IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

Answering Brief of the Claimant Below-Appellee

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NATURE OF THE PROCEEDINGS

This is an appeal of the Superior Court's November 16, 2018 decision, which affirmed an Industrial Accident Board (hereinafter "I.A.B." or "Board") decision dated April 9, 2018, in the case of *Nicholas Gates v. State of Delaware*, IAB Hearing No. 1455941 (hereinafter "*Gates*"). Nicholas Gates (hereinafter "Claimant") was injured in a motor vehicle accident on November 29, 2016, while working for the State of Delaware (hereinafter "Employer"). Claimant filed a Petition to Determine Compensation Due (hereinafter "Petition") requesting workers' compensation benefits for injuries sustained to his head and neck as a result of the accident.

Claimant asserted, and Employer disputed, the compensability of Claimant's injury and that Claimant was injured in the course and scope of his employment at the time of the accident. Following a hearing, the Board determined that Claimant was working within the course and scope of his employment contract when the motor vehicle accident occurred.

Thereafter, the Employer below-Appellant appealed the Board's decision to the Superior Court. On November 16, 2018, the Superior Court entered an Order affirming the Board's decision in *State of Delaware v. Nicholas Gates*, C.A. No. K18A-04-002 JJC (Del. Super. Nov. 16, 2018) (hereinafter "*State v. Gates*"). Employer then filed the instant appeal to the Supreme Court of the

State of Delaware. This is the Claimant below-Appellee's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Claimant denies that the decision of the Industrial Accident Board, affirmed by the Superior Court, should be reversed. The Board's decision (concluding that Claimant was working within the course and scope of his employment contract when the motor vehicle accident occurred) is supported by substantial evidence and free from legal error where the Board found, under a totality of the circumstances analysis, a sufficient nexus between the employment and the injury; that Claimant was furthering Employer's business by obtaining Employer's vehicle and responding to the call-back; and that, despite the merit rules stating that an employee's pay for a call-back does not begin until the employee arrives at the yard, Employer's actual practice was to compensate Claimant for the call-back travel time.

STATEMENT OF FACTS

Claimant had been employed with DelDOT as an equipment operator since July of 2016 when the work accident occurred. Empl. A26, A51. He worked at Employer's Magnolia Yard site. Empl. A72. Claimant's regular duties included maintaining the roads and the highways, responding to emergencies, setting up traffic control devices, and assisting with emergency response activities. Empl. A27, A36. Claimant's job was classified as an essential employee, and consequently was required to report back to work any time he is called outside of his normal work hours. *Id.* Claimant's normal work shift was Monday through Friday, from 7:00 a.m. to 3:00 p.m. Empl. A28. If Claimant declined to respond to a call back to work he faced possible termination. *Id.*

Claimant testified that he would receive a minimum of four hours' pay for call-backs, even if he worked less than four hours. Empl. A28, A52. Anytime he exceeded forty hours of work per week, he would receive time and a half for overtime. *Id.* Claimant was not paid for mileage for his normal shift or for call-backs, although his pay for call-backs included his travel time. Empl. A37.

Brittany Ford (hereinafter "Ms. Ford"), a human resources representative, testified on behalf of Employer regarding Employer's call-back pay guidelines, referring to the Merit Rules. Empl. A61. Ms. Ford asserted that Merit Rule 4.16

is "basically the claimant's contract of hire." Empl. A62. Pursuant to Merit Rule 4.16, equipment operators are not paid for mileage for their return trip back to the yard when they receive a call-back. Empl. A65-66. She explained that the call-back pay time starts when the employee arrives to the worksite and begins his duties, and that the call-back pay policy is described in Merit Rule 4.16. *Id.*

Ms. Ford testified that Employer conducts a new employee orientation, but the new employees are not provided with the "entirety of the merit rules." Empl. A83. Rather, employees are provided information on where the rules can be obtained. *Id.* Ms. Ford also admitted that Employer does not go into specifics about recording time for call-backs in the actual orientation. Empl. A83-84. She stated that employees would get that information from their supervisor or timekeeper. Empl. A84.

