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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 AMENDED OPENING BRIEF ON APPEAL

TYBOUT REDFEARN & PELL

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Date: February 4, 2019

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NATURE OF PROCEEDINGS

This is an appeal from a November 16, 2018 decision of the Delaware Superior Court (hereinafter "Superior Court") affirming a decision of the Industrial Accident Board (hereinafter "Board") dated April 9, 2018.[1] On November 29, 2016, Appellee/Claimant-Below, Nicholas Gates (hereinafter "Claimant") was involved in a motor vehicle accident when, on his way home from work, he received a call-back from Appellant/Employer-Below, the State of Delaware (hereinafter "State") to return to work due to a weather emergency.[2] On November 14, 2017, Claimant filed a Petition to Determine Compensation Due (hereinafter "Petition") with the Board seeking acknowledgment of the November 29, 2016 motor vehicle accident as a compensable work injury.[3] On April 9, 2018, the Board issued its decision, and determined that the aforementioned motor vehicle accident occurred within the course and scope of Claimant's employment, and concluded that Claimant's injuries were eligible for workers' compensation benefits.[4]

The State appealed the Board's decision to the Superior Court, arguing that the Board's decision was an error of law and not supported by substantial evidence.[5]

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[1] *State of Delaware v. Nicholas Gates*, 2019 WL 169039 (Del. Super. Nov. 16, 2018), attached hereto as Exhibit A; *Nicholas Gates v. State of Delaware*, IAB Hearing No. 1455941 (Apr. 9, 2018), attached hereto as Exhibit B.
[2] Ex. B at 2-3.
[3] Ex. B at 2.
[4] Ex. B at 12-14, 17.
[5] Ex. A at 2.

The Superior Court affirmed the Board's decision, holding that the Board did not commit an error of law, and that its decision was supported by substantial evidence.[6] The State appeals the Superior Court's decision to this Court. This is the State's Opening Brief on Appeal.

[6] Ex. A at 2.

SUMMARY OF THE ARGUMENT

I. The decision of the Industrial Accident Board, affirmed by the Superior Court, should be reversed because the Board committed legal error by misapplying the principles set forth by this Court to determine if an employee was injured within the course and scope of his employment. The Board found that Claimant sustained a work injury while driving to the yard in response to a call-back, even though the terms of his employment indicated that he was not paid for a call-back until he arrived at the yard. Further, the Board's decision is not supported by substantial evidence because Claimant admitted that he was not paid for a call-back on the day of the motor vehicle accident.

STATEMENT OF FACTS

Claimant was employed as an Equipment Operator for the State at the time of the November 29, 2016 motor vehicle accident.[7] Claimant had worked for the State for approximately four to five months before the accident.[8] Claimant's duties included responding to emergencies and assisting with emergency response activities.[9] Claimant's regular work hours were 7:00 a.m. to 3:00 p.m., Monday through Friday.[10] However, Claimant could also receive a call-back, where he is called to work outside of his regular work hours to respond to emergencies.[11] Regardless of whether Claimant is reporting for his regular work shifts or for call-backs, Claimant initially reports to the Delaware Department of Transportation (hereinafter "DelDOT") yard to obtain any necessary equipment and a work vehicle before heading to where he is needed.[12] Claimant acknowledged that, for both regular work shifts and call-backs, he was not compensated for mileage accrued when traveling to the yard to begin working.[13]

[7] A26, A36, A101.
[8] A26.
[9] A36, A108.
[10] A28, A36-A37.
[11] A28, A31.
[12] A35.
[13] A36-A37.

On November 29, 2016, Claimant's normal shift ended at approximately 3:00 p.m.[14] Subsequently, Claimant got into his personal vehicle and began driving home.[15] At approximately 3:30 p.m., before Claimant reached his home, he received a call-back.[16] Claimant then began traveling back to the yard, but before he reached it he was involved in a motor vehicle accident.[17]

Claimant testified that at the time of accident he believed that, for call-backs, he would begin getting paid at the time he received the call-back.[18] However, Claimant believed that the policy changed approximately one year after the accident, and that the current policy is that an employee does not begin to get paid for a call-back until he or she reaches the yard.[19] Claimant was presented with the State of Delaware Merit Rule 4.16 (hereinafter "Merit Rule") which states "[c]all-back pay is paid to the employee <u>from the time the employee arrives at the designated worksite</u>."[20] However, if an "employee is required to report to a site further from the employee's home than his/her regular worksite, the travel time in excess of the employee's normal commute time…is included in the calculations for hours

