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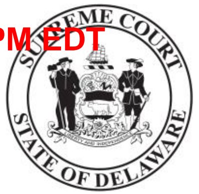

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM WELLER,	)	
	)	
Appellee Claimant-Below, Appellant,	)	**No. 200, 2018**
	)	
v.	)	
	)	
MORRIS JAMES LLP,	)	**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE**
	)	
Appellant Employer-Below Appellee.	)	**C.A. No.: N17A-08-005 FWW**
	)	
	)	

APPELLANT'S OPENING BRIEF

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DATED: June 4, 2018

TABLE OF CONTENTS

TABLE OF CIATIONS………………………………………………. ii-iv

NATURE OF PROCEEDINGS ……………………………………….. 1

SUMMARY OF ARGUMENT ……………………………………….. 6

STATEMENT OF FACTS ………………………………………….. 7

ARGUMENT……………………………………………………………17

I. THE INDUSTRIAL ACCIDENT BOARD DECISION WAS FREE OF LEGAL ERROR AND BASED ON SUBSTANTIAL EVIDENCE, THEREFORE IT WAS LEGAL ERROR FOR THE DECISION TO BE OVERTURNED BY THE SUPERIOR COURT ………………………..………. 17

A. QUESTIONS PRESENTED……………………………... 17

B. STANDARD AND SCOPE OF REVIEW…………………. 17

C. MERITS OF ARGUMENT………………………………… 18

1. THE SUPERIOR COURT ERRED AS A MATTER OF LAW DETERMINING THAT THE BOARD COMMITTED LEGAL ERROR WHEN IT MISAPPLIED THE SECOND *DALTON* FACTOR…………………….. 19

2. THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN REVERSING THE BOARD'S DECISION THAT THE EMPLOYER TOOK CERTAIN ACTIONS TO BRING SOFTBALL WITH THE ORBIT OF EMPLOYMENT ……... 22

a. BOARD'S FINDING THAT THE EMPLOYER EXERTED PRESSURE UPON ITS EMPLOYEES TO PARTICIPATE WHICH BROUGHT THE ACTIVITY INTO THE ORBIT OF THE EMPLOYMENT ……………………………………..22

b. BOARD'S FINDING WITH RESPECT TO THE EMPLOYER'S PREVIOUSLY ACCEPTED TWO PRIOR AND SEPARATE SOFTBALL INJURIES AS COMPENSABLE UNDER WORKERS' COMPENSATION ACT ………………………………. 29

c. SUPERIOR COURT SHOULD HAVE AFFIRMED, AND THE SUPREME COURT SHOULD AFFIRM, THE BOARD'S DECISION AS A MATTER OF PUBLIC POLICY…………………………………… 34

3. THE SUPERIOR COURT ERRED BY WEIGHING THE EVIDENCE AND REVERSING THE BOARD'S DECISION THAT PRODUCTIVITY IS A SUBSTANTIAL DIRECT BENEFIT TO THE EMPLOYER………………………………………………36

CONCLUSION ……………………………………………………….. 42

EXHIBIT A - Memorandum Opinion dated March 16, 2017 from The Honorable Ferris W. Wharton

TABLE OF CITATIONS

Cases Page

Chicago Bridge & Iron Co. v. Walker, 372 A.2d 185 (Del. 1977) …… 23, 38

State v. Dalton, 878 A.2d 451, 456 (Del. 2005)……………………………. 3

Doe v. Giddings, C.A. No. N10C-08-178 PLA
(Del. Super. May 7, 2012)……………………………………………………21

Frank C. Sparks Co. v. Huber Baking Co., 96 A.2d 456
(Del. 1953)……………………………………………………………….. 31

General Motors Corp. v. Freeman,
Del. Supr., 164 A.2d 686, 688 (1960)………………………… 17,19, 23, 25

Hill v. Moskin Stores, Inc., 165 A.2d 447, 451 (Del. 1960)………………. 35

Histed v. E.I. DuPont de Nemours & Co., 621 A.2d 340, 345
(Del. 1993)…………………………………………………………………...18

Johnson v. Chrysler Corp., 213 A.2d 65, 66, 67
(Del. 1965)……………………………………………….. 17, 23, 25. 26, 41

Lawhorn v. New Castle County, 2006 WL 1174009
(Del. Super. May 1, 2006) aff'd, 913 A.2d 570 (Del. 2006)………………. 18

New Castle County v. Goodman, 461 A.2d 1012, 1014 (Del. 1983)……… 35

Ocean Port Indus., Inc. v. Wilmington Stevedores, Inc.,
636 A.2d 892, 899 (Del. 1994)……………………………………..17, 25

Ostrowski v. Wasa Electric. Servs., Inc., 960 P.2d 162, 171
(Haw. Ct. App. 1988)…………………………………………………… 37

PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust, ex rel. Christiana Bank and Trust Co., 28 A.3d 1059, 1070 (Del. 2011)
quoting *CML V, LLC v. Box*, 28 3d 1037, 1040 (Del. 2011)……………. 35

Pany of Delaware, Inc. v. Carroll, 316 A.2d 562, 564 (Del. 1972)………. 21

Simms v. Christina School District, 2004 WL 344015
(Del. Super. Jan. 30, 2004)………………………………………………..21

Smyre v. Amaral, et al., USDC DE,
C.A. No. 13-387-SLR (June 28, 2013)………………………………….. 22

State v. Dalton, 878 A.2d 451, 456 (Del. 2005) ……………………...3, 5, 19

Tickles v. PNC Bank, 703 A.2d 633, 637 (Del. 1997)…………………….. 19

Wyatt v. Rescare Home Care, 81 A.3d 1253 (Del. 2013)………………31, 35

Statues

19 *Del. C.* §2362(a)…………………………………………………….. 33

19 *Del. C.* §2301(11)……………………………………………………… 31

29 *Del.C.* §10142(b) ……………………………………………………… 18

19 *Del. C.* §2301(19)(a)…………………………………………………… 28

Del. C. ANN. tit 19, §2304 ……………………………………………….. 18

Other Authorities

Larson's Worker's Compensation Law, ch. 11
(Lexis Pub. 2001) §22.04…………………………………………… 5, 35

NATURE AND STAGE OF PROCEEDINGS

Morris James LLP, as Appellant Employer-Below, Appellee ("Employer") is a law firm in Delaware. Appellee Claimant Below, Appellant William Weller ("Claimant") has been working for Employer since 2002 as a bankruptcy paralegal. A-17-18.[1]

On June 10, 2015, Claimant suffered an injury to his ankle (Achilles) while playing softball for the Employer's Softball Team in the Wilmington Lawyer's League. A-31-32. On August 27, 2015, Claimant filed a Petition to Determine Compensation Due with the Industrial Accident Board ("Board") to determine that the Claimant was in the course and scope of his employment when he was injured during the Employer's softball game. A-6.