Ms. Ford acknowledged that timekeepers and supervisors are in the yard with the equipment operators and that those are the ones the employees often talk to. Empl. A85. Ms. Ford further acknowledged that Claimant would have naturally gone to his immediate supervisor at the Magnolia Yard with any questions. Empl. A72. Upon questioning, Ms. Ford affirmed that Claimant was not paid for his transportation, mileage, nor was he paid a salary on the day of the accident. Empl. A71. Ms. Ford confirmed with Ronald Jarrell, the area

supervisor for Employer, that employees are not paid mileage and not considered to be "on the clock" until they check in at the yard. Empl. A80.

Claimant acknowledged that Merit Rule 4.16 had been in effect since May 13, 2007, but that the employees' actual practice is something "completely opposite." Empl. A39. Claimant attended a new employee orientation, but a complete copy of the merit rules was not provided to him, or any other employee. Empl. A83. Despite the large volume and complexity, Employer expects the employees to know the merit rules and follow them. Empl. A75-76. Ms. Ford did not know whether employees actually reviewed the merit rules. Empl. A85.

Claimant testified that his crew leader usually completes the paperwork for him to receive pay for his normal work shift. Empl. A29. However, Claimant completes his own timesheet to record the time worked in association with call-backs. *Id.* The timesheet is what Employer uses to determine Claimant's pay for his call-back time. *Id.* Claimant submits this timesheet to Debbie Shaner, who works at the Magnolia yard with Claimant. Empl. A40. Claimant testified that, prior to the work injury, when completing his timesheet he recorded the time he was called by Employer as the "start time" and the time when he returned to the work site ("the yard") as the "end time." Empl. A30. Claimant further testified that everyone he worked with completed their call

back time the same way including his supervisors who would also return to work when Claimant received a call-back. Empl. A30-31. Clamant did not receive any formal training on record keeping. Empl. A55. He testified that he was the youngest employee on his job and his coworkers had been with Employer for twenty to thirty years. Empl. A52. Those veteran employees groomed Claimant and advised him on how to complete his timesheets for call-backs. *Id.* Two employees in particular, Kenny Webb and Carl Legates, explained the call-back pay process to Claimant. Empl. A55. Claimant stated that Employer changed this policy after his work injury. Empl. A52.

Claimant testified that he never experienced a problem with his timesheets or with what was recorded for his call-back time. Empl. A53. He would always verify the correct amount of regular pay and overtime on his check. Empl. A52-53.

On November 29, 2016, Claimant was injured in a motor vehicle accident as he was returning to work to respond to a call-back from Employer. Empl. Exhib. B-26. Claimant was contacted by Employer around 3:30 p.m. (after completing his normal shift that day), and was informed that there had been an accident and that he needed to pick up a truck from the yard and meet Employer on Fox Chase Road. Empl. A31, A35. Since Claimant's normal route to work consisted of travel on Fox Chase Road, he had to take a detour to get to work.

Id. Just before he reached the yard, another driver ran a stop sign causing Claimant to collide with her car. *Id.* Claimant did not receive any pay at all for that call-back. Empl. A55.

Following the hearing, the Board found that Claimant was working within the course and scope of his employment contract when the motor vehicle accident occurred. The Board further found that, even if the totality of circumstances analysis had not resulted in a finding that Claimant's employment contemplated the duties in which he was engaged in at the time of the work injury, Claimant would qualify under "special errand" exception to the "going and coming rule." The Board awarded Claimant's attorney's fees and medical witness fees.

Employer appealed the Board's decision to the Superior Court, which affirmed the Board's decision, finding that there was substantial evidence to support the Board's decision. Employer has now appealed this matter to the Supreme Court.

This is Claimant Below-Appellee's Answering Brief.

ARGUMENT

I. The Board correctly determined that Claimant was injured within the course and scope of his employment.

Question Presented

Whether the Board's decision, concluding that Claimant was working within the course and scope of his employment contract when the work accident occurred, is supported by substantial evidence and free from legal error. *State of Delaware v. Nicholas Gates*, C.A. No. K18A-04-002 JJC, Answering Brief of Claimant Below-Appellee (Empl. A3).

