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Case Number 315,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARY E. SPELLMAN,	:	No. 315, 2012
Employee-Below, Appellant,	:	Court Below - - Superior Court of the State of Delaware in and for Sussex County C.A. No. S11A-08-001 RFS
v.	:	
CHRISTIANA CARE HEALTH SERVICES,	:	
Employer-Below, Appellee.	:	

EMPLOYER-BELOW, APPELLEE'S

ANSWERING BRIEF ON APPEAL

Dated:8/24/12

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NATURE AND STAGE OF THE PROCEEDINGS

On April 1, 2011, Appellant, Mary E. Spellman [hereinafter "Appellant" or "Claimant"), filed with the Industrial Accident Board (hereinafter the "Board") a Petition to Determine Compensation Due against her employer, Christiana Care Health Services. Mary E. Spellman v. Christiana Care Health Services, Delaware IAB Hearing No. 1364655. In her Petition, Appellant sought acknowledgement of the compensability of injuries suffered in a January 14, 2011 motor vehicle accident (hereinafter "the accident").

On July 19, 2011, a Hearing was conducted before the Board and was limited solely to the issue of whether or not Appellant was in the course and scope of her employment at the time of the accident. Appellant argued first that, as the Claimant is a "traveling employee," she should be exempted from the "going and coming" rule that generally precludes the compensability of injuries suffered going to and coming back from work. Appellant argued alternatively that the trip in which she was engaged at the time of her accident was one of mixed purpose and that the resulting injuries should be compensable, accordingly.

On July 22, 2011, the Board issued a written Decision (hereinafter "the Opinion" or "Order"), denying Appellant's Petition to Determine Compensation Due based upon its finding that the accident took place outside the course and scope of Appellant's employment. Appellant took a timely Appeal of that Decision to the Superior Court in and for Sussex County. By way of decision dated May 17, 2012, the Superior Court upheld the Industrial Accident Board's Order. The Superior Court noted the existence

of the "traveling employee" exception, but found that it did not apply to this case holding:

> Claimant argued to the Board and on appeal that this exception applies to her case. The Board disagreed, noting that payment of Claimant's travel expenses would have brought her within the scope of this rule, but she was not paid for her expenses. This is confirmed by the fact that Claimant was clocked out and was on a personal trip home before going to see her doctor at the time of the accident. Viewing a totality of the circumstances, the Court concludes that the Board's decision that Claimant was not acting within the course and scope of her employment when she was injured is supported by substantial evidence and is free from legal error.

Spellman v. Christiana Care Health Services, Del. Super., C.A. No. S11A-08-001 RFS, Stokes, J. (May 17, 2012).

Appellant timely filed her appeal of the Superior Court's Order with this Court on June 12, 2012. The Appellant filed her Opening Brief on Appeal on July 27, 2012. This is the Employer-Below, Appellee's Answering Brief on Appeal.

SUMMARY OF ARGUMENT

The Industrial Accident Board did not err as a matter of law in concluding that the claimant's injuries neither arose out of the course and scope of her employment, nor did the Appellant's injuries occur while she was engaging in a mixed purpose trip.

In order for an injury to be compensable under worker's compensation, the injury must "arise out of" and "in the course of" employment, regardless of whether the employee is a "traveling employee" or is bound by the "going and coming" exception to the premises rule. The Board did not err in finding that the Appellant's motor vehicle accident did not arise out of, nor was it in the course and scope of her employment as the Appellant had clocked out and was on her way home and then to a personal doctor's appointment. She was also not being compensated for her time or mileage when the injury occurred.

In addition, the Appellant was marked off of work and was no longer available to her employer. Therefore, her personal deviation was not of any benefit to her employer and does not constitute a mixed purpose or dual purpose trip.

Thus, the Board did not err in finding the Apellant's accident did not arise out of the course and scope of her employment, nor did the accident occur while she was engaged in a mixed purpose trip. As such, the Appellant's injuries are not compensable under the Worker's Compensation Act.