On December 16, 2015, the Board held a hearing on the merits. A-4. By Decision dated April 18, 2016, the Board found that Claimant sustained an injury to his left lower extremity while in the course and scope of his employment for Morris James LLP, and thus compensable under Delaware's Workers' Compensation Act. A-157. The Board, in error, identified the *Nock's* test, which is for employer-sponsored related recreational activities, instead of the *Dalton's* test, which is for non-employer-sponsored related recreational activities. *Id.*

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[1] Herein, reference to the Appellant's Appendix will be identified as "A-__"..

On May 12, 2016, Employer appealed the Board's Decision (the "Initial Appeal"). A-173. Employer's Initial Appeal of the Board's Decision was with respect to (1) the Decision constitutes an error of law, and (2) the Decision is not supported by substantial evidence. A-178. In Claimant's Answering Brief for the Initial Appeal, Claimant alerted the Court that the Board applied the wrong test in the initial Board Decision. However, Claimant indicated that this error was harmless as there was sufficient evidence in the record to support the correctly applied the *Dalton* factors, thus the error was harmless. A-180.

On March 16, 2017, the Superior Court of the State of Delaware (the "Court") issued the Memorandum Opinion in which the Court reversed and remanded the Board's Decision to the Board to take in account the *Dalton* factors and apply the correct legal standard to its factual findings. A-172.

On remand, the Board held a hearing on May 25, 2017 to determine the scope and parameters of new evidence to be heard at the May 31, 2017 remand hearing. A-189. The Board issued an Order on May 25, 2017 in which the Board limited new evidence and witness testimony to only one of the *Dalton* factors. A-240.

At the beginning of the remanded proceeding on May 31, 2017, the Board heard additional arguments with respect to limit new evidence and witness testimony. A-243. Claimant argued to the Board that the Board's Initial Decision determined that Claimant met his burden in proving the second and third *Dalton*

factors, and as such, the Employer appealed those determinations. A-209, 213-214. The Board agreed with Claimant that the scope of the remand proceedings is set by the Court, which ordered the Board to apply the *Dalton* factors, not only one of the factors. A-240.

On August 1, 2017, the Board issued a new Decision (the "Decision") and applied the *Dalton's* factors. A-402. In the Decision, the Board found that the Claimant met the second and third prongs of the *Dalton* standard, namely:

> "(2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of the employee, brings the activity within the orbit of employment" and (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."

A-411-413, quoting from *State v. Dalton*, 878 A.2d 451, 456 (Del. 2005); Arthur and Lex Larson, *Larson's Worker's Compensation Law*, ch. 11 (Lexis Pub. 2001) §22.04.

In consideration of the second prong of the *Dalton* factors, the Board found that the Employer brought the softball activity into the orbit of employment by:

> (1) the Employer exerting pressure on employees to participate in the activity, (2) the Employer inquiring and asking job applicants of the Employer if they played softball, (3) the Employer previously accepted two prior and separate softball related injury claims as work related and compensable under the Employer's Workers' Compensation insurance policy, and (4) the Employer expected the softball injury claims to be covered under the Employer's Workers' Compensation insurance policy not only for the Claimant's claim, but also for the two prior accepted claims.

A-412-413.

Further, the Board found that "…there was clearly some actions taken by Employer to bring participation in the softball game within the sphere of an employment related activity." A-412.

In consideration of the third prong of the *Dalton* factors, the Board found: (1) that the testimony of the Employer's Executive Director, Thomas Herweg, was "definitive" and that the Employer "…realized a benefit in the form of increased productivity"; and (2) that having vendors on the team can provide a business benefit for the Employer. A-412-413. The Board found "…that the Employer derived substantial direct benefit from the softball team." *Id*.

On November 27, 2017, Claimant filed the Answering Brief with the Superior Court. A-2.

On March 29, 2018 the Superior Court found that there was no substantial evidence to support the Board's Decision that Appellant suffered a work-related accident nor was the Decision free from legal error (the "Opinion"). Op. p. 2.[2] In the Decision, the Board found that the Claimant met the second and third prongs of the *Dalton* standard, namely: "(2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of the employee, brings the activity within the orbit of employment" and (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in

[2] Herein, reference to the Opinion shall be "Op. ___".

employee health and morale that is common to all kinds of recreation and social life." A-411-413, quoting from *State v. Dalton*, and *Larson's Worker's Compensation Law*, ch. 11 (Lexis Pub. 2001) §22.04.

On April 20, 2018, Claimant timely filed the Notice of Appeal of the Opinion. A-3. Here, the issue before the Board was whether the Claimant was within the course and scope of his employment at the time of his injury. A-41. In *Dalton*, the Court adopted a different standard from *Larson's* to determine whether an injury at a non-company sponsored recreational event is within the course and scope of employment. Under this standard, the factors are:

> (1) It occurs on premises during a lunch or recreation period as a regular incident of the employment; (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the service of the employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee's health and morale that is common to all kinds of recreation and social life.

State v. Dalton, see also, *Larson's Workers' Compensation Law*, Ch. 22 (Lexis Pub. 2001) §22.04. 22

It should be noted that one of the critical holdings in *Dalton* is that the factors are stated in the "disjunctive", and in other words, a Claimant only need satisfy one for a finding that the activity was within the course and scope of employment. *Dalton* at 456.

SUMMARY OF ARGUMENT

J. THE INDUSTRIAL ACCIDENT BOARD DECISION WAS FREE OF LEGAL ERROR AND BASED ON SUBSTANTIAL EVIDENCE, THEREFORE IT WAS LEGAL ERROR FOR THE DECISION TO BE OVERTURNED BY THE SUPERIOR COURT.

1. **The Superior Court erred as a matter of law determining that the Board committed legal error when it misapplied the second *Dalton* factor.**

2. **The Superior Court erred as a matter of law in reversing the Board's Decision that the Employer took certain actions to bring softball with the orbit of employment.**

    a. **Board's Finding that the Employer Exerted Pressure Upon Its Employees to Participate Which Brought the Activity Into the Orbit of the Employment.**

    b. **Board's Finding with Respect to the Employer's Previously Accepted Two Prior and Separate Softball Injuries as Compensable Under Workers' Compensation Act.**

    c. **Superior Court Should Have Affirmed, and the Supreme Court Should Affirm, the Board's Decision as a Matter of Public Policy.**

3. **The Superior Court erred by weighing the evidence and reversing the Board's Decision that productivity is a substantial direct benefit to the Employer.**

STATEMENT OF FACTS

Claimant was injured in a work-related accident that occurred on June 10, 2015 and is a Bankruptcy Paralegal with the Employer since October 2002. A-18. Claimant suffered a ruptured Achilles while participating during the Employer's softball game on June 10, 2015. A-19.

The Board held the initial hearing on December 16, 2015. A-4. At this hearing, the following witnesses testified: Claimant, Employer's Executive Director, Sherry Perna as the Employer's Controller/Chief Financial Officer ("CFO"), and Carol Folt as the Employer's Human Resources Director ("HR Director"). A-18, 56, 83, 117.