[14] A35.
[15] A35.
[16] A35.
[17] A31.
[18] A29-A30.
[19] A30.
[20] A38-A39, A109-A111 (emphasis added).

worked."[21] Claimant agreed that the Merit Rule stated it was in effect since May 13, 2007, and agreed that the rule indicated that call-back pay was to start when the employee arrived at the yard.[22] Claimant also agreed he did not have to travel further than his normal commute to report back to the yard on November 29, 2016 for the call-back.[23] Claimant testified that, despite the Merit Rule, he believed that call-back pay began when he received the call because he was told by other co-workers.[24]

However, Claimant acknowledged that his supervisor informed him that the motor vehicle accident would not be covered under workers' compensation.[25] Claimant further admitted that we was not paid any overtime for November 29, 2016 and that when he submitted a timesheet for the November 29, 2016 call-back, the time sheet was rejected.[26] Claimant then stated, contrary to his previous belief, that he would have gotten paid had he reached the yard.[27]

Brittany Ford (hereinafter "Ford") testified on behalf of the State.[28] Ford is an employee of DelDOT, and worked as Claimant's human resources representative during November of 2016.[29] If Claimant had any questions regarding his wages or

[21] A110.
[22] A39-A40.
[23] A41-A42.
[24] A41, A51-A52.
[25] A42-A43.
[26] A55-A58.
[27] A57.
[28] A61.
[29] A61-A62.

benefits, Ford would be his contact person.[30] Ford testified that the Merit Rule is part of Claimant's employment contract as the State's employees are governed by merit rules.[31] Employees are informed of the merit rules during a new employee orientation, where employees are given documents which provide the State's policies and procedures, and are informed how to properly fill out their time sheets.[32] Ford noted, however, that in an effort go paperless, the State does not provide a hard copy of every single merit rule.[33] Rather, employees are provided information on where the rules can be obtained.[34] Ford confirmed that the Merit Rule was in effect at the time of the motor vehicle accident in question.[35] Ford testified that all employees were responsible for knowing and following all applicable merit rules.[36]

Ford confirmed that, under the Merit Rule, an employee's pay for a call-back does not begin until the employee arrives at the yard.[37] Ford stated that when the Merit Rule references the worksite, the worksite is the yard.[38] When an employee receives a call-back, he or she is instructed to initially report to the yard.[39] Ford

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[30] A62, A79.
[31] A62, A69.
[32] A62-63, A79, A82-A83.
[33] A82-A83.
[34] A82-A83.
[35] A71.
[36] A76.
[37] A65-A67, A81-A82 (emphasis added).
[38] A81.
[39] A65.

testified that it was improper for Claimant to begin recording his call-back time when he received the call.[40] Ford confirmed that the State did not accept the motor vehicle accident as a workers' compensation matter, and that Claimant was not compensated for mileage or call-back pay on November 29, 2016.[41] Ford also confirmed with Claimant's ultimate supervisor that the State's policy on call-back pay was that an employee will not begin to be paid until he or she arrives at the yard, and an employee is not compensated for mileage traveling back to the yard for a call-back.[42]

The Board found that Claimant's injuries from the motor vehicle accident were work-related.[43] The Board initially held that, under this Court's decision in *Spellman v. Christiana Care Health Services*,[44] to determine whether an employee's injury is eligible for workers' compensation benefits, the Board must first consider the terms of the employment contract.[45] The Board, however, went on to find that "*Spellman* should not be interpreted to mean that an employer can avoid following [Delaware's Workers' Compensation] Act by adding provisions to a contract…which exclude an activity that clearly is, in practice, a common part of employment."[46] The Board further interpreted *Spellman* to indicate that "if an

[40] A66, A68.
[41] A70-A71.
[42] A80 (emphasis added).
[43] Ex. B at 17.
[44] 74 A.3d 619 (Del. 2013).
[45] Ex. B at 9.
[46] Ex. B at 9.

