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. 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 has been awarded compensability of his injuries stemming from the June, 20, 2014 assault. The issue litigated was that of course and scope of employment. Claimant's counsel submitted an affidavit stating that she spent ten (10) hours were spent preparing for this hearing, which lasted approximately two (2) hours. Claimant's counsel has been admitted to the Delaware Bar since 2006, and is experienced in the area of workers' compensation litigation, a specialized area of the law. Claimant's first contact with Counsel's firm was on July 7, 2014, so Claimant has been represented by counsel for approximately one year. This case was of average complexity, involving no unusual question of fact or law. 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 accepting Claimant's case precluded counsel from other employment. Counsel's fee arrangement with Claimant is on a contingency basis. Counsel does not expect 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.

STATEMENT OF THE DETERMINATION

Accordingly, for the reasons stated above, the Board **GRANTS** Claimant's Petition to Determine Compensation Due and finds that the incident on June 30, 2014 was within the course and scope of Claimant's employment. The Board awards Claimant the payment of a reasonable attorney's fee in the amount of \$3,000.00.

IT IS SO ORDERED THIS 4th DAY OF AUGUST, 2015.

INDUSTRIAL ACCIDENT BOARD



JOHN D. DANIELLO




ROBERT MITCHELL

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



Mailed Date: 8-6-15



Karen Miller
OWC Staff