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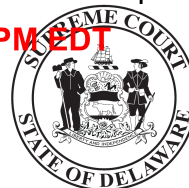

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

DOROSHOW, PASQUALE
KRAWITZ & BHAYA

BY: [signature]
THOMAS B. LACKEY (ID #5305)
ERIC M. DOROSHOW (ID #289)
1008 N. Walnut Street
Milford, DE 19963
(302) 424-7744 - Phone
(302) 424-1176 - Fax
Attorneys for Employee-Below, Appellant, Mary Spellman

DATED: 9/10/12

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

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Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

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Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

ARGUMENT

I. APPELLEE'S ASSERTION THAT COURSE AND SCOPE OF EMPLOYMENT IS A QUESTION OF FACT IS INCORRECT

In defending the Board's failure to apply the "traveling employee" exception to the general "going and coming" rule, Appellee suggests, on multiple occasions, that the determination of whether or not injuries sustained by an employee occurred in the course and scope of employment is a question of fact. Appellee states first that "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". (Appellee's Answering Brief, hereinafter "Ans." p.10) Appellee goes on to suggest that, in light of the Board making this "factual" determination, the need to apply the "going and coming" rule, or its "traveling employee" exception is vitiated. "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." (Ans. p.11)

This leads Appellee to conclude that the Board's ruling that the injuries to Appellant did not take place in the course and scope of her employment was a factual one which should remain undisturbed by this Court. "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 circumstances test. Therefore, the facts of each case are the key element to determine

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

whether or not a particular accident will be viewed as compensable. Findings of fact are the sole province of the Board." (Ans. p.13.)

However, it is well settled law that course and scope of employment issues are questions of both law and fact. "Whether Claimant's injuries occurred in the course and scope of her employment is a mixed question of law and fact. In an appeal from the Board, we examine the record for any errors of law in applying our worker's compensation act." Histed v. E.I. Dupont de Numours, 621 A.2d 340 (Del. Supr. 1993).

The Court is therefore free to make a full blown inquiry into the Board's decision below. The Board's failure to apply the appropriate legal standards to its own factual findings, as alleged in Appellant's Opening Brief, is the key issue in the case at hand.

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

II. APPELLEE'S ANALYSIS OF THE APPLICABILITY, OR LACK THEREOF, OF THE "TRAVELING EMPLOYEE" EXCEPTION TO THE GENERAL "COMING AND GOING" RULE IS INCORRECT.

It is well settled law in Delaware that injuries sustained by employees are only compensable when they occur in the course and scope of Claimant's employment. This notion has been further refined to hold that, generally, Employers are only responsible for Worker's Compensation benefits when a Claimant's injury takes place on premises owned or controlled by the Employer. Though past Claimant's have sought benefits for accidents occurring during their daily commute, under the theory that the obligation to travel to work created the circumstances of the accident, Delaware law holds that these types of injuries are not compensable. Employees injured on their daily commute face the same dangers of the road as all other drivers do.

However, the aforementioned rules limiting compensability apply to Claimants with a fixed situs of employment. As established in Devine v. Advanced Power Control., 663 A.2d 1205 (Del.Supr. 1995), traveling employees, those with a semi-fixed situs of employment, are treated differently. Travel constitutes an important part of their employment services. Therefore, the aforementioned rules are inapplicable as a matter of law. Although Appellee's Answering Brief acknowledges the existence of Devine, quoting it extensively, neither at the Board nor in its Answering brief has Appellee distinguished Devine from the facts in the case at bar such as to deny its applicability. Appellee has not denied that Appellant is a travelling employee, that she has a semi-fixed situs of employment, or that travel makes up a significant part of her services. Instead, Appellee has offered a circular argument aimed at circumventing the question of Devine's applicability.

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

Appellee alleges that "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." (Ans. p. 14) In its efforts to deny the applicability of Devine, Appellee has put the cart before the horse. Appellee incorrectly alleges that a finding of "in the course and scope of employment" is a threshold question to the issue of an analysis of the "going and coming" rule or the "traveling employee" exception. In actuality, a finding of "in or out of the course and scope of employment" can only be made *after* answering the questions of the "going and coming" rule and the "traveling employee" exception. The "going and coming" rule, by its nature excludes an entire class of Claimants; those injured on the commute to and from work. The "traveling employee" exception, on the other hand, brings a segment of that excluded class back into the realm of "in the course and scope of employment." Because these doctrines are tools used to arrive at a conclusion on the question of course and scope, they necessarily enter the analysis before a finding of "in the course and scope" can ever be made. As such, Appellee's assertion that "to get to the 'going and coming' rule or 'travelling employee' exception, one must first find that Appellant is in the course and scope of employment" is fundamentally flawed.

Appellee, in its Answering Brief (and to a lesser extent, the Board, in its original decision), treats the fact that Appellant was "off the clock" and on the way home as somehow dispositive of the question of whether or not she was in the course and scope of her employment at the time of her accident. Put another way, it appears that the essence of Appellee's argument is as follows: "to 'get to'

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

the question of the 'traveling employee' exception, one must find that the Employee was not 'off the clock' or on the way home." Stated as such, Appellee's argument is an incorrect statement of the rule of law on this issue.