employer's contract or policy indicates that a rule or provision exists, but the evidence reflects that the rule or provision is not followed or strictly applied, the actual custom or practice of the [e]mployer should control, instead of the wording in the employment contract."[47] The Board then found that Claimant, under the totality of the circumstances, was acting within the course and scope of his employment when the motor vehicle accident occurred because he testified that he regularly recorded his call-back time when he received the call, despite the Merit Rule's language and Ford's testimony.[48] The Board noted in its analysis that Claimant was not injured in his normal commute but on a special trip dictated by his supervisor.[49] The Board went on to find, alternatively, that Claimant was eligible for workers' compensation benefits under the "special errand" exception to the "going and coming" rule.[50] The State appealed the Board's decision to the Superior Court, arguing that the Board erroneously applied the law and its decision was not supported by substantial evidence.[51] The Superior Court affirmed the Board's decision, finding that the Board committed no error of law and that its decision was supported by substantial evidence.[52]

[47] Ex. B at 10.
[48] Ex. B at 13.
[49] Ex. B at 13.
[50] Ex. B at 13.
[51] Ex. A at 2.
[52] Ex. A at 7-8.

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

QUESTION PRESENTED

Whether the Board's decision concluding that Claimant was in the course and scope of the his employment when he was involved in a motor vehicle accident while driving back to the yard in response to a call-back is supported by substantial evidence and free from legal error when the employment terms between Claimant and the State specifically state that an employee is not paid wages or mileage when he or she is driving back to the yard and Claimant was never paid for responding to the call-back.[53]

SCOPE OF REVIEW

The Delaware Supreme Court reviews decisions from the Industrial Accident Board under the identical standard of the Superior Court.[54] The Court will review the decision for errors of law and these legal issues will be reviewed *de novo*.[55] Absent legal error, the Court will determine if the decision is supported by "substantial evidence," but the Court will not make independent factual findings, nor

[53] This issue was preserved by way of argument to the Superior Court below. A5.
[54] *Estate of Jackson v. Genesis Health Ventures*, 23 A.3d 1287, 1290 (Del. 2011) (citing *Vincent v. Eastern Shore Markets*, 970 A.2d 160 (Del. 2009)).
[55] *Estate of Jackson*, 23 A.3d at 1290 (citing *Vincent*, 970 A.2d 160 (Del. 2009)); *State v. Cephas*, 637 A.2d 20, 22-23 (Del. 1994) (citation omitted).

reweigh issues of credibility.[56] A decision is supported by "substantial evidence" when it is based upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[57] The standard is "less than a preponderance of the evidence but is more than a 'mere scintilla."[58] If supported by substantial evidence, absent legal error, the decision will stand so long as it is not arbitrary and capricious.[59]

MERITS OF ARGUMENT

For a claimant to be eligible to receive workers' compensation benefits for an injury, the claimant bears the burden of establishing that the injury occurred "by accident arising out of and in the course of employment."[60] "The phrases 'arising out of employment' and 'in the course of employment' are not synonymous."[61] Rather, each are distinct and the claimant "must satisfy each of them in order to get workers' compensation benefits."[62] For an injury to "arise out of employment," the

[56] *Estate of Jackson*, 23 A.3d at 1290 (citation omitted).
[57] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[58] *Hairston v. Christiana Care Health Services*, 2010 WL 4527255, at *5 (Del. Super. Nov. 8, 2010) (internal quotations and citations omitted).
[59] *See generally, One River Place v. New Castle County Department of Finance*, 2007 WL 1296870, at *2 (Del. Super. Apr. 27, 2007) (citation omitted).
[60] *Spellman v. Christiana Care Health Services*, 74 A.3d 619, 623 (Del. 2013) (citing 19 *Del. C.* § 2304) (internal quotations omitted); *Davenport v. D&L Construction & Solid Walls, LLC*, 2014 WL 5649756, at *7 (Del. Super. Oct. 27, 2014) (citation omitted).
[61] *Davenport*, 2014 WL 5649756, at *7 (citation omitted).
[62] *Id.* (citation omitted).

injury must have occurred due to "the nature, conditions, obligations or incidents of the employment, or [have] a reasonable relation to it."[63] Whether an injury occurs "in the course of employment" depends on the "time, place and circumstances of the accident."[64] Generally, an injury occurs "in the course of employment" when it takes place when the claimant is working and at a place where the claimant may reasonably be as a result of his or her employment.[65]