Scope of Review

In reviewing whether the Industrial Accident Board properly exercised its authority in applying the facts to the law, the role of the appellate court is to examine the record to determine whether substantial evidence exists to support the findings below. *Hebb v. Swindell-Dressler, Inc.*, 394 A.2d 249 (Del. 1978); *Histed v. A.I. duPont de Nemours & Co.*, 621 A.2d 340 (Del. 1993). "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Histed, supra*, citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). The evidence must be substantial, and this Court's duty is to weigh and evaluate the evidence for sufficiency to support

the Board's findings. *M.A. Hartnett, Inc. v. Coleman*, 226 A.2d 910 (Del. 1967).

This Court "takes due account of the Board's experience and specialized competence and of the purposes of the Delaware's worker's compensation statute" where factual determinations are at issue. 29 *Del. C.* § 10142(d); *see also Spellman v. Christiana Care Health Services*, 74 A.3d 619, 623 (Del. 2013). This Court's review of questions of law is *de novo*. *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989).

Merits of Argument

The Board's decision of April 9, 2018 held that, evaluating the totality of circumstances, Claimant was, in fact, working within the course and scope of his employment contract when the motor vehicle accident occurred. *Gates* at 12. The Board further concluded that, even if the totality of circumstances analysis had not resulted in a finding that Claimant's employment contract contemplated the duties in which Claimant was engaged at the time of the accident, Claimant would qualify under the "special errand" exception to the "going and coming rule." *Gates* at 13.

Employer contends, and Claimant disputes, that Employer's policy regarding call-back pay should dictate the outcome despite the fact that Employer's actual practice was inconsistent with the policy. The Board

correctly afforded weight to the evidence presented regarding Employer's actual practice of compensating employees for call-backs from the time the employee receives the call-back. As such, the Board correctly concluded that Claimant was working within the course and scope of his employment at the time he was injured in a motor vehicle accident and the Superior Court did not err in affirming the Board's decision.

Claimant was injured within the course and scope of his employment.

An employee is entitled to receive workers' compensation benefits for injuries "arising out of and in the course of the employment," but only while the employee is engaged in, on or about the premises where the employee's services are being performed *or* while engaged elsewhere in or about the employer's business where the employee's services require his presence as part of such service at the time of the injury. 19 *Del. C.* § 2304; *see also Tickles v. PNC Bank*, 703 A.2d 633, 635-36 (Del. 1997). This rule has become known as the "going and coming rule." *Histed*, 621 A.2d at 343.

The courts in Delaware have interpreted this rule as a limitation on an employer's liability to employees for injuries sustained while traveling to and from the employee's place of employment. *Id.*; *Tickles*, 703 A.2d at 636. The rationale behind the rule's limitation is that employees traveling to and from

work are subject to "no greater hazard or risk than an individual on a personal excursion." *Id.*

The phrase "arising out of the employment" refers to the origin and cause of injury. *Id.* at 637. It is unnecessary to determine a causal relationship between the employment and the injury. *Id.* The phrase "in the course of employment" refers to the time, place and circumstances of an employee's injury. *Spellman v. Christiana Care Health Svcs.*, 74 A.3d 619, 623 (Del. 2013).

When an employee is paid "an identifiable amount as compensation for time spent in traveling to and from work, the trip is within the course of employment." *Histed*, 621 A.2d at 345 (citing 1 A. Larson, The Law of Workmen's Compensation § 16.21 (1990)); *see also Collier v. State*, 1994 Del. Super. LEXIS 290 *7 (Del. Super. July 11, 1994). No requirement exists for this additional compensation to be specifically designated as travel pay. *Id.* at 346. It is enough that part of this payment serves to reimburse the employee for his additional travel expense or inconvenience. *Id.*