STATEMENT OF FACTS

The Appellant, Mary E. Spellman (hereinafter "Appellant") worked as a home health aide for Visiting Nurse Association (hereinafter "VNA" or "Employer"), providing services to clients which included assistance with hygiene and light housekeeping (IAB O. p. 2, B-2)[1]. Employees of VNA use a telephone based computer system known as "telephony" to obtain schedules, clock in and out of appointments and to clock in and out of travel and mileage reimbursement (IAB Tr. pp. 40-42, B-51-53)[2]. VNA's Employee Handbook specifically states that mileage is paid each day from the first client that you visit until the last client that you visit; however, the mileage is not paid from the employee's home to their first client's home or from leaving the employee's last client's home to the employee's home, as specifically set forth in the Handbook (IAB Tr. p. 40, B-51).

On January 13, 2011, the Appellant called her supervisor, Keith Torbert, indicating that she wanted to be blocked off between the hours of 10:30 a.m. and 1:00 p.m. on the following day, January 14, 2011 (IAB Tr. p. 42, B-53). This request was accommodated utilizing Horizon Home Healthcare, an interactive scheduling system where VNA can actually go in and block time off for an employee stating they were unavailable so that they could not be scheduled for any work during that time (IAB Tr. p. 42, B-53). The clients which had been assigned to the Appellant for this time period were reassigned to other employees accordingly (IAB Tr. pp. 40-42, 42-44, B-51-53, B-53-

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[1] Throughout this Brief, reference to the Board's Order is noted as (IAB O. p. __, B-___)

[2] Throughout this Brief, reference to the transcript of the Board's 7/19/11 Hearing is noted as (IAB Tr. p. __, B-___)

55). The Appellant was on the schedule, but blocked out and unavailable for any clients between the hours of 10:30 a.m. and 1:00 p.m. on 1/14/11 (IAB Tr. p. 42, B-53). In being blocked out, she would not be available for any emergency calls or scheduling of any other clients during that time (IAB Tr. pp. 42, 43, B-53, 54). In addition, on 1/13/11, the Appellant asked for the "blocked out" time on 1/14/11 to be treated as vacation time and to be compensated accordingly for that time off (IAB Tr. p. 43, B-54). Unfortunately, the Appellant had used all of her vacation time and had none available, so this time would not be paid vacation nor would it be paid personal time or paid travel/mileage reimbursement time (IAB Tr. p. 43, B-54).

On January 14, 2011, the Appellant traveled from her home to her first appointment/client of the day, Mr. McVey, according to her testimony, arriving at 7:45 a.m. (IAB Tr. p. 18, B-29), but according to the telephony system, she clocked in at 8:04 a.m. (IAB Tr. p. 45, B-56). The Appellant worked at Mr. McVey's home from 8:04 a.m. to 8:55 a.m. (IAB Tr. p. 45, B-56). The Appellant was not paid mileage or travel time from her home to Mr. McVey's home, but was paid for her time while in the client's home (IAB Tr. pp. 40-42, B-51-53). Then, the Appellant clocked out at Mr. McVey's home and into the travel block/mileage reimbursement time and was paid her travel reimbursement for the period 8:56 a.m. to 9:18 a.m. when she arrived at Mr. Lourdy's house (IAB Tr. p. 45, B-56). She then clocked out of the travel block/mileage reimbursement time and into the work time at Mr. Lourdy's house (her second client of the day) (IAB Tr. p. 45, B-56). She then worked at Mr. Lourdy's house from 9:19 a.m. to 10:31 a.m. (IAB Tr. p. 45, B-56). From 10:32 a.m. and ongoing, the Appellant was no

longer clocked into working time for any particular client, was no longer clocked in to travel time for VNA and was no longer eligible for any mileage reimbursement in accordance with VNA's policies, handbook and telephony system, as well as in accordance with the Appellant's pre-requested time off from VNA (IAB Tr. pp. 40-42; 42-44, B-51-53, 53-55).

After leaving her second client of the day, heading home on a personal deviation and while not receiving payment for mileage/travel, the Appellant was involved in a one-car motor vehicle accident for which she was cited as traveling in a careless and reckless manner for the weather conditions (IAB Tr. p. 32, B-43).