This Court has held that, to determine whether an employee's injury is work-related and therefore eligible for workers' compensation benefits, the analysis necessarily begins with "the terms of the employment relationship or contract."[66] "If the evidence of the contractual terms resolves the issue of whether the injury arose out of and occurred in the course of the claimant's employment, then the analysis can end."[67] In making such a determination, the employment contract is viewed "under the totality of the circumstances."[68] Only when the employment contract cannot resolve the issue may the Board or Court look to other doctrines or default presumptions such as the "going and coming" rule.[69]

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[63] *Id.* (citing *Dravo Corp. v. Strosnider*, 45 A.2d 542, 544 (Del. Super. Ct. 1945) (citation omitted).
[64] *Id.*
[65] *Id.* (citing *Dravo*, 45 A.2d at 543-44).
[66] *Spellman*, 74 A.3d at 625-626.
[67] *Id.* at 625.
[68] *Id.*
[69] *Id.*

In *Spellman*, the claimant worked as a home health aide for the employer.[70] Her duties involved helping patients at their homes with daily needs, such as light housekeeping.[71] Claimant was paid by the hour only for the services she performed at patients' home, and paid mileage for travel between patients' homes.[72] Claimant was not paid mileage for travel from home to the first patient of the day, nor was she paid mileage from the last patient of the day to home.[73] Claimant used Telephony, a phone-based system, to clock-in and clock-out of work, and to keep track of her reimbursable mileage.[74] When claimant left a patient's home, she would clock-out using Telephony and check-in for mileage reimbursement.[75] Once she arrived at the next patient's home, she would check-out to end mileage tracking and clock-in for work.[76]

On January 14, 2011, claimant was working and had visited two of her patients.[77] After finishing up with her second patient, claimant clocked out with the intention of stopping home before attending a personal doctor's appointment.[78] As she was not traveling to another patient, she did not check in for mileage purposes

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[70] *Id.* at 620.
[71] *Id.*
[72] *Id.* at 621.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

as it would not be reimbursed.[79] While claimant was driving back home, she was involved in a motor vehicle accident.[80]

Claimant filed a petition to determine compensation due, seeking workers' compensation benefits for injuries sustained from the motor vehicle accident.[81] The Board denied claimant's petition, holding that claimant was not acting within the course and scope of her employment because, among other things, she was "off the clock."[82] Claimant appealed the matter to the Superior Court, who affirmed the Board's decision.[83] Claimant then appealed to this Court.[84]

The Court affirmed the Superior Court's decision that claimant was not in the course and scope of her employment.[85] The Court held that to determine whether an employee's injury is work-related, the inquiry necessarily begins with whether, under the employment contract, the employee was on the job.[86] The Court found that claimant's injury was not work-related because, per the terms of her employment contract, she was not paid any wages or mileage when she was traveling

[79] *Id.*
[80] *Id.* at 622.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 626.
[86] *Id.*

from a patient's home to her own home.[87] Therefore, claimant "was not acting within the course, and her injury did not arise out of, her employment."[88]

When an employment contract specifically states that an employee is not paid wages or mileage when traveling between work and home, any injury occurring during that travel period is not work-related, and no further inquiry is necessary.[89] In *DeSantis*, claimant was employed by DelDOT as a construction manager and his duties included inspection and administration of construction projects related to road paving.[90] Claimant's core hours were from either 8:00 a.m. to 4:00 p.m. or 7:00 a.m. to 3:00 p.m., but he would regularly work overtime outside of his normal hours due to many construction projects occurring at night.[91] For overtime pay, Claimant was compensated for the time he spent at worksites.[92] Claimant, however, was not compensated in any manner for any time traveling between work and home during regular or overtime work.[93]

On October 16, 2014, claimant attended a professional association function which was unrelated to his employment.[94] After the function, claimant visited a