On the date of the work injury, Claimant received a call-back from Employer around 3:30 p.m., after working his normal shift, to meet on Fox Chase Road, due to an accident. Empl. A31, 35. Although Claimant's regular hours were 7:00 a.m. to 3:00 p.m., Monday through Friday, he could be called

back to work, to perform additional services for Employer. Empl. A28. While Claimant was en route, he was involved in a collision himself. *Id.* Although Claimant was not physically present on Employer's premises at the time of the accident, he was engaged elsewhere—heading back to work to pick up a truck to attend to an emergency identified by Employer—at Employer's specific behest. Empl. A31. Claimant's presence on the highway, at the time of the accident, was required to comply with Employer's urgent request that he return to work. Claimant's job requires that he return to work at times, in addition to his normal shift, and drive to offsite locations on behalf of Employer, and that is the activity he was engaged in at the time the work injury occurred. Claimant testified that he faced possible termination if he were to decline a call-back. Empl. A27. Thus, it is clear that Claimant's injury was one arising out of and in the course of his employment.

Claimant testified that he recorded his own time for call-backs on a timesheet. Empl. A29. Employer paid Claimant based on the timesheet Claimant submitted. *Id.* Claimant further testified that, for call-backs, he received a flat rate of four hours' worth of pay regardless of whether he actually worked four hours on the call-back. Empl. A28-29. In addition, if he worked over forty hours in a week (including call-back time), he was paid time and one half for overtime. Empl. A28. When completing his timesheet, Claimant

testified that, prior to the work injury, he always logged the time he was *called* by Employer as the "start time," and he logged the time he arrived back to the yard as the "end time." Empl. A30. Claimant would verify his pay when he received his paycheck. Empl. A53. His paycheck would show the number of hours he worked along with the amount of overtime he worked, which included the travel time for his return to work. *Id.* Claimant would compare the numbers to ensure he was paid correctly. *Id.*

Claimant testified that "everybody [he] worked with" completed their timesheets the same way, which was also his understanding from the supervisor at his yard. Empl. A30, A53. Employer changed this policy after Claimant's work injury. Empl. A30. As Employer did not rebut Claimant's testimony with timesheets proving otherwise, the Board was free to infer, under the totality of the circumstances, that Claimant was paid an identifiable amount for the travel time associated with call-backs and, hence, that Claimant's injury was sufficiently work-related. That Claimant was paid for a minimum of four hours for every call-back, which included his travel time, is sufficient evidence to conclude that Claimant was paid for his travel. It is important to point out that the Court in *Spellman* notes, in dicta, that the Board's holding that "if [the employer] were paying all of [the claimant's] travel expenses, that would bring [the claimant] within the course and scope of her employment," correctly

applied the substantive principles of law and is supported by the record. *Spellman*, 74 A.3d at 625 n. 25. Thus, in an instance where Employer was paying Claimant for his call-back travel and the Board determined that he was acting in the course and scope of his employment when the accident occurred, the Board's decision should be affirmed by this Court as well.

The terms of the employment relationship support the Board's finding that Claimant's injury was within the course and scope of his employment.

In *Spellman*, this Court encouraged an analysis of the totality of circumstances to determine whether "the employment contract between the employer and employee contemplated that employee's *activities* at the time of the injury would be regarded as work-related," and thus compensable. *Id.* at *4 (emphasis added); *Spellman*, 74 A.3d at 625 (emphasis added). Under *Spellman*, the analysis should begin by focusing on the employment agreement itself. *Spellman*, 74 A.3d at 625. If the employment agreement resolves the "scope" issue, then the analysis can end. *Id.*

"Generally, the unilateral statement of policy contained in an employee handbook does not create an employment contract between the employer and employee," although it can create contractual rights in certain circumstances. *Kerly v. Battaglia*, 1990 Del. Super. LEXIS 425, at *4-5 (Nov. 21, 1990). The Court must examine the language used in the handbook and any course of

conduct which supports a reasonable reliance on the part of the employee to determine whether a provision contained in a handbook is part of an employment contract. *Id.* at *5.