This matter proceeded to Hearing on 7/19/11 where testimony was offered by the Appellant on her own behalf and on behalf of VNA by the Appellant's supervisor, Keith Torbert. After hearing all of the evidence, the Board ordered that the Appellant was not acting in the course and scope of her employment at the time of the motor vehicle accident (IAB O. p. 10, B-10). The payment of travel expenses would bring the Appellant within the course and scope of her employment pursuant to the "traveling employee" exception of the general "going and coming" rule, according to the Board. The Board, however, found that the Appellant's motor vehicle accident did not arise out of or in the course of her employment as it occurred while she was "off the clock" and on her way home and then to a personal doctor's appointment (IAB O. p. 10, B-10). She was not on a special errand related to work, not on a mixed purpose trip since there was no benefit to VNA, not on a short personal comfort stop as has been argued by the Appellant and she was not traveling between appointments. These are all factual

findings of the Board in their 7/21/11 Order (IAB O. p. 10, B-10). The Board specifically found that the fact that the Appellant was not paid mileage or for her time at the time of the motor vehicle accident are additional factors leading to the Board's Decision that the Appellant was not in the course and scope of her employment at the time of the accident (IAB O. p. 10, B-10). Finally, the Board indicated that the Appellant's departure to go home and then to a personal doctor appointment was so great as can be inferred that she "abandoned" her job temporarily (IAB O. p. 10, B-10) and the Appellant's Petition was denied, accordingly (IAB O. p. 11, B-11).

ARGUMENTS

I. THE INDUSTRIAL ACCIDENT BOARD DID NOT ERR AS A MATTER OF LAW IN CONCLUDING APPELLANT'S INJURIES DID NOT ARISE OUT OF THE COURSE AND SCOPE OF HER EMPLOYMENT.

A. Question Presented

Did the Industrial Accident Board err as a matter of law by concluding Appellant's injuries did not take place in the course and scope of her employment? (Question preserved at IAB Tr. p. 42-43, 66-71, B-53-55, B-77-82, question presented in Superior Court Brief Argument I)

B. Standard and Scope of Review

The sole function of both the Superior and Supreme Courts on Appeal from a Decision of the Board is to determine whether there was substantial evidence to support the findings and conclusions of the Board. A. Mazzetti & Sons, Inc. v. Ruffin, 437 A.2d 1120 (Del. 1981); Talmo v. New Castle County, 444 A.2d 298, aff'd, 454 A.2d 758 (Del. 1982). While the Court is empowered to review findings of the Board on the record, the scope of such review is narrow, as the Court does not sit as a trier of fact with authority to weigh evidence, determine credibility, and make factual findings and conclusions. Craig v. Snyvar Corp., 233 A.2d 161 (Del. Super. 1967); Johnson v. Chrysler Corp., 213 A.2d 64 (Del. 1965). To the contrary, where the evidence is sufficient to support the Board's conclusions, its decision will not be disturbed absent an error of law. Dallachesia v. General Motors Corp., 140 A.2d 173 (Del. Super. 1958); General Motors Corp. v. Freeman, 164 A.2d 686 (Del. Super. 1960); Hunter v. Wright Transfer & Supply Co., 69 A.2d 296 (Del. Super. 1949). Findings made by the trier of fact which are

supported by the record should be accepted even if the reviewing Court, acting independently, would reach a contrary conclusion. Besk Oil. Incorported v. Brown & Bigelow, Inc., Del Super., C.A. No. 88A-JA-3-1-AP, Stiftel, P.J. (December 16, 1988). A discretionary ruling of the Board will not be disturbed on appeal unless it is based on clearly unreasonable or capricious grounds. Seaford Feed Company v. Moore, Del. Super., C.A. No. 85A-AP-3, Ridgely, J. (July 2, 1987) citing Berry v. State of Delaware, Del. Super., C.A. No. 85A-AU-2, Bush, J. (June 19, 1987). Weighing evidence, determining the credibility of witnesses and resolving any conflicts in testimony are functions reserved exclusively for the Board. Downes v. State, 623 A.2d 1142 (Del. 1993).

In reviewing the record for substantial evidence, the Superior Court must consider the record in a light most favorable to the party prevailing below. General Motors Corp. v. Guy, Del. Super., C.A. No. 90A-JL-5 Gebelein, J. (August 16, 1991). Only where there is no satisfactory proof in support of the factual finding of the Board may the Superior or Supreme Court overturn it. Johnson v. Chrysler Corp., 213 A.2d 64 (Del. 1965).