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[87] *Id.*
[88] *Id.*
[89] *State v. DeSantis*, 2017 WL 4675765, at *3 (Del. Super. Oct. 17, 2017).
[90] *Id.* at *1.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*

construction site and stayed there for approximately an hour before driving home.[95] While claimant was on his way home, he was injured in a motor vehicle accident.[96] As a result, claimant filed a petition with the Board seeking workers' compensation benefits for the injuries sustained in the motor vehicle accident.[97] The Board granted claimant's petition.[98] Initially, the Board acknowledged that, under *Spellman*, it was required to first analyze the employment contract to determine whether claimant's motor vehicle accident was work-related and therefore eligible for workers' compensation benefits.[99] The Board determined that claimant was not compensated for travel time to or from home per the employment contract.[100] However, the Board went on to hold that claimant was still eligible for benefits because he had a semi-fixed place of business, and therefore an exception to the "going and coming" rule.[101] Employer appealed the Board's decision to the Superior Court.[102]

The Superior Court reversed the Board's decision, holding that the Board committed legal error when it improperly expanded its analysis of whether claimant's injuries were work-related beyond the employment contract.[103] The

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[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at *2.
[103] *Id.* at *3.

Superior Court found that the terms of the employment contract stated that claimant is not compensated for travel time or mileage between home and work.[104] The Superior Court then held that because the contract specifically did not compensate the employee for travel time between home and work, "*Spellman* required a ruling that the injury incurred while driving home from work did not arise out of and in the course of employment" and the inquiry of whether the injuries were work-related should have ended.[105] The Board committed legal error by making any analysis beyond the employment contract because the contract itself addressed the issue.[106]

In the instant case, Claimant's injuries did not arise out of and in the course of employment because the employment terms between Claimant and the State specifically indicated that Claimant is not compensated in any way for travel time between home and the yard for call-backs. Like the employment contract in *Spellman*, and nearly identical to the employment contract in *DeSantis*, Claimant's employment contract with the State expressly stated, in the Merit Rule, that Claimant is not paid wages or mileage traveling between home and the yard on a call-back.[107] Rather, call-back pay begins once Claimant reaches the yard.[108] Ford testified that

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] While the Merit Rule does provide an exception when the travel time is longer than an employee's normal commute to work, Claimant admitted that the exception did not apply in this case. A109-111.
[108] A65-A67, A81-A82, A109-A111.

the Merit Rule is part of the Claimant's employment contract, and Claimant was made aware of that policy.[109] As Claimant's motor vehicle accident occurred during non-compensable travel time, his resulting injuries are not work-related and Claimant is not eligible for workers' compensation benefits. Therefore, the Board committed legal error by misapplying the principles regarding whether an employee's injuries arose out of and in the course of employment as set forth in *Spellman*, and the Board's decision should be reversed. Alternatively, the State submits that the matter should be reversed and remanded to the Board for further fact finding to determine the precise policy regarding when pay begins for a call-back.

The Board's decision is also not supported by substantial evidence because Claimant's testimony does not support the contention that his compensation for a call-back begins when he receives the call. Claimant admitted he was not paid for any mileage when traveling back to the yard on a call-back.[110] Further, Claimant's own supervisor informed him that he would not receive workers' compensation benefits for the injuries sustained in the motor vehicle accident.[111] Most telling is Claimant's admission that he was not paid any wages for the call-back on the day of

[109] A62-A63, A69, A79, A82-A83.
[110] A37.
[111] A42-A43.

the accident.[112] Claimant attempted to submit a timesheet for call-back time on the date of the motor vehicle accident, but the timesheet was rejected.[113] Claimant's contention that his compensation for a call-back begins when he receives the call is contradicted by his own testimony.[114] If Claimant's assertion were true, he would have been paid for the time between when he received the call-back until the motor vehicle accident occurred. However, the fact that he was not paid for call-back time comports with Ford's testimony and the Merit Rule. Consequently, the Board's decision is not supported by substantial evidence and should be reversed because there is no evidence that Claimant was actually paid for call-back time when he received the call on the day of the accident. Rather, the evidence demonstrates that call-back time is paid once an employee reaches the yard.