Contrary to Employer's assertion that Claimant was governed by an employment contract, no evidence of an actual written employment contract was presented at the hearing. *See Gates*, at 9. Employer argues that the employment terms "specifically state that an employee is not paid wages or mileage" for responding to a call-back"[1] (referring to Merit Rule 4.16), but the Board and the Superior Court correctly rejected this argument, finding that Merit Rule 4.16 did not provide a term of Claimant's employment agreement. *Id.* at 10; *State v. Gates* at 8. Employer failed to even meet its burden of proving that it intended for Merit Rule 4.16 to supply the terms of the employment agreement or to bind the parties.

Ms. Ford testified on behalf of Employer. Empl. A61. Ms. Ford referred to a document titled Call-Back Pay Guidelines and Recommended Procedure, which showed "Merit Rule 4.16." Empl. A62. Ms. Ford alleged that Merit Rule 4.16 is "part of basically the claimant's contract of hire." *Id.* Even if this were true, a course of conduct between the parties can modify the parties' employment contract. *L.H. Doane Assocs. v. Seymour*, 1985 Del. LEXIS 589, at

[1] Empl. Op. Br. at 10.

*4 (Apr. 23, 1985) (citing *Collins v. Aikman Corp. v. Compo Indus., Inc.*, Del. Supr., No. 233, 1983, McNeilly, J (May 1, 1984) (ORDER)).

Ms. Ford testified that when Employer conducts a new employee orientation and provides new employees with information, the merit rules are merely "referenced." Empl. A62. She admitted that, since Employer is "trying to go paperless," employees are not provided with the "entirety of the merit rules." Empl. A83. Rather, employees are provided information on where the rules can be obtained. *Id.* Upon questioning as to whether the new orientation session includes topics such as when the employees are "on the clock, when they are not, what they can submit as far as mileage, [and] what they can't submit as far as mileage, Ms. Ford responded that "we don't go into those specifics in the actual orientation." Empl. A83-84. She agreed that there are a lot of rules and that they are dense, but stated that the employees are responsible for knowing and following them. Empl. A75-76. Upon further questioning, Ms. Ford admitted that she was uncertain whether the employees even reviewed the rules. Empl. A85. Thus, it can hardly be said that Merit Rule 4.16 supplied the terms of the employment agreement in this case.

Further, the parties' actual course of conduct runs directly counter to the merit rules. Claimant testified that the actual practice of employees was inconsistent with the merit rules, and this testimony is unrefuted. Empl. A40.

Claimant further testified that Merit Rule 4.16 was not included in the handbook he received when he was first hired. Empl. A51. He explained that he was the youngest employee at his job and that "everyone there has been there twenty, thirty years" and that those veterans employees "basically groomed [him] and told [him] how to go about things and what to do." Empl. A52. Claimant testified that he was specifically told by Kenny Webb, an employee who has since retired, and Carl Legates, another employee who also groomed him, that call-backs started at the time when he received the call. Empl. A55. Further, Claimant did not receive any formal training on record-keeping. *Id.* He never experienced any problems with the time he recorded for overtime and always received the appropriate pay based on the work hours he submitted. Empl. A53-54. Further the process was governed by "business management." Empl. A74.

Claimant's reliance upon his supervisor and veteran co-workers as a source for guidance in completing his timesheets is reasonable under the circumstances here. Claimant is a truck driver. He 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. Given the vast amount and complexity of the merit rules to which Claimant may have been directed, it should be expected (and indeed, Employer did expect) that he would look to his supervisor and co-workers to answer any questions about

Employer's policy rather than resorting to locating and parsing the merit rules himself. Even Ms. Ford acknowledged that timekeepers and supervisors are in the yard with the equipment operators and that those are the ones the employees often talk to. Empl. A85. Ms. Ford further acknowledged that Claimant would have naturally gone to his immediate supervisor at the Magnolia Yard with any questions. Empl. A72.

Employer wishes to harp on the fact that Claimant was not paid for the call-back on the date of the injury, but this is simply a distraction from the reality that Employer consistently paid Claimant for travel related to call-backs prior to the work injury, in the form of a flat-rate minimum of four hours for each call-back. That Employer did not pay Claimant for his call-back time on one occasion in particular, which happens to correspond with the date of a work injury that Employer is disputing, is insufficient to rebut Employer's actual practice of compensating Claimant for this time.