Much of the analysis in this matter has centered around the term "on the clock," which Ms. Spellman admittedly was not at the time of her accident. This term serves as a red herring, bearing no inherent legal significance. It is simply another way of saying that Ms. Spellman was not being paid for the time during which her accident took place. The term "on the clock" does not appear in the Worker's Compensation Act. Delaware's definition of a compensable work injury does not ask whether the injury occurred "on the clock'; instead, it asks if the injury took place "in the course and scope of employment." This distinction acknowledges that there are injuries that occur when an employee is "off the clock" that should justly be called compensable. Injuries to traveling employees make up one such class, as made evident by the holding of Devine.

As previously stated, trips between home and work are *generally* excluded from compensability under the "going and coming" rule of employer non-liability. This rule, however, is not absolute. Devine makes it clear that, for employees with semi-fixed places of employment, travel, including the commute home, is a substantial part of employment. Therefore, the fact that Appellant's accident took place during a trip home from a patient's house is not necessarily a bar to compensability. As a result, even this alternate interpretation of Appellee's argument that "to get to the question of the 'going and coming' rule/'traveling employee' exception, one must first find that the Employee was in the course and scope of her

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

employment" fails to adequately explain why the "traveling employee" exception established in Devine is not applicable in the present matter.

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

III. APPELLEE'S ARGUMENTS REGARDING THE RELATIONSHIP BETWEEN PAID TRAVEL AND COMPENSABILITY ARE UNSUPPORTED BY CASE LAW AND CONTRARY TO PUBLIC POLICY.

As both the Board and Appellee correctly point out, Appellant was not being paid for her travel at the time of the accident. The Board and Appellee are also correct when they note that there were, in fact, times that Appellant was paid for her travel. That the accident did not occur during such a trip is not in dispute. However, from this starting position, Appellee argues alternatively that this Court should adopt one of the following interpretations of the relationship between paid travel and compensability: Either Appellant assented to waiving the compensability of trips to and from home by agreeing to not be paid for travel on those trips, or the presence of paid travel creates an inference that injuries suffered during unpaid travel are not compensable. Neither of these positions are supported by case law, and both are against public policy.

In Appellee's Answering Brief, Appellee argues that "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." That injuries occurring on the commute to and from work are generally not compensable is not in dispute. However, Appellee's argument seems to suggest that the terms of paid travel outlined in VNA's handbook constitute an agreement to be bound solely by the "going and coming" rule during unpaid trips and waiving the "traveling employee" exception. This argument is completely unsupported by precedent, and is violative of both the letter and spirit of the Worker's Compensation Act.

19 Del.C. §2305 provides in pertinent part as follows: "No

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

agreement, rule regulation or other device shall in any manner operate to relieve employer or employee in whole or in part from any liability created by this chapter." What Appellee is suggesting, that Appellant somehow agreed to waive her rights with respect to the compensability of accidents occurring during the commute to and from work, is clearly contrary to the above referenced statute. If Appellee's argument is taken to its logical conclusion, all Delaware employers that employ the services of traveling employees, be they nurses, salesmen, tradesmen or the like, would be able to completely eliminate exposure for travel related accidents with "agreements" similar to the one allegedly created by VNA's handbook.

Appellee's other argument, that if paid travel constitutes a "compensation exception" as suggested in Histed v. E.I. Dupont de Numours, 621 A.2d 340 (Del. Supr. 1993), then any travel that is not paid by the Employer creates an inference that the travel is not within the course and scope of employment, is similarly unsupported by case law. It bears repeating that the "going and coming" rule is the standard for injuries occurring during the commute to and from work; such injuries are presumed to take place outside the course and scope of employment until and unless it is demonstrated that an *exception* applies. The "compensation exception" doctrine established in Histed, like the traveling employee exception created by Devine, is an *exception* to the general "going and coming" rule of employer non-liability. Under Delaware law, the Board is directed to "narrowly interpret the going and coming rule and broadly interpret the exceptions so that coverage is not denied wherever the injuries can fairly be characterized as arising out of the employment." Collier v. State, 1994 WL 381000 at 2, (Del. Super. 1994). An inference of the

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

type suggested by Appellee is inconsistent with this directive and should not be adopted by this Court.

The adoption of either of the new approaches suggested by Appellee and described above would lead to the same unfortunate consequence; Employers in Delaware would have a great deal of incentive to *not* pay Employees for travel, and the practice would cease for the Employees of private Employers. If this Court finds that Employers can limit their exposure to liability for injuries sustained by Employees on the road by reaching an "understanding" with Employees that unpaid travel is not compensable, Employers could eliminate liability entirely by unilaterally refusing to compensate Employees for travel. It is clearly in the public's interest for Employees to be adequately compensated for employment related travel where appropriate; to adopt such a rule would do a disservice to all Employees who travel for their Employer's benefit. The adoption of a rule creating an inference that unpaid travel is outside the course and scope of employment would have similar consequences. Employers would gain a distinct legal advantage by not paying Employees for travel. The number of Employers willing to engage in the practice of compensating Employees would surely dwindle, if not disappear completely. As a result, this Court should reject both of these arguments entirely.