Claimant testified that in 2002 or 2003, he was asked by a Partner of the Employer to manage the Employer's softball team, which he did until 2012 or 2013. A-18-19. Claimant performed these duties exclusively during work time. A-19. Claimant's efforts as softball manager were communicated in the Claimant's yearly review conducted by the Employer, which was reviewed and approved by the Employer. A-27, 62, 69. Such inclusion of these accomplishments did not go unnoticed by the Employer. A-69. Employer's Executive Director testified that his view was on the inclusion of Claimant's softball related efforts on Claimant's yearly reviews as "It's nice. It's that he's participating, he's active in the firm, he wants to be active and a good member of the firm." A-69. The Employer's Executive

Director, was of the belief and equated participation on the Employer's softball team to being an "active and a good member of the firm." *Id*. Claimant would be directed by the Employer's CFO to complete certain softball related tasks, during the workday, to ensure that the Employer's participation in the softball event was a success. A-22-23.

Claimant further testified that the softball team was managed by the Employer's executive management, namely the Employer's Executive Director and CFO. A-47. The Employer's Executive Director and CFO would directly email, or personally visit, certain employees to ascertain their availability for games. *Id.* The Employer's Executive Director had sole authority as to who can participate on the team. A-20-21. Finally, all softball related emails by employees were done on Employer's email. A-29.

Claimant, Executive Director, and CFO testified that the Employer executed Hold Harmless Agreements for the Employer's softball events, and that the Employer's CFO would execute the Hold Harmless Agreements. A-21, 39-40. Claimant testified that he was aware and had an expectation of coverage due to prior injury during a softball game, and that injured employee received benefits under Worker's Compensation. A-29-31, 48. Claimant testified that in his prior conversations with the Employer's CFO, she confirmed that another other

employee's injury was covered under the Employer's Worker's Compensation insurance because it was a work event. A-31.

Claimant and CFO testified that on the date of the injury, the CFO instructed Claimant to obtain, prepare and bring refreshments to the softball event. A-22-23, A-93-94. After the injury, and while at the hospital, Claimant testified that the CFO called him and advised him that the injury would be covered under Worker's Compensation. A-32. The Executive Director would have the Employer's HR Director provide Claimant with a Worker's Compensation claim number, which the HR Director did on the next day. A-32-33, 119. Claimant testified that the HR Director also advised the Claimant that prior softball game related injuries were covered under the Employer's Worker's Compensation insurance. A-34. Claimant testified, and CFO agreed, that the CFO advised Claimant that after his claim was denied by the insurer that Claimant should contest the denial of claim. A-50-51, 90.

Claimant testified that the Employer benefited from its participation in the Softball League, with such benefits being a team building exercise, networking with teams from other law firms, the State Courts and Bankruptcy Court, fostering improved communication amongst the Employer's employees, and in sum the Employer's productivity would effectively be enhanced. A-27-28, 36-37, 53-54.

At the initial Board hearing, the Employer's Executive Director, and in such capacity, testified that he is in charge of every non-lawyer at the law firm since 2001

and the Employer has been a long-term participant in the Lawyers Softball League. A-56-57.

The Executive Director testified that all softball related documents, including Hold Harmless Agreements for softball, are executed by Employer's CFO. A-59. The Employer would be responsible for any claims, and as he indicated the person signing the Hold Harmless Agreements is signing on behalf of the Employer and the Employer would be liable. A-74, 77-78. He further testified that if a non-employee suffered an injury during a softball game that the Employer executed a Hold Harmless Agreement, the Employer would be liable, and would immediately step up and defend the action. A-78.

The Executive Director testified that all financial aspects of the softball team are paid by the Employer. A-57, 60-61. He agreed with CFO that it was the Employer's policy that all new employees are included in softball, unless they expressly opt-out by. A-58, 65, 84, 89. The Employer's control was evidenced by testimony that the Executive Director would send an email directly to an employee to participate at the softball event as he did not want the Employer's team to forfeit games, as forfeits would cause removal of Employer's team from the lawyers' league. A-59. The Executive Director also testified that he was aware of an email on the day before Claimant's injury, in which the CFO emailed and instructed the

employees to "calendar the appointment so we get a good head count…" for the softball game. A-66.

Executive Director further testified that another employee had an injury playing on the softball team, submitted the claim under Worker's Compensation, which was not contested by the Employer or the insurance carrier for the Employer, and thus accepted by the Employer. A-62-65. Executive Director testified that enhancing morale, camaraderie, good will, all those three things combined, would enhance ultimate productivity for the Employer. A-80-81. In response, the Board, in follow-up direct questioning of the Executive Director, specifically asked him to confirm that it would enhance the productivity within the Employer, and Executive Director stated yes, and further added "It would. I mean that's the goal, that's the hope of it. It's the attitude that I've tried to foster since I've been there." A-81.

Executive Director, with the assistance of the Employer's insurance broker, is responsible for the handling of the Employer's Worker's Compensation Insurance. A-131. The two prior softball injuries were accepted as work related injuries. A-62. Prior to Claimant's injury, the Executive Director testified that: the Employer switched Worker's Compensation insurance carrier and he relied upon the Employer's insurance broker to ensure the coverages are same as with the prior; stated that no attorney from within the Employer (a law firm) reviewed the new Worker's Compensation insurance contract, nor was there any involvement from the

Employer's personal injury or Worker's Compensation departments within the law firm; and if the broker "tells us the coverages are the same, then the coverages are the same." A-131-132.

CFO testified that: she is the Employer's Controller/Chief Financial Officer; she always signs the Hold Harmless Agreements for softball as "Controller for the firm"; and as the Employer's softball event approached, the CFO routinely email employees, and for employees that did not respond to these emails, she would personally visit specific employees during work hours to ensure the Employer had the requisite number of participants for the event. A-86-88. CFO agreed that the Employer entirely controls the softball event. A-89-90.

CFO further testified that: she is responsible for the staff in the accounting department; the schedule for the Employer's softball team is changed to accommodate the Executive Director's availability and there was no other testimony that anyone else sought or received this accommodation; she was aware of two prior, separate, softball injury claims that were covered and paid by the Employer's Worker's Compensation; she advised and instructed the Claimant to put his claim under Worker's Compensation; and nothing changed in how the Employer handled the softball program during the time period of the first accepted claim and Claimant's injury. A-89-90, 110.

CFO testified that the Employer benefits from softball events as a team building exercise, as "build relationships", "brings us together" and get to "know each other" as employees, networking, and "… it benefits the firm by our employees getting along and knowing each other, and being able to work with each other", and allows the softball event to benefit certain charity causes. A-92-93, 109.

Carol Folt, the Employer's HR Director, testified at the initial Board hearing that she was aware that Claimant included his softball-related tasks as contributions to the Employer on his annual reviews, and that the inclusion of such information on a yearly review is a reminder to the Employer of the employee's contribution to the Employer for that respective year. A-118-119. HR Director testified that one day after Claimant's injury she provided Claimant with Worker's Compensation claim number. A-119-120.