The terms "employment contract," "employment agreement," and "employment relationship" are used interchangeably throughout Justice Jacobs' opinion in *Spellman*, which strongly indicates that this Court is concerned with the understanding between the parties. *Compare Spellman*, 74 A.3d at 625 ("employment contract between employer and employee"); and *Id.* ("focusing upon the employment agreement itself"); and *Id.* ("the contract-related

evidence"); and *Id.* at 626 ("start with the terms of the employment relationship or contract") (*emphasis added*). Since there was no actual written employment contract between this Employer and Claimant, the Board correctly looked to the relationship between the parties (as evidenced by their course of conduct).

Although Claimant attended a brief orientation, the merit rules were merely referenced during the orientation and were not provided to Claimant. Empl. A82-83. Claimant gained his understanding of how the call-back pay was recorded from veteran employees, and not the merit rules, or even Ms. Ford. Claimant was specifically told that the call-back pay time began when he received the call from Employer. Claimant recorded his time accordingly and was paid for the time consistent with his timesheet submissions. The only time Claimant did not receive pay for a call-back was when he submitted time for the day the work injury occurred. The fact that Claimant submitted a timesheet for overtime on the day of the work accident "is further confirmation of his belief/understanding that the start time of overtime is when he receives the callback." *Gates*, at 14.

Employer argues that the merit rules contemplate that Claimant not be paid for his travel time associated with call-backs. However, the Board found the evidence supported Employer's actual practice of paying Claimant a minimum of four hours for each call-back, which included time he submitted for

his travel. Moreover, it is unreasonable to expect that Claimant would have a full understanding of dense, complicated merit rules, so voluminous that Employer refrained from providing hard copies to new employees. Employer would have the Court look at the merit rules to the exclusion of all the other evidence presented, which is explicitly inconsistent with *Spellman*. Under a "totality of the circumstances" analysis, the Board properly considered Employer's actual practice. The Board's finding, which was affirmed by the Superior Court, is supported by substantial evidence in the record, and should not be disturbed.

Employer argues that the Board committed legal error by looking beyond Claimant's employment contract. However, there was no actual written employment contract here, which is the case for many claimants under the workers' compensation system. Indeed, the cases in which a written employment contract exists are exceedingly rare, such that in the vast majority of cases, *Spellman's* requirement (to look first to any written contract of hire) would not be applicable, and the "going and coming rule" would then be the "primary, first-resort, rule of decision," along with its exceptions. Furthermore, even if an employment contract did exist in this case, the terms of the contract (as alleged by Employer) and the conduct of the parties are fundamentally

incongruent. Thus, under *L.H. Doane Assocs.*, the course of conduct of the parties would control the alleged contract terms in any event.

Accordingly, the Board correctly relied on 19 *Del. C.* § 2305 in rejecting Employer's assertion that Merit Rule 4.16 excluded payment for Claimant's call-back time, when the evidence showed that it was Employer's practice to pay him for said time. The Board's interpretation is consistent with this Court's holding in *L.H. Doane Assocs.* as well as the Superior Court's holding in *Kerly*. The Board correctly examined the language used in Merit Rule 4.16 and considered the parties' actual course of conduct, including Claimant's reliance upon his supervisors and veteran co-workers as a source for guidance in recording the time for which he was to be paid. *See Kerly*, 1990 Del. Super. at *5.

DeSantis is inapposite to the instant case.

Employer seeks to rely upon *DeSantis*, which is inconsistent with the Supreme Court's holding in *Spellman* in that it unreasonably restricts the analysis of the course and scope issue under the going and coming rule beyond what was pronounced by Justice Jacobs. *See State v. DeSantis*, 2017 Del. Super. LEXIS 520 (Del. Super. Ct. Oct. 17, 2017). Contrary to Employer's assertion, the facts of the instant case are <u>not</u> identical to those at issue in *DeSantis*, and the distinctions are so remarkable that *DeSantis* cannot be dispositive here.