C. Merits

1. The Board did not err with regard to its evaluation of the applicability of the "traveling employee" exception established by Devine v. Advanced Power Control

Regardless of whether an employee is bound by the "going and coming" rule or is a "traveling employee" who may be exempt from said rule, there remains the requirement that the employee be injured "arising out of" and "in the course of"

employment - - two separate requirements, both of which must be met for the Workers' Compensation Act to be applicable. Dravo Corp. v. Strosnider, 45 A.2d 542 (Del. Super. 1945). An injury occurring while an employee is on his way to work or on his way home from work is not compensable under the "going and coming" rule of employer non-liability. Histed v. E.I. DuPont de Nemours & Co., 621 A.2d 340 (Del. 1993). The Courts have developed exceptions to the "premises" rule in instances where an employee is injured in a parking lot owned or controlled by the employer; or if the employee was on a special errand at the request of the employer. In order for a claim to be compensable when the employee is off the premises and is providing services for the employer which require his presence off the premises, 19 Del. C. §2301 (18) (a) states "...or while he is engaged elsewhere in or about his employer's business where his services require his presence as part of such service at the time of the injury." If the employee is injured when the sole purpose of the trip is business and the employee is where he should be at the time he should be, then there is no question that the employee is within the course and scope of his employment.

In this case, the factual finding by the Board, after hearing all the evidence, was that the Appellant was not acting in the course and scope of her employment at the time of the motor vehicle accident on 1/14/11 (IAB O. p. 10, B-10). The finding of the Board was that the Appellant's motor vehicle accident did not arise out of or in the course and scope of her employment as it occurred while she was "off the clock" and on her way home and then to a personal doctor's appointment (IAB O. p. 10, B-10). The Board specifically found that the Appellant was not on a special errand related to work, was

not on a mixed purpose trip as there was no benefit to VNA, was not on a short personal comfort stop and was not traveling between client appointments (IAB O. p. 10, B-10).

The Board, making the factual finding and accepting the testimony offered on behalf of VNA and thereby concluding that the Appellant was not in the course and scope of her employment at the time of the motor vehicle accident, concludes the need for any further consideration of either the "going and coming" rule and the "traveling employee" exception to the "going and coming" rule.

With regard to this matter, the Appellant has the burden, by a preponderance of the evidence, to establish that the motor vehicle accident that caused her injuries occurred while she was in the course and scope of her employment resulting in lost time/disability. Delaware law requires that for an injury to be compensable, it must have arisen by accident occurring "out of and in the course of employment." 19 Del. C. §2304. There must exist a causal relationship between the injury and the employment. This statute has been interpreted as establishing the premises rule for a compensable accident; which has been extended to cover parking lots as part of the employer's premises. Quality Carwash v. Cox, 438 A.2d 1243 (Del. Super. 1981). As a general rule, an employee "going and coming from employment" is not considered within the course and scope of employment; however, there have also been exceptions recognized to this general principle such as those stated in Histed, 621 A.2d at 340. In Histed, the Delaware Supreme Court noted that the Appellant was on a "special errand" due to the urgency of her trip, the fact that she was paid travel pay, the time and trouble of making

the journey, and the special inconvenience and the hazards of making the trip under such circumstances.

In Devine v. Advanced Power Control, Inc., 663 A.2d 1205 (Del. Super. 1995), the Superior Court reviewed whether or not the employee was within the course and scope of his employment when involved in an automobile accident that occurred while the employee was returning home after installing electrical equipment on the premises of the employer's customer. The Court analyzed the "going and coming" rule in the context of employment situs reviewing an Ohio Court case in which it noted that the employment situs may present one of three major characteristics. It may be a fixed situs of employment – the employee has a fixed situs of employment when he or she reports to the same place each day to carry out his duties; another characteristic of employment is in the absence of a fixed situs – a traveling salesman is one who would normally present no fixed situs employment; and the third situation involves an employee who works for varying time periods at various sites. The Court went on to state that the "going and coming" rule applied, by definition, only to an employee with a fixed place of employment. When the employee had a semi-fixed place of employment where the employer contracted with the employee to perform services for the employer's customers at a designated time and place and contracted with the customer to dispatch someone to perform the services at that time and place, the employee's trip to work was a necessary and required part of his employment. Consequently, the risk of accident during travel was a risk interrelated with the nature of the employment. See id.