HR Director testified that in handling the two prior compensable softball injury claims, she advised Claimant that Claimant's claim should likewise be compensable under Worker's Compensation. A-121, 126-127. HR Director testified that Employer assigns the softball preparation/coaching tasks to certain employees, with Claimant being one of them in the past, and that the assigned employees organize the Employer's involvement with the league. A-128.

On May 31, 2017, the Board held its remand hearing, and Teresa Atwell, as an employee within the Employer's Accounting Department, testified that she has

been playing softball for the Employer since 2004. A-294. She suffered two separate softball injuries, and for these injuries, she was "told" by the Employer to submit her claims under Workers' Compensation, which were accepted. A-295, 298-299. She further testified that she was paid a permanent impairment. A-295. Ms. Atwell testified that for the Employer to obtain the necessary participants for softball, she would try to play almost every game, as there were games that she was told by the Employer that she needed to be there, and she considered softball as a work-related event and that she felt an obligation to participate. A-296-297. Ms. Atwell testified that she was surprised Claimant's injury was not covered under workers' compensation, since her claims were, and that she had an expectation of coverage because no one from the Employer advised that softball injuries were no longer going be covered under Workers' Compensation. A-295-297.

Jamie Dawson is a paralegal at the Employer. A-306-307. Ms. Dawson testified once she learned Claimant's injury was not covered under Worker's Compensation, she no longer participated because the thought it was a covered event and because of the consequences if injured. A-307, 311. Ms. Dawson was under this impression because the Employer paid for all of the activities, which included all costs, such as uniforms, after game dinners, and going to the batting cages. A-308. She testified that she was aware that Ms. Atwell's injuries were covered by Workers' Compensation. A-307-308, 312-313.

Further, Ms. Dawson stated that the pressure of playing was another reason for her to no longer participate in the Employer's softball event (A-307-308, 312-313), with such pressures being: the Executive Director coming to her office to make sure that she was participating (A-309); instances in which the Employer needed her to play softball, but she had time-sensitive work-tasks to complete that day, so with the permission of the Employer, she would leave work and participate in softball event to only return that night to the Employer's office and after the softball game to finish her tasks (A-312-313); and that if she did not participate in the softball event, she would be "haggled" by her superiors at work. A-310-311.

Eric Monzo, a Partner within Claimant's department, testified at the remand hearing. A-262. Mr. Monzo testified that the Employer encourages participation in the softball event. A-267. Mr. Monzo, on behalf of the Employer, inquires during job interviews whether the candidate plays softball. A-291. The Employer conceded that while Mr. Monzo is a Partner at the Employer, he is not in charge of the Employer's finances, he doesn't measure the Employer's productivity or like and is not in any position to testify about Employer's benefit. A-204.

Sherry Perna, now as Employer's Executive Director and formerly as the CFO, who replaced the retired Mr. Herweg, testified at the remand hearing. A-322, 341.   At the remand hearing, Ms. Perna testified that she regularly encourages employees to participate in the Employer's softball event, and that she asks job

applicants during their interview if they play softball. A-338, 341. Ms. Perna further testified that certain of the Employer's vendors play on the Employer's softball team, and that the Employer's pays all of the corresponding costs of their participation, including covering related costs for beverages for the games and all dinners for the vendors. A-337. In consideration of Mr. Herweg's (Executive Director) prior testimony that employees' participation in softball increased productivity, Ms. Perna testified that "…if that's what he (Mr. Herweg) said, then that's what he felt." A-338. Ms. Perna added that Mr. Herweg was in that position for fifteen years and was the leader of the non-lawyers of the Employer. A-338.

ARGUMENT

I. THE INDUSTRIAL ACCIDENT BOARD DECISION WAS FREE OF LEGAL ERROR AND BASED ON SUBSTANTIAL EVIDENCE, THEREFORE IT WAS LEGAL ERROR FOR THE DECISION TO BE OVERTURNED BY THE SUPERIOR COURT.

A. Questions Presented.

Whether the Superior Court erred in by reversing the Board's decision which was based on substantial evidence and free of legal error. This issue was raised below at A-455 to A-493.

B. Standard and Scope of Review.

In reviewing the findings of the Industrial Accident Board, it is function of this Honorable Court to determine whether the Board's decision is support by substantial evidence and is free from legal error. *General Motors Corp. v. Freeman*, Del. Supr., 164 A.2d 686, 688 (1960). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Ocean Port Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del. 1994). This Honorable Court does not have authority to alter any legally correct decision of the Industrial Accident Board that is supported by substantial competent evidence in the record. *Johnson v. Chrysler Corp.*, 213 A.2d 65, 66, 67 (Del. 1965). The reviewing Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual

findings. *Johnson,* 213 A.2d at 66. It is the responsibility of a review Court to determine if the evidence is legally adequate to support the Industrial Accident Board's factual findings. 29 *Del.C.* §10142(b). It is well settled that "when interpreting the Worker's Compensation Act, the Court engages in a liberal construction so as to accomplish the statute's purpose to compensate injured employees resolving "any reasonable doubts in favor of the worker." *Lawhorn v. New Castle County*, 2006 WL 1174009 (Del. Super. May 1, 2006) aff'd, 913 A.2d 570 (Del. 2006).

C. Merits of Argument

The Workers' Compensation 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. C.* ANN. tit 19, §2304. Thus, the employment connection focuses on two aspects: "whether the injury was in the course of employment" and "whether the injury arose out of the employment scope." "Questions related to the course and scope of employment are highly factual and 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 employee does not have to be injured during a job related activity to be eligible for workers' compensation benefits." *Tickles v. PNC Bank*, 703 A.2d 633, 637 (Del. 1997) (citations omitted).

A decision as to whether a given activity is within the scope of employment is a conclusion of law based on fact specific analysis. *State v. Dalton*, 2005 WL 148770 at *1 (Jan. 20, 2015). The Court reviews the agency findings of fact under the substantial evidence standard. *Id.* This limited review determines only whether the Board heard enough evidence to fairly and reasonably support its conclusion, regardless of whether the Court would have reached a different result in the first instance. *Id.* The Delaware Supreme Court and Superior Court have repeatedly emphasized the limited appellate review of an administrative agency. *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

1. **The Superior Court erred as a matter of law determining that the Board committed legal error when it misapplied the second *Dalton* factor.**

The Superior Court's finding that the Board did not set forth the correct applicable legal standard is contradicted by the record. The Board's Decision is clear that the *Dalton* factors were correctly used and applied. "The *correct standard*, adopted from Larson's, is that used in the Dalton case, which consists of the following three factors:

> (1) It occurs on premises during a lunch or recreation period as a regular incident of the employment; *(2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the service of the employee, brings the activity within the orbit of the employment*; or (3) the employer derives substantial direct benefit from the activity beyond the

> intangible value of improvement in employee's health and morale that is common to all kinds of recreation and social life.

