WILLIAM W. POCHVATELLA, Employee,
v.
CARVER!S LAWN & LANDSCAPE, INC., Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1147276

Date mailed: May 17, 2000
May 17, 1999

DECISION ON PETITION TO DETERMINE COMPENSATION DUE

Pursuant to due notice of time and place of hearing served on all parties in interest, the above-stated cause came before the Industrial Accident Board on May 2, 2000, in the Hearing Room of the Board, New Castle County, Delaware. Deliberations in this matter concluded on May 3,2000.

PRESENT:

LOWELL L. GROUNDLAND

JESSE I. HASTINGS

Linda Lasocha Wilson, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Donald E. Marston, Esquire, on behalf of Employee

Robert H. Richter, Esquire, on behalf of Employer

NATURE ANDSTAGE OF THE PROCEEDINGS

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On December 16, 1999, William W. Pochvatilla ("Claimant") filed a petition to determine compensation due alleging that he was injured in a compensable accident, wherein he received second and third degree burns over fifty percent of his body, on December 7, 1998. The employer, Carver's Lawn & Landscape, Inc. ("Carver's"), contends that Claimant is not entitled to workers' compensation benefits because the accident did not occur "in the course and scope" of employment. Alternatively, Carver's contends that Claimant forfeited his right to recover workers' compensation benefits because of his "deliberate and reckless indifference to danger." The parties narrowed the issues before the Board to compensability and the validity of Carver's defenses therefore no expert medical testimony was introduced.

SUMMARY OF THE EVIDENCE

Claimant, who, is twenty-nine years old, testified that on December 7, 1998, he was employed by Carver's as a foreman. As of that date, he had been a foreman for about five to six months and with Carver's for about two to two and a half years.

At the end of each day, he and his crew would return to the shop. Once back at the shop, it was his responsibility to take care of paperwork and to make sure that everything (tools/equipment) was put away and the yard was safe.

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The accident occurred on a Monday. He remembers returning to the shop at the end of the day. He went into the office to do paperwork while his crew unloaded the truck. He spent ten to fifteen minutes going over blueprints with Mr. Ashby. Then he went outside, got into his personal car, which was parked outside of the enclosed area, and drove into the enclosed area and around back to make sure his tools were locked up. This was a normal part of his job. As a foreman, he was responsible for making sure everyone else's "stuff' was put away, too. The tool lock-up area ("out back" or "around back") is about 400 to 500 yards from the office. He drove around back because it was a Monday night. He bowls on Monday nights and he was in a hurry to leave work.

By the time he parked his car, it was "pretty much" dark. Ben Patterson, Joe Wotypka and Kelvin Yearwood were out back. He believes they were working on one of Mr. Wotypka's personal cars. He does not remember discussing anything with Mr. Patterson. He parked his car at the base of a hill/loading ramp and walked up to the tool shed and checked the tools. As he walked down the ramp of the tool shed, he remembers tripping or kicking something and after that, all he remembers is intense heat. The next thing he remembers is waking up sometime in January. He had suffered severe burns and had been in a coma for six weeks. He does not actually remember tripping over a bucket. That is what someone told him. He has been told that the fire in a fifty gallon drum back-flashed and ignited him. He had

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seen this drum before. It was used for burning wood. He believes everyone had their own reason for having a fire in the drum and that one of the reasons was warmth.

The weekend before the accident, he and Mr. Wotypka did some work on his car on Carver's premises. One of the things they did was change the oil. A black pan was used to drain the oil. He does not know what Mr. Wotypka did with the oil after he drained it.

Christopher M. Ashby, vice president of operations for Carver's, was called as a witness by Claimant. At the time of the accident, he was senior manager. One of his jobs was to oversee operations. Claimant worked for Carver's as a foreman. Claimant's duties included taking care of timesheets and making sure projects got done. It was also his responsibility to make sure that the trucks his crew used were unloaded at the end of the day and that all of the tools were put away and locked up. Mr. Ashby does not know whether Claimant would do this before or after he signed out for the day but he assumes Claimant would do it while he was still on the clock. Claimant signed out at 5:15 that day.