The Delaware Courts have recognized that questions relating to course and scope of employment are highly factual so that they must be resolved under the totality of the circumstance test. Therefore, the facts of each case are the key element to determine whether or not a particular accident will be viewed as compensable. Findings of fact are the sole province of the Board. Downes v. State, 623 A.2d 1142 (Del. 1993).

2. The Board did not commit error by failing to apply the "traveling employee" exception to the general "going and coming" rule.

For argument sake only, even if one were to apply the "traveling employee" exception to the fact pattern in this case, it is clear that there were periods when the Appellant was considered on the clock and, therefore, compensated for time and mileage between clients and there were specific periods documented through the telephony system when she was considered off the clock and not compensated for mileage and travel (IAB Tr. pp. 40-42; 42-44, B-51-53, 53-55). It is clear from the understanding of the parties as set forth in VNA's handbook that the normal "going and coming" rule would apply to its employees from their home to their first appointment and after their last appointment to whatever may be their personal, final destination as the risks and hazards of such travel is no different than those experienced in daily commuting trips of the general public. Histed v. E.I. DuPont de Nemours & Company, 621 A.2d 340 (Del. 1993). There is a presumption that when an employee is being paid an identifiable amount of compensation for time spent in travel to and from work, the trip is "within the course of employment for purposes of workers' compensation." Devine v. Advanced Power Control, 633 A.2d 1205 (Del. Super. 1995). If, therefore, there is a clear, technologically advanced system (in this case was the

telephony system) which shows when the Appellant was "in the service of her employer" and being compensated for travel/mileage, as opposed to when the Appellant was not "furthering the benefits of her employer" and was not being compensated for travel, then the reverse rule should apply. If the Appellant was not being compensated, then she was not "in the course and scope of her employment," as was correctly held by the Board (IAB O. pp. 10, 11, B-10, 11). The "traveling" exception, therefore, fails in this case.

3. The Board correctly relied upon Histed v. E.I. DuPont de Nemours in denying Appellant's Petition.

The Appellant is incorrect in their interpretation of how the Board relied upon the Decision in Histed v. E.I. DuPont de Nemours & Company, 621 A.2d 340 (Del. 1993). The Appellant is looking at facts which distinguish the Histed Decision from that with which we are confronted in this case, but is failing to consider the case law that was developed by Histed. See id. The point the Board is trying to make by citing Histed is the fact that you must be in the course and scope of your employment at the time of the injury for the claim to be compensable. In order to get to whether or not the "going and coming" rule should apply or whether or not the "traveling employee" exception should apply, one must first find that the Appellant is in the course and scope of employment. Histed is cited merely for that premise and no other, so the fact that the Histed underlying fact pattern is distinguishable from that in our case is irrelevant but may explain why in Histed, ultimately the employee was found to be compensated, and in "the course and scope of employment," contrary to this case where the Appellant

was found not to be in "the course and scope of employment" and not entitled to compensation.

4. The Board correctly relied upon Dietel v. Chartwell Law Office in denying Appellant's Petition.

Here again, the Appellant is misunderstanding the Board's reliance upon the Decision in Dietel v. Chartwell Law Office, Del. IAB Hearing No. 1362880 (June 27, 2011). In the Board's Decision, this case is cited merely because it was an argument made by VNA to rebut the Appellant's arguments of "personal comfort," "mixed purpose" and/or "dual purpose." This case was cited by VNA and the Board notes VNA's arguments and citation to this case, but never specifically indicated that the Board, itself, relied upon that Decision (IAB O. pp. 10, 11, B-10, 11). Regardless, this Decision again stands for the premise that an employee is covered when the employee is "in or about the employer's business" and further stands for the legal position that a "personal deviation from work duties may be so great that an intent to abandon the job temporarily may be inferred so that the conduct cannot be considered an incident of 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 course and scope of employment." Dietel at 10. It does not matter that the fact pattern is not identical in the Dietel case compared to that with which we are confronted, it is the legal reasoning that is being offered by VNA. That legal reasoning is that when an individual is on an unpaid break (and not where they normally are), and engaged in a personal errand and not going about their employer's business, they are not compensated. See id. Again, this case stands for the premise that it does not matter whether you have a fixed

location of employment or you are a "traveling employee," if you are not "in the course and scope of your employment," have taken a personal deviation, are on an unpaid leave and/or on a personal errand at the time of injury then such injury is not compensable.

