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Case Number 602,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	:	No: 602, 2018
	:	
Employer Below – Appellant,	:	On Appeal From:
	:	Superior Court in and for
v.	:	Kent County
	:	
NICHOLAS GATES,	:	C.A. No.: K18A-04-002 JJC
	:	
Claimant Below – Appellee.	:	

EMPLOYER-BELOW/APPELLANT'S REPLY BRIEF ON APPEAL

TYBOUT REDFEARN & PELL

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASE **PAGE**

ARGUMENT

I. The Board's Decision finding that the Claimant was injured within the course and scope of his employment was an error of law and not supported by substantial evidence

In reply to Claimant's Answering Brief (hereinafter "Ans. Br. ____") the State reasserts the arguments contained in its Opening Brief and further responds below.

A. Claimant makes inconsistent arguments in direct conflict with Spellman

Claimant argues that the employment relationship between Claimant and the State establishes that Claimant was injured while in the course and scope of his employment.[1] Claimant then attempts to argue that the employment relationship fails to address whether Claimant was within the course and scope of his employment, and therefore the "special errand" exception to the "going and coming" rule applies.[2] Claimant cannot make both arguments because doing so directly contradicts the Delaware Supreme Court's holding in *Spellman v. Christiana Care Health Services*.[3]

Claimant admits that *Spellman* dictates where the Board's analysis begins with regard to determining whether an employee was acting within the course and scope of his or her employment.[4] Under *Spellman*, the Court held that to determine

[1] Ans. Br. 15.
[2] Ans. Br. 26.
[3] 74 A.3d 619 (Del. 2013).
[4] Ans. Br. 23.

if an employee's injury is work-related, the inquiry necessarily begins with whether, under the employment contract, the employee was on the job.[5] Making that determination "will require the Board (or reviewing Court) to draw inferences from the totality of the circumstances, within the employment contract framework."[6] If the "contractual terms resolves the issue of whether the injury" occurred within the course and scope of employment, "then the analysis can end."[7] Only if the evidence regarding the contractual terms is insufficient to resolve the issue may the Board or reviewing Court "resort to secondary default presumptions" such as the "going and coming" rule and its exceptions.[8]

In the instant case, Claimant cannot argue that the contractual terms resolve the issue of whether Claimant's injuries occurred within the course and scope of employment, but then argue that an exception to the "going and coming" rule applies because if the contractual terms resolve the course and scope issue, the analysis immediately ends. Claimant may only assert the applicability of an exception to the "going and coming" rule if the contractual terms do not resolve the course and scope issue. Because both the State and Claimant agree that, under the totality of the circumstances, the employment contract or relationship resolves the issue of whether

[5] 74 A.3d at 626.
[6] *Id.* (internal quotations omitted).
[7] *Id.* at 625.
[8] *Id.* at 625-626.

Claimant was within the course and scope of employment when he was injured (albeit with opposite conclusions), Claimant is precluded from asserting the applicability of an exception to the "going and coming" rule because Claimant's employment contract with the State unambiguously addresses the issue of whether travel time is compensable back to the yard during a call-back.[9]

B. Claimant's assertion that his pay for a call-back began when he receives the call, instead of when he arrives at the yard, is contradicted by his own testimony and without merit

Claimant attempts to argue his pay for responding to a call-back begins when he receives the call because Claimant alleges his supervisor informed him as such, and because Claimant alleges that was the State's policy until it was changed after the November 29, 2016 motor vehicle accident.[10] Claimant's assertions are solely self-supported and directly contradicted by his own inconsistent testimony. Claimant agreed that Merit Rule 4.16, which indicated that call-back pay began when an employee reaches the yard, was in effect since May 13, 2007, over nine years before Claimant's work accident.[11] Claimant further testified that his direct supervisor informed him that his November 29, 2016 motor vehicle accident would not be

[9] Although Claimant may assert a "misunderstanding" or hypothesize as to possible deviations from the Merit Rules, the Claimant presented no actual evidence that supports the conclusion that the Merit Rules are not part of the employment contract.
[10] Ans. Br. 14-15.
[11] A39-A40.

covered under workers' compensation.[12] Because Claimant admitted that Merit Rule 4.16 was in effect well before the November 29, 2016 motor vehicle accident and his supervisor informed him that the accident would not be covered under workers' compensation, Claimant's assertions plainly contradict his own testimony.