To the extent the Board found that the Merit Rule was not part of the employment terms between Claimant and the State because Claimant never received a copy of the Merit Rule, the State submits that such a finding is erroneous because employees are still responsible for knowing the rules governing their occupation regardless of whether they receive a hard copy of the rules; employees were directed as to how to obtain the merit rules electronically. For example, attorneys are still responsible for abiding by the rules of professional conduct even though they never

[112] A55-A57.
[113] A58.
[114] A57.

receive a hard copy of said rules. Therefore, the fact that Claimant never received a hard copy of the Merit Rule does not preclude its applicability to the employment terms between the State and Claimant. Further, Claimant's failure to read or understand a term of his employment contract should not be held to preclude enforcement of that contract.[115]

The Board committed further legal error because it looked beyond Claimant's employment contract to determine if the motor vehicle accident was work-related when the contract already resolved the issue, directly contradicting *Spellman*. The employment contract in this case plainly stated that Claimant is not compensated in any way for travel time back to the yard during a call-back, which should have ended the analysis of whether the motor vehicle accident in this matter was work-related. The Board, however, improperly expanded its analysis by looking at how Claimant decided to record his time for call-backs, even though it contradicted the terms of the employment contract.[116] Such a ruling would essentially allow any employee to disregard the terms of their contract as long as they did so with regularity and then testify as to the mistaken belief that they were correct. Further, the Board's focus on Claimant's "awareness" of the contract terms and/or when his pay begins for call-

[115] *See, e.g.*, *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 3247992, at *5 (Del. Ch. Oct. 6, 2009), *quoting Williston on Contracts* § 70.113 (4th ed.2009) (noting that the "failure to read a contract provides no defense against enforcement of its provisions").
[116] Ex. B at 13-14.

backs is concerning. As discussed, *supra*, there is no evidence that Claimant was ever paid for his call-back. His errant belief to the contrary cannot serve to substantiate his burden of proof with regard to compensability. Such a result would be illogical. Because the Board committed legal error by improperly furthering its analysis beyond the employment contract, its Decision should be reversed.

The Board committed another legal error by finding that Claimant was eligible for benefits under the "special errand" exception to the "going and coming" rule because the Board never should have made such a determination.[117] The Board, again, contradicts *Spellman* by improperly furthering its analysis beyond the employment contract. *Spellman* held that the Board may only consider the "going and coming rule" and its exceptions when the employment contract fails to resolve the issue of whether an employee was in the course and scope of employment at time of the injury.[118] As the contract in the instant case resolved the course and scope issue because it indicated that Claimant is not compensated in any way for travel time to the yard during a call-back, the Board erred by considering the "special errand" exception to the "going and coming" rule.

The Board also incorrectly relied on 19 *Del. C.* § 2305 for the proposition that an employer cannot use contractual terms to "exclude an activity that clearly is, in

[117] Ex. B at 13.
[118] 74 A.3d at 625.

practice, a common part of the employment, from the course of employment.[119] However, as noted above, compensation for travel between home and the worksite is not guaranteed by Delaware's Workers' Compensation Act. This Court, in *Spellman*, expressly acknowledged that such travel was an appropriately delineated contractual term.[120] Further, the Superior Court found that the employment contract in *DeSantis*, which also excluded travel time between home and work from compensability, was also valid.[121] Therefore, the employment contract in the instant case did not improperly eliminate any of the State's workers' compensation obligations.

[119] Ex. B at 9-10.
[120] 74 A.3d at 626.
[121] 2017 WL 4675765, at *3.

CONCLUSION

The Board's decision to grant Claimant's Petition, and the Superior Court's decision affirming the Board's decision, must be reversed because the Board committed legal error and its decision was not supported by substantial evidence.

The Board committed legal error by looking beyond the employment contract to determine whether the motor vehicle accident occurred within the course and scope of employment because the employment contract already resolved the issue. As the employment terms indicate that Claimant is not paid wages or mileage for travel time back to the yard on a call-back, the Board's course and scope analysis should have ended under both *Spellman* and *DeSantis*. Further, the facts of the instant case are virtually identical to those in *DeSantis*, where the Court found that the employee was not injured within the course and scope of his employment.

The Board's decision is also not supported by substantial evidence because Claimant readily admitted he was not paid any call-back time on November 29, 2016, despite his submission of a timesheet. The fact that Claimant was not paid contradicts his assertion that payment for call-backs begin when the call is received. The evidence comports with the testimony of Ford and the Merit Rule that compensation for a call-back begins when an employee reaches the yard.

The Board's decision committed legal error and is unsupported by substantial evidence. As a result, the State respectfully request that this Court reverse the decisions below by the Board and Superior Court.

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