A-411. (emphasis added).

The Board correctly identified the standard by indicating that "a significant holding in the *Dalton* case was that the factors were stated in the "disjunctive", in other words a claimant only needs to satisfy one for a finding that the activity was in the course and scope of employment." A-411. The Board further indicated correctly that "after reviewing the record and the evidence…Claimant has met his burden to prove that his injury was in the course and scope of his employment." A-412. In the very next paragraph, and continuing with the same thought from the prior paragraph that correctly identified the second *Dalton* factor, the Board used the phrase "employment related activity" to articulate its findings with respect to evidence that the Employer brought the activity into the orbit, sphere, or scope of the employment. A-412.

The Superior Court stated that the Board's use of "employment related activity" is a meaningless term, that is "…too elastic to comport with *Dalton*, and is legal error." Op. 20. The Superior Court's finding of legal error as to the Board's use of "sphere of employment related activity" and "employment related activity" is legally incorrect. The Board's Decision identified and utilized the correct standard. A-411-412. In *Dalton*, the Court cited the underlying Board decision, which used similar language as the Weller Board Decision. In the Dalton board decision, the

Board found that Dalton was '*in or about the employer's business'* when he was injured. Further, "Dalton *went about of the State's business* by his participation". (emphasis added). It is noteworthy that none of these phrases in *Dalton* found by the Supreme Court as "meaningless" or "too elastic" and that Administrative agencies operate less formally than courts of law. *Pany of Delaware, Inc. v. Carroll*, 316 A.2d 562, 564 (Del. 1972).

The Superior Court found that the Board's use of "employment related activity" is a "meaningless term", and "proves nothing". Op. 20. The Superior Court's parsing of the words is essentially a distinction without a difference. The Superior Court has previously used this exact same phrase in other employment law cases without confusion and was not considered a meaningless term. For example, *Simms v. Christina School District*, 2004 WL 344015 (Del. Super. Jan. 30, 2004), the Court in emphasizing the employee's role and employees misconducted offered that "…no employment related activity was even remotely taking place" when the misconduct occurred; in *Doe v. Giddings*, C.A. No. N10C-08-178 PLA (Del. Super. May 7, 2012), the Superior Court case cited the "no employment related activity" phrase in determining whether an employee was in the scope of employee's employment when a tort occurred.; and in *Smyre v. Amaral, et al.*, USDC DE, C.A. No. 13-387-SLR (June 28, 2013), "…no employment related activity" was utilized in an opinion of the United States District Court for Delaware that found the

employee was "clearly taking advantage of his position as a residential advisor during work hours and at the workplace, no employment related activity was even remotely taking place when [the employee] was sexually abusing the plaintiff." In each of these examples, the Courts utilized the same exact term in employment law cases. The language was not deemed meaningless nor was it too elastic to be used in each of the courts respective opinions.

Here, the Superior Court committed legal error in its rigid finding that the use of "employment related activity" was legal error. Op. 20. The Board correctly and explicitly identified the correct standard. A-411-12. Further, and in the same thought sequence in the following paragraph, the Board utilized the exact same phrase that is commonly cited in other Superior Court's Opinions and the United States District Court's Opinion for employment law issues. Here, the record is clear that the Board correctly identified and evaluated the applicable legal standard, and the record adequately supports its Decision. A-411-412. As such, the Superior Court committed legal error in reversing the Board's Decision.

2. **The Superior Court erred as a matter of law in reversing the Board's Decision that the Employer took certain actions to bring softball with the orbit of employment.**

    a. **Board's Finding that the Employer Exerted Pressure Upon Its Employees to Participate Which Brought the Activity Into the Orbit of the Employment.**

The Board took into consideration the following when determining whether

the Employer's conduct brought the softball into the orbit of employment:

> (1) the Employer exerting pressure on employees to participate in the activity, (2) the Employer inquiring and asking job applicants of the Employer if they played softball, (3) the Employer previously accepted two prior and separate softball related injury claims as work related and compensable under the Employer's Workers' Compensation insurance policy, and (4) the Employer expected the softball injury claims to be covered under the Employer's Workers' Compensation insurance policy not only for the Claimant's claim, but also for the two prior accepted claims.

A-412.

The Superior Court committed legal error when it weighed the evidence, determined questions of credibility, and made its own factual findings and conclusions that reversed the Board's Decision. *Chicago Bridge & Iron Co. v. Walker*, 372 A.2d 185 (Del. 1977); *Johnson,* 213 A.2d at 64. In consideration of the Board's finding that the Employer exerted pressure on its employees to participate, the Superior Court weighed and inserted its own findings and conclusions, as indicated by "any objective pressure came from team members in their individual capacities…" and "evidence illustrates independent actions by employees not attributable to Morris James as employer." Op. p. 21. The Board weighed the evidence and found that the Employer, through its Executive Director and CFO, in their official capacities, not just as individuals, exerted pressure on employees to participate. A-412. In review of the record, there is substantial evidence to support such a finding by the Board, as indicated below:

- Ms. Atwell testified that she felt "obligated" to play. A-300-301;

- Ms. Atwell testified that "If I had to change my (personal) schedule to be there, I'll be there." A-302;
- Ms. Dawson testified that she was pressured to play. A-308, 310;
- Ms. Dawson testified that if they were short on players, "…Mr. Herweg (as Executive Director) would come visit my office to make sure if I was going to be at softball." A-309;
- Ms. Dawson testified that her superiors ensured she participated in softball. A-309;
- Ms. Dawson testified that if she did not play, she "…certainly didn't feel like being haggled the next day…" by her superiors. A-311;
- Ms. Dawson testified that the Employer's Executive Director pressured her to play. A-314;
- Ms. Dawson testified that if work-related matters were pending, but the Employer needed her for softball, with the Employer's permission, she would participate in softball, and then immediately return to Employer to finish her pending work-related matters. A-313;
- Executive Director testified that if light on participation and did not want to risk a forfeit or "have a bad reputation in the league", then either he or CFO would go around the Employer to employees to encourage participation. A-58-59;
- CFO's email to an employee: "I singled you out because I thought you might want to play." A-65;
- CFO's email to employees: "We have…a (softball) game coming up, …make sure calendar the appointment so we get a good head count…" A-66;
- CFO would send an email to get employees to participate, if the employees did not respond, she would go directly to them in person. A-87;

- CFO agreed that the Employer entirely controls the softball event. A-112;
- CFO testified that Employer "encourages" participation rather than "invites". A-112;
- CFO testified that she regularly "encourages" employees to participate. A-99;
- CFO directed Claimant to prepare and bring refreshments to the softball game (the game he was injured), which he did during his work shift. A-93-94;
- CFO directed employee to bring her softball supplies during work day. A-108;
- Equity Partner of Employer testified that the Employer "encourages" the employees to participate. A-267.