Claimant also argues that his fellow co-workers taught him to begin recording his call-back time on timesheets as of the time of the call, and not upon arrival to the yard, and such practice demonstrated that Claimant was in fact paid for travel time back to the yard during a call-back.[13] Initially, the State submits that Claimant's co-workers had no authority to advise Claimant to contradict the State's policy as stated in Merit Rule 4.16. More importantly, Claimant admitted that when he attempted to submit a timesheet for call-back pay for November 29, 2016, the timesheet was **rejected** and he was not paid for any call-back time for the date of the motor vehicle accident.[14] The fact that Claimant's timesheet was rejected demonstrates that an employee is not paid for travel time back to the yard during a call-back because the only thing Claimant did in this case, in response to the call-back, was start traveling back to the yard before he was involved in the motor vehicle accident.[15] If Claimant

[12] A42-A43.
[13] Ans. Br. 18.
[14] A58 (emphasis added).
[15] Additionally, Claimant presented no evidence that the State was aware or condoned (tacitly or expressly) any improper timesheets submitted by employees that violated the Merit Rules, nor did Claimant present any corroborating testimonial evidence to support such a proposition.

truly was paid for travel time back to the yard during a call-back, as he contends, then the timesheet would not have been rejected.

Claimant further asserts that the fact that he was not paid on the date of the accident is a mere distraction and insufficient to overcome an alleged practice of the State paying employees for travel time back to the yard in response to a call-back.[16] Claimant has **not established** such a practice existed.[17] Claimant had only worked for the State for approximately five months, and failed to establish how many times Claimant actually responded to a call-back.[18] Therefore, any assertion that there was a practice of paying for travel time back to the yard for a call-back is speculative and lacks foundation. Further, the State submits that the fact the Claimant was not paid for any call-back time when Claimant failed to make it to the yard is direct evidence that travel time to the yard for a call-back is not compensable.

Claimant further attempts to argue, twice, that the fact that he is paid a minimum of four hours during a call-back demonstrates that Claimant was paid for travel time back to the yard during a call-back.[19] Claimant's argument fails on multiple fronts. Initially, as stated *supra*, Claimant was not paid four hours, or anything, for a call-back on the day of the accident because he never reached the

[16] Ans. Br. 19.
[17] (emphasis added).
[18] A26.
[19] Ans. Br. 14, 19.

yard. Further, the amount of pay Claimant receives during a call-back is irrelevant to the analysis. The issue is **when** Claimant's pay begins during a call-back, which would have been at the arrival at the yard.[20]

Claimant's argument that he is not a sophisticated individual capable of understanding all of the State's employment rules is also unavailing.[21] Claimant cites no case law for such a proposition. Furthermore, such a ruling would lead to an amorphous standard of when an employee should or should not be aware of his or her employer's rules, such that the ignorant employee benefits from maintaining his or her ignorance and only the knowledgeable employee must follow the rules. The fact that Claimant's co-workers, who had no authority to speak for the State, allegedly provided him with incorrect information does not allow Claimant to circumvent the State's contract of hire. Further, as mentioned above, when Claimant asked his supervisor if his November 29, 2016 motor vehicle accident would be covered under workers' compensation, the supervisor advised him it was not covered.