Mark DeSantis was an employee of DelDOT, who was not compensated for any time commuting to or from his home, either during his normal work hours or when working overtime. *Id.* at *2. Mr. DeSantis was involved in a motor vehicle accident on his way home from a job site, which was not due to an emergency or a call-back (i.e. no 'special errand'—just Mr. DeSantis' normal commute home from work). *Id.* After a hearing on the merits, the Board awarded him compensation for his injuries. *Id.* at *3. On appeal, the Court held that the Board erred by making an analysis beyond the employment contract because the contract itself addressed the issue. *Id.* Also,

Here, there is no employment contract to address the issue, and the merit rules proffered by Employer are inconsistent with Employer's actual practice. There was no testimony in *DeSantis*, however, regarding the employer's conduct being inconsistent with the terms of the employment contract governing the employer and Mr. DeSantis. Thus, the case at bar is distinguished from both *DeSantis* and *Spellman*. However, *Spellman* is still applicable where it instructs the Board as to where to begin its analysis.

Here, Claimant was paid for the travel time associated with his call-backs as he was paid for a minimum of four hours for each call-back, and he started recording his time from the moment he received a call-back from Employer. No evidence was presented by Employer to refute this testimony despite the fact

Employer was in the best position to present pay statements documenting what it paid to Claimant. "[S]tanding alone, the existence of travel pay is strong evidence that an employee is within the course and scope of employment while on a trip to and from work." *Histed*, 621 A.2d at 345.

Employer argues that employees are responsible for knowing the rules governing their occupation regardless of whether they receive a hard copy of the rule without citing any authority for this proposition. *See* Empl. Op. Br. at 19. Further, Employer inappropriately likens Claimant to an attorney who is responsible for abiding by the rules of professional conduct whether or not the attorney receives a copy of said rules. *Id.* However, the Claimant in this case is no attorney and has no legal background or training. In fact, Employer did not provide him any formal training on record-keeping. Empl. A55. Claimant also does not have the sophistication of an attorney. Thus, if Employer intended for Claimant to be bound by the merit rules, Employer should have ensured that Claimant was provided with a complete copy of same and acknowledged his understanding that he would be bound by these rules. Further, Employer should either not have relied on Claimant's supervisors and co-workers to provide him and other new employees with guidance on timekeeping and pay procedures or ensured that the information provided by those supervisors and co-workers was consistent with the allegedly intended policy.

Contrary to Employer's assertion an affirmation of the Board decision here will not effect a *carte blanche* disregard by employees as to the terms of an existing employment contract. On the other hand, it will emphasize an employer's responsibility to ensure that employees fully understand the policies under which they are governed. Further, Claimant was not found to have disregarded Employer's policy. In fact, he was actually complying with the policy as relayed to him by his supervisors. Thus, Employer's argument is without merit. Claimant testified that Employer changed its policy directly after Claimant's accident to prevent any similar instances in the future. However, Employer's reformation should not be afforded retroactive application here.

Employer may wish to argue that the relationship between the parties was based on a misunderstanding since Claimant's understanding was based on the advice of his superiors and experienced co-workers rather than what was stated in the merit rules. However, Employer was in the best position to correct any misunderstandings, either through the supervisors, timekeepers, and/or "business management."

If the Court finds the evidence regarding the employment relationship here to be insufficient to end the inquiry or to resolve the "scope" issue, then *Spellman* is not dispositive of this case and further analysis of the exceptions, under *Histed*, is warranted. *Spellman* left the established precedent undisturbed

in cases where there is no written agreement and a contract-based interpretation is inappropriate.[2] Thus, *Histed*, which articulates the special errand exception, is still good law, under which Mr. Gates would correctly be awarded compensation in this case.[3]

Claimant's return trip to work as the result of a call-back from Employer qualifies under the "special errand" exception to the "going and coming rule"