In reviewing the findings of the Industrial Accident Board, it is function of this Honorable Court to determine whether the Board's decision is support by substantial evidence and is free from legal error. *General Motors Corp.*, 164 A.2d at 686, 688. Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Ocean Port Indus.* 636 A.2d at 892, 899. This Honorable Court does not have authority to alter any legally correct decision of the Industrial Accident Board that is supported by substantial competent evidence in the record. *Johnson*, 213 A.2d at 65, 66, 67. The reviewing Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings. *Johnson,* 213 A.2d at 66. It is the

responsibility of a review Court to determine if the evidence is legally adequate to support the Industrial Accident Board's factual findings. 29 *Del.C.* §10142(b).

Here, the Superior Court, in error, found that there was not substantial evidence to determine that the Employer brought softball within the orbit of employment and that there was not a scintilla of evidence in the record for the Board to makes its determination. Op. 23. The Court ignored the following finding of facts made by the Board:

> First The Board finds that there was sufficient evidence presented to show that there was pressure put on employees to play that by implication it was an employment related activity. Claimant provided evidence that there was pressure put on members of the team to play and for new employees, in particular, female employees, to join the team. Both Mr. Monzo and Ms. Perna testified about asking potential employees at job interviews whether they played softball. Ms. Dawson was asked in her interview whether she played softball. Ms. Dawson and Ms. Atwell testified about the pressure to play once they were on the team. Both also considered the softball game work events. Ms. Atwell also submitted workers compensation claims and was paid benefits for her softball injuries. She was told to submit these claims by Employer. At the initial hearing, Claimant testified that he was told to submit a workers compensation claim by Employer, which was we know was later denied. Thus there was clearly some actions taken by Employer to bring participation in the softball team within the sphere of employment related activity. A-412.

As indicated in the above passage, the Board thoughtfully weighed the evidence that was presented at the hearings and made its determination that Claimant suffered a worked-related injury.

The Superior Court also incorrectly weighed the evidence and found that the Employer did not bring the activity within orbit of employment by indicating that the employees' subjective pressures are irrelevant. Op. 21. The Superior Court's finding is flawed as the Superior Court failed to recognize that the ample examples of where the Employer's *management* exerted pressure to participate and thus brought the activity into the orbit of employment.

In *Dalton*, the pressure felt by the State Troopers to participate was from the State Police command (the *management*). *Dalton*, at 455. In *Dalton*, the Board found, and the Superior and Supreme Court's affirmed, that the "subjective pressures" from the employer caused an environment that through these pressures to participate brought the activity into the orbit of the employment. Here, and akin to *Dalton*, the Employer, through the actions of its *management*, the Executive Director and CFO, brought the activity into the orbit of the employment.

The Superior Court was in error when it weighed the evidence and narrowly determined that the "subjective feelings of employees, however, are not what *Dalton* addresses." Op. p. 21. As in *Dalton*, the evidence is clear that the "subject pressures of employees" is not what the Board found, but rather that the Employer exerted pressures upon the employees which brought the activity into the orbit of the employment.

Furthermore, the Superior Court incorrectly stated that there is a lack of evidence as to whether the Claimant felt any of these pressures. Op. 21. The record is clear that for the softball event in which Claimant was injured, the CFO directed the Claimant to prepare and bring the cooler to the event, for which Claimant had to leave work early to prepare the cooler and ensure enough time to have it at the event prior to its commencement. A-22. The CFO was a superior of the Claimant. A-89. In *Dalton*, he was asked to participate by his superiors. *Dalton*, at 455. The Claimant suffered an injury during this event, for which the Employer required his presence at the softball event which resulted in his injury. 19 *Del. C.* §2301(19)(a).

In *Dalton*, it was determined that Dalton was pressured to participate as "Dalton was asked to participate by his superior officer…and drew the softball game into the scope of Dalton's employment." *Dalton*, at 453-454. Additionally, Claimant and the Employer's Executive Director testified that the Executive Director would send emails directly to certain employees, which included the Claimant, to encourage attendance, as the Employer would not want to risk being removed from the league, from which it has been a long-standing regular participant, due to poor attendance. A-47, 57. The Executive Director further testified that employees are encouraged to participate so that the Employer does not "have a bad reputation in the league" and if needed, the Employer's management would send somebody around to obtain the necessary participation level, and that all of the softball league

related documents are executed by the Employer's CFO. A-58-59. Claimant further testified that employee participation enhances the Employer's prestige in the legal community, and is in the best interests of the Employer. A-53. The Claimant further cemented this belief by including it routinely in his yearly reviews, for which the Executive Director's view on such an inclusion was "It's nice. It's that he's participating, he's active in the firm." A-69. Such testimony by the Executive Director clearly indicated that the Employer deemed such participation in softball by the Claimant in a positive light and furthered the Employer's interests as testified to by the Executive Director.

In *Dalton*, a key finding was that pressure from the employer compelled Dalton to participate. *Dalton*, at 456. Here, the Claimant, like Ms. Atwell and Ms. Dawson, felt pressure to participate. A-22.

Therefore, the Superior Court was incorrect when it found that there was no record of pressures of participation upon Claimant to participate in the softball event, and committed legal error when it weighed the evidence and made its own findings which were contrary to the Board's finding that "there was sufficient evidence presented to show that there was pressure put on employees to play" in the Employer's softball event.

b. Board's Finding with Respect to the Employer's Previously Accepted Two Prior and Separate Softball Injuries as Compensable Under Workers' Compensation Act.

The Board heard testimony that two prior and separate softball injuries were accepted by the Employer as work-related injuries, and that no changes were made to the Employer's softball event between the time of these two prior injuries and Claimant's injury. The Board cited to testimony that the employees in the prior two injuries were told by the Employer to submit their claims under Worker's Compensation, were paid benefits for such claims, and that Claimant was likewise told to submit his claim under Worker's Compensation. As such, the Board found "there was clearly some actions taken by Employer to bring participation" into the orbit of the Claimant's employment. A-412.

In error, the Superior Court weighed the evidence and made its own factual findings that the Employer in accepting two prior and separate softball related injuries as compensable as work related injuries is "curious" and not relevant as to bringing the activity within the orbit of employment. Op. 22. The Court further opined that the insurance carrier determined whether to accept or deny coverage, and that "there was unrebutted testimony" with respect to coverage by the prior insurance carriers. Op. 22.