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

IV. APPELLEE'S ANALYSIS OF THE "DUAL PURPOSE" TEST SET FORTH IN NISSEN, MORE SPECIFICALLY AS IT RELATES TO THE DEFINITION OF A "BUSINESS PURPOSE," IS INCORRECT.

In analyzing the applicability of the "dual purpose" doctrine established in Children's Bureau v. Nissen, 29 A.2d 603 (Del.Super. 1942), both the Board and the Superior Court dismissed the doctrine by asserting that there was no "business purpose" to Ms. Spellman's travel at the time of her injury. Appellee goes so far as to claim that such a finding is one of fact, failing to point out that by making such a determination, the Board and Superior Court are reaching a legal conclusion based off of the facts presented at the hearing. However, this does not comport with the holding of Nissen, cited in full in Appellant's Opening Brief and summarized here, which stated that the dual purpose test is as follows:

> The question is whether the employer exposed the employee to risk. Service to the employer must, at least, be a concurrent cause of the injury... The test is whether it is the employment or something else that impels the journey and exposes the traveler to its risks. If the service creates the necessity for the travel, the employee is in the course of his employment, even though, at the same time, he is serving some purpose of his own.

Nissen 29 A.2d at 607.

In the case at hand, it is clear that Ms. Spellman was on the road the morning of her accident because of her service to her employer. That Ms. Spellman was at the home of Mr. Lourdy, a client of Employer, because of her employment is not in dispute. However, the holdings of the courts below, coupled with the arguments advanced by the Employer, suggest that, though there is a business purpose in going to the home of Mr. Lourdy, there is no business purpose in *leaving* Mr. Lourdy's home. Setting aside for a moment Ms. Spellman's destination at the time of the accident, the underlying equities

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

dictate that if an Employee's work requires her to traverse dangerous conditions to reach her objective, the Employer is responsible for the injuries she suffers trying to make her egress from the hazard, regardless of the Employee's final destination.

Accordingly, the suggestion by Appellee, the Board, and the Superior Court that Ms. Spellman was not on a "dual purpose" trip at the time of her accident on account of having no "business purpose" rings hollow. Whether she was paid for the travel or not, Ms. Spellman had no choice but to leave Mr. Lourdy's home. The implications of any argument to the contrary are that Ms. Spellman only served a business purpose if, upon her departure, she proceeded directly to the next appointment. This position is inconsistent with the case law established by previous decisions in Nissen and Devine.

In his treatise *The Law of Workmen's* Compensation, Professor Larson offers a compelling solution to this conundrum. Larson suggests that when a trip serves both a business and personal purpose, injuries sustained while traveling are compensable until a point of personal deviation is reached. 1-17 Larson's Worker's Compensation Law § 17.02.

Beginning with the premise that Ms. Spellman could not stay indefinitely at the home of Mr. Lourdy, that at some point, service to her Employer would compel her to leave his home, Ms. Spellman was on a trip that served two purposes: her business purpose was to depart the home of one client, and begin traveling in the direction of another. Her personal purpose was to go back to her own home to freshen up before a doctor's appointment. Ms. Spellman offered unrefuted testimony that, regardless of destination, she would have been traveling on Reynold's Pond Road at the time of the accident

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

(Appellant's Opening Brief p.7). Ms. Spellman's travel would not have become strictly personal until she reached the intersection of Reynold's Pond Road and Route 30, at which point the direction she traveled would have varied based upon her destination (Appellant's Opening Brief p. 23-24). This divergence never took place, as Ms. Spellman's accident occurred shortly after leaving Mr. Lourdy's home, approximately 1.2 miles from the point of divergence. According to the theory set forth by Professor Larson and discussed in Argument II of Appellant's Opening Brief, Ms. Spellman's accident should be compensable as a result.

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744

CONCLUSION

For the reasons set forth above, as well as in Appellant's Opening Brief, Ms. Spellman respectfully requests this Honorable Court to reverse the Board's July 21st, 2011 legally erroneous decision and find that Appellant was in the course and scope of her employment at the time of her January 14, 2011 motor vehicle accident.

Respectfully submitted,

DOROSHOW, PASQUALE
KRAWITZ & BHAYA

THOMAS B. LACKEY (ID #5305)
ERIC M. DOROSHOW (ID #289)
1008 N. Walnut Street
Milford, DE 19963
(302) 424-7744 - Phone
(302) 424-1176 - Fax
Attorneys for Employee-Below, Appellant, Mary Spellman

DATED: 9/10/12

Doroshow, Pasquale,
Krawitz & Bhaya
1008 N. Walnut Street
Milford, Delaware 19963
302-424-7744