II. THE INDUSTRIAL ACCIDENT BOARD DID NOT ERR IN FAILING TO FIND THE APPELLANT'S ACCIDENT TOOK PLACE DURING A MIXED PURPOSE TRIP.

A. Question Presented

Did the Industrial Accident Board err as a matter of law by concluding that Appellant was not engaged in a dual purpose trip at the time of her January 14, 2011 accident? (Question preserved at IAB Tr. pp. 42-43, 71-73, B-53-54, B-82-84, question presented in Superior Court Brief Argument II)

B. Standard and Scope of Review

The sole function of both the Superior and Supreme Courts on Appeal from a Decision of the Board is to determine whether there was substantial evidence to support the findings and conclusions of the Board. A. Mazzetti & Sons, Inc. v. Ruffin, 437 A.2d 1120 (Del. 1981); Talmo v. New Castle County, 444 A.2d 298, aff'd, 454 A.2d 758 (Del. 1982). While the Court is empowered to review findings of the board on the record, the scope of such review is narrow, since the Court does not sit as a trier of fact with authority to weigh evidence, determine credibility, and make factual findings and conclusions. Craig v. Snyvar Corp., 233 A.2d 161 (Del. Super. 1967); Johnson v. Chrysler Corp., 213 A.2d 64 (Del. 1965). To the contrary, where the evidence is

sufficient to support the Board's conclusions, its decision will not be disturbed absent an error of law. Dallachesia v. General Motors Corp., 140 A.2d 173 (Del. Super. 1958); General Motors Corp. v. Freeman, 164 A.2d 686 (Del. Super. 1960); Hunter v. Wright Transfer & Supply Co., 69 A.2d 296 (Del. Super. 1949). Findings made by the trier of fact which are supported by the record should be accepted even if the reviewing Court, acting independently, would reach a contrary conclusions. Besk Oil. Incorported v. Brown & Bigelow, Inc., Del Super., C.A. No. 88A-JA-3-1-AP, Stiftel, P.J. (December 16, 1988). A discretionary ruling of the Board will not be disturbed on appeal unless it is based on clearly unreasonable or capricious grounds. Seaford Feed Company v. Moore, Del. Super., C.A. No. 85A-AP-3, Ridgely, J. (July 2, 1987) citing Berry v. State of Delaware, Del. Super., C.A. No. 85A-AU-2, Bush, J. (June 19, 1987). Weighing evidence, determining the credibility of witnesses and resolving any conflicts in testimony are functions reserved exclusively for the Board. Downes v. State, 623 A.2d 1142 (Del. 1993).

In reviewing the record for substantial evidence, the Superior Court must consider the record in a light most favorable to the party prevailing below. General Motors Corp. v. Guy, Del. Super., C.A. No. 90A-JL-5 Gebelein, J. (August 16, 1991). Only where there is no satisfactory proof in support of the factual finding of the Board may the Superior or Supreme Court overturn it. Johnson v. Chrysler Corp., 213 A.2d 64 (Del. 1965).

C. Merits

1. **The Board did not err by failing to apply the "dual purpose" rule established in Children's Bureau v. Nissen.**

The Appellant asked the Court to find a "dual purpose" in the Appellant's travel at the time of the accident. See Children's Bureau v. Nissen, 29 A.2d 603 (Del. Super. 1942). This is a factual finding that was specifically rejected by the Board. The Board indicated that the Appellant was not "on a mixed purpose trip since there was no benefit for VNA." (IAB O. p. 10, B-10).