Claimant asserts that the State should have provided him with a complete copy of all applicable rules to ensure he understood all of the rules.[22] Claimant's assertion

[20] *See Spellman*, 74 A.3d at 621, 626; *DeSantis*, 2017 WL 4675765, at *3 (emphasis added).
[21] Ans. Br. 18.
[22] Ans. Br. 24.

is contradictory because he claims "[h]e is not a sophisticated individual in terms of being able to parse through a large volume of rules and have a full and complete understanding as to how each applies to him."[23] Claimant cannot simultaneously argue that he should have been given a complete copy of all rules but also that he was not sophisticated enough to understand all the rules. Claimant was provided access to the Merit Rules. Claimant apparently elected not to read them. Claimant's failure to read the Merit Rules does not negate their existence or applicability.

Claimant further alleges that the State failed to meet its burden that Merit Rule 4.16 was intended to be part of the employment contract.[24] Initially, Claimant has cited no case law to establish what "burden" is on an employer to establish a term of employment. Further, Ford testified that Merit Rule 4.16 was part of the employment contract.[25] Finally, it is the Claimant bears the burden of establishing that his injuries are work-related.[26]

The State does not, as Claimant suggests, contend that Merit Rule 4.16 should be viewed in isolation.[27] Rather, the State submits that the evidence demonstrates, under the totality of the circumstances, that the only reasonable conclusion is the

[23] Ans. Br. 18.
[24] Ans. Br. 16.
[25] A62.
[26] *Branum v. Franklin Co.*, 1993 WL 489383, at *2 (Del. Super. Oct. 18, 1993) (citation omitted).
[27] Ans. Br. 21.

State does not compensate Claimant in any way for travel time back to the yard during a call-back, and therefore Claimant was not within the course and scope of his employment when the motor vehicle accident occurred. Not only does Merit Rule 4.16 indicated that Claimant is not paid for a call-back until he reaches the yard, but Claimant's own supervisor informed him that the accident was not covered under workers' compensation for that exact reason. Further, Ms. Ford confirmed that Claimant would not be paid for a call-back until he reached yard. Claimant was not paid for the call-back on November 29, 2016 because he never reached the yard. The only evidence to suggest that Claimant is paid for travel time back to the yard during a call-back is Claimant's own inconsistent and speculative testimony. As such, the Board's decision is not supported by substantial evidence.

Claimant cannot rely on *Kerly v. Battaglia*[28] to eliminate Merit Rule 4.16 as part of the employment agreement because that case is factual distinguishable to the instant matter. *Kerly* involved a breach of contract matter and had nothing to do with a workers' compensation matter.[29] The court in *Kerly* found that an employee could not enforce a contractual provision in an employment manual to eliminate inequalities in salary because the provision was too vague to create a contractual

[28] 1990 WL 199507 (Del. Super. Nov. 21, 1990).
[29] *Id.* at *1.

right for the employee.[30] The instant matter had nothing to do with a breach of contract claim, nor is there any argument that Merit Rule 4.16 is vague.

Likewise, Claimant's reliance on *L.H. Doane Associates v. Seymour*[31] is likewise inappropriate because there is no course of conduct to imply any change to Merit Rule 4.16. To the extent Claimant argues that the State's payment to Claimant for prior call-backs where claimant listed the start time as when he received the call, the State submits that those payments were premised on the fact that Claimant correctly recorded the start time, which would be when he arrived at the yard. This is bolstered by the fact that when Claimant submitted his timesheet for the date of the accident, it was rejected because the State knew he never arrived at the yard. While Claimant argues that the fact that he even submitted a timesheet demonstrates his belief that he was to be paid for travel time back to the yard,[32] a mistaken belief does not allow an employee to bypass the terms of his employment.

Claimant also argues that application of Merit Rule 4.16 should not be retroactively applied.[33] The State is not arguing for retroactive application. Rather, Merit Rule 4.16 was already in force at time of Claimant's motor vehicle accident.[34] The State submits that Claimant merely ignored it.

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[30] *Id.* at *3-4.
[31] Del. Supr. No. 172, 1983, Horsey, J. (April 23, 1985) (ORDER)
[32] Ans. Br. 20.
[33] Ans. Br. 25.
[34] A71.