He remembers meeting with Claimant in his office on the date of the accident at around 5 or 5:15. They discussed what had been done that day and took care of paperwork. He sees forty people a day in his office so he does not specifically recall what they discussed. The meeting did not last long

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About ten to fifteen minutes after Claimant left, a man named Tom Bums came to his office and said someone was on fire. By the time Mr. Ashby got out back, Claimant was on the ground, face down, with fire extinguisher powder all over him. When Mr. Ashby got out back, Mr. Wotypka, Mr. Yearwood and Mr. Patterson were there, near Mr. Wotypka's Mercedes. He did not speak to them and they did not speak to him. He knew Mr. Wotypka and Mr. Yearwood were out back working on Mr. Wotypka's car. They had permission to do so. He is not sure whether Mr. Patterson had permission. Carver's allows off-duty employees to work on their personal vehicles on its premises so long as they have permission to do so.

Employee parking is in front of the building and behind the building, outside of the gate. Employees can drive into the enclosed area. They just cannot park there all day and the company prefers that they not drive into, the enclosed area at all, due to space constraints.

Deputy State Fire Marshall Brent E. Billings, a four-year employee of the Delaware State Fire Marshall's office, was called to testify by Carver's. Based upon witness interviews, his review of the scene, and physical evidence found at the scene, it is his opinion that Claimant's' injuries were caused when a white plastic bucket of oil/gas was poured into a "burn barrel."

He was called to the scene the night of the fire. The crime report indicates that the incident was reported at 5:37. It took him fifteen to twenty minutes from

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the time that he was called to arrive at the scene. By the time he arrived, Claimant had been taken by helicopter to Crozier Hospital. He examined the scene, took pictures and conducted interviews. He began conducting the interviews about fifteen minutes after he arrived.

He interviewed the responding fire captain to learn about the fire department's actions as to patient care, fire extinguishment and what they moved or used. The fire captain told Deputy Billings that they had moved a white bucket. He did not say that they had moved anything else. The fire captain directed Deputy Billings' attention to the burn barrel and a white plastic bucket by the garage door, which contained what appeared to be motor oil.

On the night of the fire, Deputy Billings interviewed Mr. Ashby, Mr. Patterson, Mr. Wotypka and Mr. Yearwood. Mr. Ashby told Deputy Billings that he had had a brief meeting with Claimant and that after their meeting, he saw Claimant drive his car around back, and that no more than ten to fifteen minutes later, he learned that Claimant had been burned.

Mr. Patterson said he had been working with Mr. Wotypka and Mr. Yearwood, pulling a motor out of Mr. Wotypka's Mercedes. He was operating the tractor that they were using to extract the motor. He was concentrating on the motor when he saw a flash, looked over, and, saw Claimant on fire.

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Mr. Yearwood told Deputy Billings that he was on the passenger side of Mr. Wotypka's Mercedes, which was facing away from the burn barrel. He had his back turned when he heard Claimant yelling. He turned around and saw Claimant on fire. His pants were on fire. He saw Claimant running around and ended up near the ramp to the garage lying on the ground.

Mr. Wotypka told Deputy Billings that he was on the driver's side of the Mercedes, facing the burn barrel area. He was concentrating on what he was doing and looked up to see Claimant on fire. He thought he saw Claimant with a white bucket in his hands, which he thought then fell over.

During the course of his December 7, 1998 interviews, someone, he does not remember who, told him that Claimant was burned by kicking a bucket over. However, the scene examination and evidence were inconsistent. He felt the evidence was inconsistent because there was no burning of the oil on the ground. Furthermore, the burn barrel had been sitting on a pallet. If the material was kicked over and ignited by the burn barrel, you would have more burning on the bottom surface of the pallet, which you do not have. Due to these inconsistencies, on December 14, 1998, he re-interviewed the witnesses.

On December 14, 1998, Mr. Wotypka told Deputy Billings that he was out back working on his car with Mr. Patterson and Mr. Yearwood when he saw Claimant pull up in his car. There was already a fire going in the burn barrel and he

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saw Claimant take a white five-gallon bucket and pour the contents onto the fire. The fire "flamed up," Claimant did not let go of the bucket and some of the contents fell to the ground and caught Claimant's clothing on fire.

Mr. Wotypka also told Deputy Billings that Claimant changed the oil in his car on Saturday, December 5, 1998; that Claimant poured the oil from his car into a white plastic bucket; and that Claimant placed the bucket, with the drain pan standing upright in the bucket, behind the hood of a car that was sitting at the shop. Mr. Wotypka said the oil from Claimant's car was very thin for the time of the year and he smelled gas and thought something was wrong with the injectors. He thought there was gas leaking into the oil somehow.

Deputy Billings re-interviewed Mr. Patterson, who said he had been working out back with Mr. Wotypka and Mr. Yearwood when he saw

Claimant drive up in front of the burn barrel in his car. About ten minutes later, he saw a flash. He looked over and saw Claimant on fire.[1] He extinguished Claimant.