There are several exceptions to the "going and coming rule". One of the exceptions, which is relevant in this instance, is for the "special errand." *See Histed*, 621 A.2d at 343; *see also Gondek v. Easy Money Grp.*, 2013 Del. Super. LEXIS 608, *3 (Del. Super. Dec. 27, 2013). Under this exception, an employee's journey is brought within the course of employment based on the well-recognized proposition that the elements of urgency or increased risk may supply the necessary bases for converting a routine trip into a special errand. *Histed*, 621 A.2d at 343 (citing 1 A. Larson, The Law of Workmen's Compensation § 16.10 (1990)). "[T]he trouble and time of making the journey, or the *special inconvenience, hazard or urgency* of making it in the particular

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[2] "We do not mean to suggest that our Courts . . . reached erroneous results by applying the 'going and coming' rule and its exceptions as substantive doctrines of first resort." *Id.*

[3] Under *Spellman*, the exceptions to the "going and coming rule" are just not "primary, first-resort, rules of decision." *Id.*

circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself." *Id.* A "special errand" does not end until the employee has arrived at home or makes a personal detour. *Gondek*, 2013 Del. Super. LEXIS 608, at *3.

The facts of this case are similar to those in *Histed* in that Claimant was injured in a motor vehicle accident, which occurred after his normal work hours, while he was responding to a call-back from Employer requesting his service at an accident site on Fox Chase Road. Similar to the Claimant in *Histed*, Claimant's position as an essential employee required that he respond to call-backs from Employer for emergency assistance outside his normal work shift. The claimant in *Histed* was paid a three hour minimum based on her regular hourly rate plus time and one-half for each hour worked,[4] while Claimant was paid a flat rate—a four hour minimum—regardless of whether he actually worked four hours. Empl. A28-29.

Here, Claimant's trip back to work was a special inconvenience. Claimant was asked to return to work—with some urgency—after working a full shift. He testified that, due to the accident on Fox Chase Road, he had to "take a long way around." Empl. A31. As such, had it not been for the call-back, Claimant would not have taken the route where the work injury occurred in the

[4] *Histed*, 621 A.2d at 342.

first place. Further, Claimant testified that he faced possible termination if he declined a call-back, which, the Board found, "adds to the sense of obligation and urgency." Empl. A19. These factual circumstances are directly on point with *Histed*. Therefore, Claimant's return trip to work qualifies as a special errand exception to the going and coming rule, and the Board's decision should be affirmed.

CONCLUSION

The Board's decision, which was affirmed by the Superior Court, is supported by substantial evidence where Claimant was engaged in activities contemplated by the parties' employment agreement when the work accident occurred. The course of conduct between the parties consisted of Claimant being paid for a minimum of four hours for every call-back, which included his travel time. Accordingly, there was ample support for the Board's and Superior Court's conclusion that Claimant was acting in the course and scope of his employment when the accident occurred.

Employer fails to acknowledge that a unilateral statement of policy contained in an employee handbook does not create an employment contract between an employer and employee, and, even if it did, that it is still possible for the course of conduct between the parties to modify those terms.

Employer's reliance on *DeSantis* is misplaced where Employer failed to prove that an employment contract existed, admitted that a complete copy of the merit rules were not provided to Claimant, and that it was uncertain whether Claimant even reviewed them. Thus, Employer's argument that the merit rules constitute Claimant's contract of hire is without merit.

Claimant agrees with the Superior Court that there is substantial evidence supporting the Board's finding that the employment agreement between the

parties fixed, as compensated, Claimant's call-back time and that no analysis is required under the "special errand" exception. However, if this Court does not agree, it is Claimant's position that Claimant's activities, at the time of the work accident, clearly fall under the "special errand" exception and the Board's decision may be affirmed on that basis as well.

WHEREFORE, based on the foregoing, the Claimant Below-Appellee, Nicholas Gates, by and through his attorneys, Schmittinger & Rodriguez, P.A., hereby respectfully requests that the Court affirm the decisions of the Industrial Accident Board and Superior Court below.

Respectfully submitted,

SCHMITTINGER AND RODRIGUEZ, P.A.

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