First, the Superior Court was in legal error when it determined that under Delaware Workers' Compensation Act that the Employer and its insurer are not likewise legally responsible for decisions under the Act. Op. 22. The Superior Court found that the Employer's insurance carrier determined whether to accept or deny

coverage, and that Employer "simply followed its mandatory reporting requirement" and that the Employer's "actions cannot be construed as an affirmative action bringing the activity within the orbit of employment." Op. p. 22. However, the Act is clear that the "*Employer*…the term shall include the *insurer*." 19 *Del. C.* §2301(11) (emphasis added). As such, the "Employer", as defined to include the insurer, determined to accept the two prior softball injury claims, and the Superior Court was in error when it determined that the decisions by the insurers with respect to two prior claims were not indicative of the Employer's acceptance of the claims as compensable as work related injuries. As previously set forth by the Delaware Supreme Court, "the Workmen's Compensation Law as a practical matter does not differentiate between the "employer" and "insurer". *Frank C. Sparks Co. v. Huber Baking Co.*, 96 A.2d 456 (Del. 1953). The "statutory framework is unambiguous" that the Employer can either accept or deny the injury as work related, and the Employer would need to rebut any evidence to the contrary. *Wyatt v. Rescare Home Care*, 81 A.3d 1253 (Del. 2013).

Second, the Superior Court in error indicates that "there was unrebutted testimony" with respect to prior softball injury claims being covered in error by the carriers. Op. 22. However, in review of the record, it is clear that Claimant's counsel *objected* to the hearsay testimony of the Employer's HR Director, with respect to her conversation with the prior insurance carrier as to the reasons why they deemed

as compensable the two prior, and Employer accepted, work-related softball injury claims. Furthermore, the Board placed a limitation on this testimony, and indicated that it would *only* be allowed if it did not involve speculation. A-121-122. The Superior Court erred in weighing the "unrebutted testimony," whereas the Board in proper context, weighed and determined that such testimony was not relevant. Indeed, the Board cited to the two prior accepted claims as a basis for actions by the Employer that brought the activity into orbit of employment. A-412.

Lastly, the Superior Court further opined that with respect to liability on the Employer's part that it would be a curious result if actions of a third party could bring the activity into orbit of employment. Op. 22-23. However, the Superior Court failed to take notice that the record shows that the Employer was willing to accept liability for any injuries through the CFO's execution of the hold harmless agreements for the softball events. A-77-78. Furthermore, the Executive Director testified that the Employer would be liable if a non-employee was hurt at the softball event, which was ironic since the Employer has denied coverage for an employee at the softball event. A-77-78.

In sum, the Board in its Decision applied common sense logic to explaining that the Employer, in consideration of the two previously accepted and separate softball injuries as a work-related injury as required under 19 *Del. C.* §2362(a), took certain actions to bring the softball event into the orbit of employment. After the

first accepted softball injury claim, the Employer (a law firm) could have instituted changes to the softball event and alert its employees that it would no longer be a covered event. The Employer did not, nor did they after the second accepted claim. In fact, the testimony is clear that the Employer meant for it to be covered under Workers' Compensation. The Executive Director testified that after the first softball injury, the Employer could have disputed acceptance of the softball injury claim as a work-related event, but the Employer did not. A-63. The Executive Director, HR Director and CFO told Claimant his claim would be covered under Workers' Compensation. A-32, 90, 121 When the insurer denied the claim, the CFO told Claimant that he should contest it. A-50-51, 90. Ms. Atwell testified that for both her prior two softball related and accepted claims, she was told by the Employer to submit her claims under Workers' Comp. A-299. Ms. Atwell further testified that the Employer did not tell her that the softball event would no longer be covered under Workers' Comp. A-297. Ms. Dawson in her testimony indicated that once she learned Claimant's injury was not covered, she no longer participated because she thought it was a covered event. A-311.

In the totality of the circumstances, the record is evident that the Employer, through its actions and inactions, brought the activity into the orbit of employment. The Board's finding is free of legal error and is supported by substantial evidence,

and thus the Superior Court committed legal error when it reversed the Board's Decision.

c. **Superior Court Should Have Affirmed, and the Supreme Court Should Affirm, the Board's Decision as a Matter of Public Policy.**

The testimony of all involved, which included Executive Director, CFO, HR Director, Claimant, Ms. Dawson, and Ms. Atwell is clear that the Employer expected for the softball event to be covered under Workers' Compensation.[3] The Executive Director testified that after the second accepted softball injury, the Employer switched insurance carriers and that the Executive Director relied upon the broker to ensure "same coverages" which would have been inclusive of the softball event (as two prior claims covered by prior carrier). A-131-132. The Claimant was not a party to any such conversations and was not aware of any switch in policies and/or applicable coverages. Testimony is also clear that the employees were not forewarned that the softball event was no longer covered under Workers' Compensation. Thus, the employees were aware that prior claims were covered, but were not afforded the opportunity to make an informed decision to not participate anymore due to the activity not being covered. Indeed, Ms. Dawson, after Claimant's

[3] Executive Director A-32, 62-65; CFO A-31-32, 89-90, 110; HR Director A-121, 126-127; Claimant A-29-31, 48; Ms. Dawson A-307-308, 313-313; and Ms. Atwell A-295-297.

injury, made such an informed decision not to participate any longer due to Claimant's injury not being covered. A-307.

It is settled public policy in Delaware that Workers' Compensation Act is to be liberally construed. *New Castle County v. Goodman*, 461 A.2d 1012, 1014 (Del. 1983). The Supreme Court will "resort to other sources…including relevant public policy" in interpreting a statute "to produce a harmonious whole". *Wyatt*, 81 A.3d at 1253 citing *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Trust, ex rel. Christiana Bank and Trust Co.,* 28 A.3d 1059, 1070 (Del. 2011); quoting *CML V, LLC v. Box*, 28 3d 1037, 1040 (Del. 2011). The "public policy of the Workmen's Compensation Act…was passed for the benefit of the employee." *Hill v. Moskin Stores, Inc.*, 165 A.2d 447, 451 (Del. 1960).

The Supreme Court has held that if "[t]he decision of the Board was supported by the minimum quantrum of evidence required and [then it] should have been affirmed." *Steppi v. Conti Elec., Inc.*, 991 A.2d 19 (Del. 2010). In *Steppi*, the Supreme Court emphasized that the Board is entrusted to find the facts in any given case, and its findings of fact "must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way." (quoting 8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 130.01[3] (2009)).

In the interest of public policy, and in consideration of the Board's Decision and the evidence therein, the Superior Court should have, and this Court should, affirm the Board's Decision.

3. The Superior Court erred by weighing the evidence and reversing the Board's Decision that productivity is a substantial direct benefit to the Employer.

In both IAB's Decisions, the respective Boards found that the Employer derived a substantial benefit from the employees' participation in softball. A-169, 412-413. In the later IAB Decision, the Board weighed the evidence and determined that the testimony of the Executive Director of the Employer was "more definitive" with respect to his testimony that participation in softball increased productivity and that it was the Employer's goal since 2001. A-412-413. The Board concluded that the Employer derived a "substantial direct benefit" from the employees' participation in the form of increased productivity and cited to and relied upon the Employer's Executive Director's testimony as an officer of the Employer. A-413.

The Superior Court in its Opinion incorrectly found that the Board was in error: when it relied upon testimony of the Employer's Executive Director that participation "enhanced ultimate productivity", that it was a goal of the Employer since 2001, and that the Employer derived a substantial direct benefit from its employees participating in softball. Op. 15-18.