Mr. Patterson told Deputy Billings that it looked like something flammable was poured onto and had run down the outer sides of the burn barrel and the fire was burning more intensely than it had before. He said that he had started the burn barrel that evening and whatever was on the sides of the barrel was not there when he started the fire. To Deputy Billings, this indicated that something was poured into the barrel. If the injury was caused by something being kicked, the fire would

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have been at the bottom of the burn barrel, and it was not. Mr. Patterson told Deputy Billings that he saw no evidence of a bucket with oil in it being tripped over accidentally. He also said that a few days earlier he had seen Claimant throw some oil from the white bucket onto the fire. Mr. Patterson told Deputy Billings that he observed Claimant, on more than one occasion, pour oil onto the fire to get it started.

Deputy Billings re-interviewed Kelvin Yearwood, who said he was out back working on the car with Mr. Wotypka and Mr. Patterson and that he saw Claimant pour the contents of a white plastic bucket onto the fire.[2]

Based upon the witness interviews and his review of the scene, Deputy Billings believes there was already a fire going in the burn barrel when Claimant arrived. He believes the barrel had been started as a source of heat for Mr. Wotypka, Mr. Yearwood and Mr. Patterson. Because the white bucket was 1/4 to 1/2 full and because the bucket was melted from the top down in a 'v' or "u" shape, rather than melted inward, he believes Claimant's injuries were incurred when he poured the content of the bucket into the burn barrel.

He does not believe Claimant's injuries occurred when he tripped over or kicked a white bucket, thereby causing the content of the bucket to be ignited by the burn barrel. He does not believe this because he believes if this is what had happened, the bucket would have been empty. He further believes that the fact that

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the barrel sat three to four inches off of the ground on a wood pallet supports his opinion. He believes that if a bucket had been kicked and the contents ran to the barrel, it would have flashed back and Claimant would have had more leg burns than hand burns due to the height of the flames that would be produced. However, on cross-examination, Deputy Billings acknowledged that he does not recall where the burn barrel was in relation to the pallet and that there are photographs showing that it was not on the pallet. He concluded that it had been on the pallet due to burn rings on the pallet but he acknowledged that the burn rings could have been made on some prior date. He therefore admits that he does not know when the barrel was moved off of the pallet.

Upon further cross-examination, Deputy Billings testified that his office issued several reports regarding the incident. A report dated December 30, 1998 says, "status - pending active." The status was "pending active" although they had already done the re-interviews because they wanted to interview the victim. The final report, dated August 11, 1999 said "Status: closed accidental." His office did not file any charges against Claimant.

He stands by his opinion that the white bucket, a photograph of which was introduced into evidence, was the bucket that Claimant was holding. He is aware of the existence of another white bucket. He does not believe the second bucket is the one that caused the fire because if it had been kicked over and its contents spilled,

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the pool of gas and oil that was in that bucket would have burned back to its source causing fire damage to that bucket, which did not happen. He

does not believe the dark marks on the second bucket are due to fire damage.

Kelvin Yearwood, a four-year employee of Carver's, testified on behalf of Carver's. On December 7, 1998, he was off duty but at Carver's helping Mr. Wotypka take a motor out of Mr. Wotypka's Mercedes. Mr. Yearwood was on a tractor, which they were using to extract the engine, when he saw a car pull up. He looked around and saw that it was Claimant, who "just stood by his car." Mr. Yearwood continued helping Mr. Wotypka with the engine. He does not know what Claimant did next. The next thing he knew, he heard Claimant shouting. He looked around and saw Claimant holding a bucket, which was on fire. Claimant was trying to get the bucket away from himself. When Mr. Yearwood saw Claimant, Claimant was standing. He does not know if Claimant tripped.

He was interviewed by the Fire Marshall the night of the accident. He told the Fire Marshall that Claimant tripped and fell because Claimant asked him to say this. He does not know why Claimant asked him to say this. It was after Claimant had been burned and was lying on the ground covered in fire extinguisher powder and awaiting medical attention that he said to the others, "you guys have to stick with me and tell them that I tripped on the bucket."

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He was re-interviewed about a week later at which time he "changed his story" "because things were getting out of hand." There were court proceedings and they thought Claimant was going to die.

He did not see Claimant trip. He did see Claimant holding a bucket. The bucket was on fire and Claimant was trying to get away from the bucket but its contents kept spilling and the fire kept getting bigger. He never told the Fire Marshall that he saw Claimant take the white plastic bucket and pour the contents into the barrel.