C. Claimant is mistaken as to the precedent set forth in Spellman and DeSantis

It appears that Claimant is attempting to argue that going and coming rule should apply because there no written employment contract between Claimant and the State.[35] Claimant's argument fails because *Spellman* has no such requirement. Nowhere in the *Spellman* decision does it reference a requirement of a written employment contract. Further, the State submits that *Spellman* does not require a written employment contract to establish contractual terms to address whether an injury is work-related because it viewed the employment relationship under the totality of the circumstances.[36] As such, Claimant's argument fails.

Claimant also attempts to argue that *DeSantis* is inconsistent with *Spellman*.[37] *DeSantis* properly applied the holdings in *Spellman* because the *DeSantis* Court initially analyzed the employment contract between claimant and employer to determine if the claimant was within the course and scope his employment when he was injured, and found that the employment contract resolved the issue and then properly ended its inquiry.[38] Therefore, the State submits that *DeSantis* directly and properly applied and interpreted *Spellman*.

[35] Ans. Br. 23.
[36] 74 A.3d at 625-626.
[37] Ans. Br. 22.
[38] 2017 WL 4675765, at *3.

D. Claimant's reliance on Histed is misplaced

Claimant also argues on two occasions that, under *Histed v. E.I. Du Pont de Nemours & Co,*[39] Claimant's injury arouse out of and in the course of his employment because he was paid for travel time back to the yard.[40] Claimant's argument fails because the Court in *Histed* applied an exception to the going and coming rule in finding that the claimant's injury was work-related.[41] In the instant case, both Claimant and the State contend that the employment terms resolve the issue. Therefore, *Histed* is inapplicable because, under *Spellman*, once the employment terms resolve the issue of whether a claimant was within the course and scope of his employment at the time of injury, no further analysis is necessary, including the applicability of the going and coming rule and any exceptions.[42]

Histed is also factually distinguishable because, in that case, there was no dispute that the claimant was paid for travel time.[43] In the instant matter, however, Claimant was not paid for travel time back to the yard on the day of the motor vehicle accident. Therefore, *Histed* is both factually and legally distinguishable from the instant case.

[39] 621 A.2d 340 (Del. 1993).
[40] Ans. Br. 12, 27.
[41] 621 A.2d at 345-346.
[42] 74 A.3d at 626.
[43] 621 A.2d at 345.

CONCLUSION

The Board's Decision to grant Claimant's Petition must be reversed because the Board committed legal error and it is not supported by substantial evidence.

Initially, Claimant may not argue that the employment contract or relationship between himself and the State demonstrates that Claimant was within the course and scope of his employment, but then also argue that the employment relationship fails to address the issue and an exception to the "going and coming" rule applies because such a position is in direct contradiction to *Spellman*.

Further, the Board's decision is not supported by substantial evidence because the **only** evidence that Claimant presented in support of his contention that he was paid for travel time back to the yard for a call-back was his own inconsistent testimony which was not grounded in actual knowledge or practice by the State. All other evidence, including Merit Rule 4.16, the rejection of Claimant's timesheet, Ms. Ford's testimony, and the testimony of Claimant's own supervisor, indicate that Claimant's pay for a call-back begins once he reaches the yard, and not beforehand.

Claimant's assertion that a written employment contract is necessary under *Spellman* fails because the Court in that case made no such requirement. Rather, the evidence is viewed under the totality of the circumstances. The State also submits that *DeSantis* correctly applied the holdings from *Spellman*, and that Claimant's reliance on *Histed* is flawed.

Consequently, for the reasons stated in the State's Opening Brief on Appeal, as well as the Board's failure to appreciate the relevant factual background, testimonial evidence and controlling legal standards discussed herein, the Board's April 4, 2018 decision and Superior Court's November 16, 2018 decision must be reversed.

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