The Superior Court found that such enhanced productivity is a consequence of the increased morale, camaraderie, and health of the employee, and that the Board was in error when it relied upon the testimony of the Employer's Executive Director. In its Opinion, the Superior Court relied upon *Ostrowski v. Wasa Electric. Servs., Inc.*, 960 P.2d 162, 171 (Haw. Ct. App. 1988) and *Dalton* to indicate the appropriate standard for substantial direct benefit.

In error, the Superior Court relied upon *Ostrowski* as its fact pattern is inapposite to the one presented here. Op. 15. In *Ostrowski*, an employee was injured during an altercation between the employee and another individual at an after work, off premises drinking party. As indicated in *Ostrowski*, there was no evidence of *any benefit* to the employer, and thus the injury was not deemed compensable as work-related injury. The Superior Court's reliance on *Ostrowski* is misplaced and is not applicable to the facts presented to the Board, and it is noted that in *Dalton* it was not even cited to as the standard.

In *Dalton*, the Supreme Court affirmed the Dalton IAB's Decision that Dalton was in or about the employer's business when he was injured during the softball event as Dalton's actions were taken in good faith to further his employer's interests, Dalton's participation may have acted to deter crimes and that such participation was believed to benefit the Employer's image in the community. *Dalton*, at 454-456.

In the present case, the Superior Court indicated that *Dalton* requires substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale, that the Employer derived no business benefit by having Claimant participate in softball, and that there is no evidence that the goal articulated to by the Executive Director was realized in fact. Op. 15-17.

The Superior Court committed legal error when it weighed the evidence and testimony before the Board. The reviewing court is empowered to review findings of the Board on the record, but the scope of such review is narrow, since the Court does not sit as the trier of fact with authority to weigh evidence, determine questions of credibility, and make its own factual findings and conclusions. *Chicago Bridge & Iron Co.*, 372 A.2d at 185; *Johnson,* 213 A.2d at 64. The Superior Court cited to the Executive Director's prior testimony with respect to benefit of morale and camaraderie, but the Court misinterpreted the purpose of the later direct questioning from the Board's member to the Executive Director in which the Board was trying to ascertain if there was any benefit *beyond* morale, camaraderie, etc. Op. 15-18. Here, the Board sought definitive testimony as to any benefit that the Employer may have received *beyond* morale, camaraderie, etc. The Executive Director testified in response to the Board's direct questioning that: (1) *beyond* enhancing morale, camaraderie, and good will, all those things combined, would in fact enhance

ultimate productivity and (2) not only would it increase ultimate productivity but that it was a *goal* of the Employer since 2001. A-80-81.

Thus, the Board did exactly what the Board was supposed to do. The Board was unclear in the Employer's position, so the Board asked additional follow-up, direct questions to the Executive Director, as an officer of the Employer and the only witness responsible for all non-lawyers of the Employer. A80-81. Such additional questioning produced uncontroverted testimony from the Executive Director to indicate the benefit *ultimate productivity*, which was *beyond* enhancing morale, camaraderie, and good will, and that it was a *goal* of his as the Executive Director since 2001. A-81. The Board weighed the evidence before the Board, and it was clear that the Employer received substantial direct benefit of increased productivity from participation in the softball event, beyond morale camaraderie and good will. A412-413.

Furthermore, the Board found this testimony to be compelling and explicitly indicated it in the Decision by stating the Executive Director's "testimony was more definitive and not qualified…" and the Board "will continue to rely on his representation as an officer of the firm that Employer realized a benefit in the form of increased productivity." A412-413. It is the Board's duty to weigh the evidence. As such, the testimony cited to by the Board was from the very person who is

responsible for all non-lawyers of the Employer, and in that capacity, the Board relied upon his testimony. A412-413.

Here, and likewise to *Dalton*, the Board found that the Claimant furthered the Employer's interests with respect to increased productivity, which was a goal of the Employer. The Board found credible the testimony from the Employer's Executive Director, as an "officer" of the Employer, that ultimate productivity was enhanced. A-412-413.

Furthermore, the Superior Court weighed the evidence with respect to testimony by Eric Monzo, whereas the Board correctly disregarded such testimony. The Superior Court cited to Mr. Monzo's testimony that "Monzo did not believe Morris James benefitted from…softball games." Op. p. 5. However, such testimony by Mr. Monzo was not credible as the *Employer's* counsel at the remand hearing indicated to the Board that while Mr. Monzo is a Partner at the Employer, he is <u>not</u> in charge of the Employer's finances, he <u>doesn't</u> measure the Employer's productivity or like and is <u>not</u> in any position to testify about Employer's benefit. A-204. The Board correctly weighed and determined issues of credibility with respect to Mr. Monzo's testimony and did not find it compelling; but in error, the Superior Court weighed this testimony and cited to it in the Opinion. Op. 5.

The Superior Court erred when it weighed the evidence and found that the Executive Director's goal was "[A]t best, it is aspirational" and there is no evidence

that it was ever realized. Op. 16-17. However, here, the Superior Court committed legal error when it required an *additional* component to the *Dalton* factors by requiring that any benefit needs to be proven that it was realized by the Employer. A-17. Here, the Executive Director testified that the benefit was increased ultimate productivity and that it was a goal of the Employer since he started in 2001. A-412-413.

In *Dalton*, no such requirement of proof that the goal or interests were realized. In *Dalton*, the Supreme Court affirmed the Board's Decision that Dalton's participation "…were taken in good faith to further his employer's interests…", "…*may have* acted to deter crimes…" and "…participation in this event…was *believed* to benefit" the employer (emphasis added). A-454. *Dalton* did not require proof that the goal or employer's interests were achieved or realized, and it should not be required here either.

The Superior Court erred when it weighed the evidence and determined that there was not substantial evidence to support the Board's finding that there was a substantial direct benefit to the Employer by the employees' participation in the softball event. Op. 18. The Board correctly weighed the evidence, determined the credibility of the witnesses, and made an independent factual finding. A-412-413. *Johnson*, 213 A.2d at 64, 66. The Superior Court committed legal error when it reversed the Board's Decision.

CONCLUSION

One of the critical holdings in *Dalton* is that the factors are stated in the "disjunctive", and in other words, a Claimant only need satisfy one for a finding that the activity was within the course and scope of employment. Here, the Board found that Claimant satisfied two of the *Dalton* factors. In the Decision, the Board adequately explained how the Claimant's injury, in consideration of the substantial direct evidence, arose out of the course and scope of his employment.

For the foregoing reasons, Appellant respectfully requests that this Honorable Court reverse the Opinion of the Superior Court and uphold the Decision by the Industrial Accident Board, dated as August 1, 2017, that (i) determined that Claimant's injury on June 10, 2015 was in the course and scope of his employment for Morris James LLP, and (ii) awarded Claimant a reasonable attorney's fee.

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