He does not know who started the burn barrel that evening. It was going when he got out back. He believes the purpose of the burn barrel was heat. People had been using the burn barrel for fires for about a month prior to the accident. He previously saw Claimant pour flammable liquid in the barrel prior to the date of the accident and "the fire would just ignite higher." Before it became a "burn barrel," the barrel contained oil, which was used in the equipment that was used in the business.

He was at Carver's the Saturday before the accident. Claimant was there that day. He had changed the oil, filter and spark plugs in his car. Claimant and Mr. Patterson were good friends. They were always together.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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"Arising out of I and "In the Course of Employment. "Every employer shall be bound ... to pay ... compensation for personal injury ... by accident arising out of and in the course of employment, regardless of the question of negligence 19 Del. C. § 2304. The terms "arising out of" and "in the course of" employment are not synonymous, but distinct, and both must be shown to exist in a given case. Children's Bureau v. Nissen, Del. Super., 29 A.2d 603 (1942). Also see Storm v. Karl-Mil, Inc. by The Home Ins. Co., Del. Supr., Del. Supr., 460 A.2d 519 (1983).

"In the course of employment" relates to the time, place and circumstances. Tickles v. PNC Bank, Del. Supr., 703 A.2d 633 (1997); Storm v. Karl-Mil, Inc., by Home Ins. Co., Del. Supr., 460 A.2d 519, 521 (1983). "It covers those things that an employee may reasonably do or be expected to do within a time during which he is employed and at a place where he may reasonably be during that time." Dravo Corp. v. Strosnider, Del. Super., 45 A.2d 542, 543-44 (1945).

"Arising out of the employment" refers to the origin and cause of the injury. Tickles, 703 A.2d at

637; Storm, 460 A.2d at 521. "It is sufficient if the injury arises from a situation which is an incident or has a reasonable relation to the employment, and that there be some causal connection between the injury and the employment." Dravo, 45 A.2d at 544. "It is clear, however, that the mere fact of the happening of an injury is not intended to make such injury a compensable one. There clearly must be shown a causal relation between the injury and the

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employment, and that the injury arose. out of the nature, conditions, obligations or incidents of the employment, or that a connection exists between the employment and the injury, by which the employment was a substantially contributing, but not necessarily the sole or proximate, cause of the injury." Dravo, 45 A.2d at 544.

The Board finds that Claimant sustained personal injury by accident arising out of and in the course of employment. Carver's stipulated that the accident occurred on its premises. The accident occurred at the end of Claimant's workday. While technically Claimant was "signed out" by the time the accident occurred, he was still in Carver's service at the time of the accident and it was this service that exposed Claimant to risk. The Board finds that the sole reason Claimant was out back was as part of his service to Carver's and it was while he was out back in Carver's service that he was injured. Claimant's uncontroverted testimony was that at the end of a workday, he would do paperwork while his crew unloaded the truck. However, as foreman, he was responsible for insuring that the equipment his crew used was secured and the yard cleaned up and safe. He testified that on the day of the accident, after his meeting with Mr. Ashby, he went out back to make sure that the equipment had in fact been secured. There is no evidence that he went out back to help with the Mercedes or to socialize with Mr. Patterson. In fact, Claimant's testimony that it was a Monday and he was in a hurry to leave because he bowls on Monday nights, contradicts these contentions.

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Claimant testified that he remembers but ripping into or kicking or tripping on something and that the next thing he knew, he felt intense heat. If the accident was triggered by Claimant kicking, something while he was checking to see if his tools were locked up, then there is no question that the accident arose out of and in the course of his employment. See Rose v. Cadillac Fairview Shopping Center Properties (Delaware) Inc., Del. Super., 668 A.2d 782 (1995). However, Carver's contends, based upon Deputy Billings' investigation, that Claimant was burned when he poured oil/gas from a white plastic bucket into the burn barrel.

If Claimant's injury were sustained as a result of him pouring the contents of a white plastic bucket onto the bum barrel, then the Board must determine whether such action would have been part of Claimant's duties. The Board finds in the affirmative. Claimant's uncontroverted testimony is that he was responsible for making sure the yard was clean and safe. Given this testimony and Claimant's testimony as to why he went out back that evening and given that he was in a hurry to leave work so he could go bowling, the Board finds, assuming arguendo that Claimant was injured as a result of pouring the contents of a white plastic bucket onto the burn barrel, that he was doing so as part of his job, to make the yard clean and/or safe, not for heat or for any other non work related purpose. Claimant was in a hurry and he went out back to take care of business, part of which he considered to be cleaning and securing the yard. Under these conditions, the Board

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does not believe he would have taken the time to stoke the fire. While the burn barrel may have been started by someone else for the purpose of heat, assuming arguendo that Claimant was injured as Carves claims, the Board does not find that is why Claimant added to the burn barrel.