At the time of the work accident, the Appellant was on her "own time." (IAB Tr. pp. 42-44, B-53-55). She had requested that this time "be blocked out" so that she could not be going about her employer's business (IAB Tr. pp. 42-44, B-53-55). She had requested that this time be considered vacation and that she be compensated, accordingly (IAB Tr. pp. 42-44, B-53-55). Having no vacation time, however, she still chose to have the time blocked out, to deny the Employer access to her and to deny the Employer's purpose at the time of the motor vehicle accident (IAB Tr. pp. 40-42, 42-44, B-51-53, 53-55). She was no longer in the control of the Employer. She was free to travel north, south, east and west in any direction, for any purpose and without fear of being interrupted or contacted by her Employer for any purpose (IAB Tr. pp. 40-42, 42-44, B-51-53, 53-55). Her time was hers to do with what she wanted and she was not being compensated for that time nor for any mileage (IAB Tr. pp. 42-44, B-53-55). It was the Appellant's statement to the adjuster, Beth Taylor, that at the time of the work accident, she knew she "was off the clock and...was going to a doctor's appointment when this

happened." (IAB Tr. p. 37, B-48). To the Board, the Appellant indicated that it was her intention to go home to freshen up for her doctor appointment and to have a cup of coffee before she left for that personal doctor's appointment (IAB Tr. p. 23, B-34). There is no coinciding purpose being served for the Employer at the time of the accident (IAB O. p. 10, B-10).

2. The Board correctly rejected the "mixed purpose" analysis offered by Professor Larson and demonstrated in Williams v. American Employers' Ins. Co.

Professor Larson, in his treatise *The Law of Workmen's Compensation*, offers another approach in determining compensability for injuries that occur during a trip that has both personal and employment related functions. He analyzes trips that serve multiple purposes by breaking the trip into its successive parts and labeling them as "business" or "personal." 1-17 Larson's Workers' Compensation Law §1702. Compensability should then be determined based upon the nature of the part of the trip on which the injury occurred. See id.

On this point, the analysis under Larson's, supra., the claim would still fail in the case with which we are confronted. If one breaks down the trip into successive parts and labels them "business" or "personal," then it was clear that once the Appellant "clocked out" of the telephony system, once she was no longer being compensated for time and/or mileage, she was now on her "personal time" and no longer in the course and scope of her employment. During the times when the Appellant was on the telephony system and was being compensated for mileage and/or travel time, then if

the injury had occurred, she would have been compensated. In applying Larson's, supra., the Appellant's claim still fails.

The Appellant also argues the case of Williams v. American Employers' Ins. Co., 107 F.2d 953 (D.C. Cir. 1939). This case discusses what appears to be an individual traveling from point A to point C with point C having a business purpose. Before getting to point C, however, the employee intends to make a "personal detour" for a personal errand. Prior to getting to point B where the deviation would occur, the employee sustains an injury so that it was argued that the prospect of a future deviation is of no consequence as long as the accident occurred on the direct route that the Appellant had to travel, with the point being that the employee had to travel that route for the business purpose. In this case, the Appellant did not have to travel the route for any business purpose. The business purpose was completed (IAB Tr. pp. 42-44, B-53-55). The Appellant was free to take any route, in any direction, to fulfill any purpose, at the time of the motor vehicle accident. The Appellant testified that she was traveling home for the exclusive purpose of freshening up before her personal doctor appointment and obtaining a cup of coffee beforehand (IAB Tr. p 23, B-34). Accordingly, the trip home could not possibly be considered a "temporary deviation" or for "mixed purpose." There was no longer any business purpose for the Appellant's travel and, therefore, there could not be a finding of "mixed purpose."

CONCLUSION

Reading the record as a whole, there is more than substantial evidence to support the Board's factual conclusion that the Appellant's motor vehicle accident did not arise out of or in the course of her employment, as it occurred while she was "off the clock" and on her way home for coffee and then to a personal doctor's appointment. She was not on a special errand related to work, she was not on a mixed purpose trip as the Board found no benefit that adheres to VNA, she was not on a short personal comfort stop, was not on a minor personal deviation nor was she traveling between client appointments. These facts, combined with the fact that the Appellant was not being paid mileage and not being paid for her time at the time of the motor vehicle accident led to the Board's Decision that the Appellant was not in the course and scope of employment at the time of the work accident. The Board also found that the Appellant's departure to go home and to a doctor's appointment was so great a deviation as to be inferred that she had temporarily abandoned her job. Only by this Reviewing Court replacing its own factual findings for those of the Board would there be a basis to overturn this Decision.

Therefore, the Board's Decision, which was previously upheld in its entirety by the Superior Court sitting in and for Sussex County, should again be affirmed in its entirety.

Dated: 8/24/12

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Respectfully submitted,

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TABLE OF UNREPORTED CASES