Forfeiture. Having found that Claimant's injuries arose out of and in the course of the employment, the Board must next consider whether Claimant forfeited his right to compensation. The relevant statutory section relied upon by Carver's provides that "[i]f any employee be injured because of the employee's deliberate and reckless indifference to danger the employee shall not be entitled to recover damages in an action at law or to compensation. 19 Del. C § 2353(b). The burden of proof under this subsection is on the employer. Id.

Carver's failed to show that Claimant was injured as a result of deliberate and reckless indifference to danger. Employees are commonly called upon to undertake dangerous tasks. See Myers v. Brandywine Painting Co., Del. Super., C.A. No. 94A-11-005, 1995 WL 264711, Barron, J. (Apr. 11, 1995) (ORDER) (standing near the top of a 32-foot-high ladder in order to paint under the peak of a roof; CC Oliphant & Sons, Inc. v. Dennis, Del. Super., C.A. No. 89A-NO-3, 1990. WL 127821, Lee, J. (Aug. 31, 1990) (Memorandum Opinion), aff'd Del. Supr., 590 A.2d 502 (1991) (working on a roof with an uncovered skylight). It takes more than the undertaking of a dangerous task to trigger the forfeiture provision. The

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forfeiture statute specifically requires a showing of "deliberate and reckless indifference to danger." 19.Del. C § 2353(b).

Assuming arguendo that Claimant was injured as a result of pouring oil/gas onto the burn barrel, there is no evidence to support a finding that Claimant had an understanding of the danger involved in such an action. The Fire Marshall's conclusion that the accident was in fact "an accident" supports this finding. There is no evidence that Claimant had special fire training or was familiar with back drafts. In fact, although somewhat unreliable, there is evidence that 'Claimant previously poured liquid from a white plastic bucket onto the fire and that this simply caused the fire to burn more intensely. There is no indication that it ever previously caused a back flash. In this case, there is no evidence that Claimant had reason to understand the nature of the danger that he faced and that he disregarded this danger. Furthermore, the Board does not find that Claimant was aware that the white bucket contained gas and oil. Assuming arguendo that Claimant did in fact pour oil/gas into the burn barrel, the Board does not consider this action any more deliberate and recklessly indifferent to danger than the Claimant's actions in Shockley v. King, Del. Super., 117 A. 280 (1922). In Shockley, the claimant lost his right hand in a saw mill accident when a piece of wood got caught in the saw. In Shockley, the Court found that the claimant's actions of turning to one side rather than the other thereby allowing the wood to get caught in the saw, even

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though he had been forewarned against doing so, did not amount to deliberate and reckless indifference to danger. In the instant case, there is no indication of a warning of danger.

Attorney's Fees and Medical Witness Fee. Having received an award, Claimant is entitled to have a reasonable attorney's fee taxed as a cost to Carver's. 19 Del. C § 2320 (g)(1). Claimant's counsel has submitted an affidavit that he spent twenty-five hours in preparation for the hearing. Taking into consideration the amount of time spent by Claimant's counsel on this case and the potentially substantial effect of this award (given the nature of Claimants injuries and his--testimony that he was in a coma for six weeks, which gives an indication of the disability benefits that may be due Claimant) and given the fees normally charged in this area for such representation, the Board finds that an attorney's fee of $2,250 is appropriate.

STATEMENT OF DETERMINATION

For the foregoing reasons, Claimant's petition to determine compensation due is hereby GRANTED. Claimant is awarded an attorney's fee in the amount of $2,250.

IT IS SO ORDERED this 17th day of May, 1999.

INDUSTRIAL ACCIDENT BOARD

LOWELL L. GROUNDLAND

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JESSSE I. HASTINIGS

I, Linda Lasocha Wilson, Workers' Compensation Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

LINDA LASOCHA WILSON

Date mailed: 5/17/00

M.L.R.
OWC Staff

#hlr#

Notes:

1. On cross-examination, Deputy Billings agreed with Claimant's attorney who said, "on re-interviewing Mr. Patterson, he changed his story and said he'd watched [Claimant] pour something from that bucket into the fire" but on direct, Deputy Billings did not say that Mr. Patterson said that he saw Claimant pour the bucket contents into the barrel.

2. In his testimony, Claimant specifically denies seeing or saying this.
