CATHERINE TAYLOR, Employee,
v.
WILMINGTON FRIENDS SCHOOL, INC., Employer.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

Hearing No. 1417179

Mailed Date: May 15, 2015
May 13, 2015

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 April 1, 2015, in the Hearing Room of the Board, New Castle County, Delaware. The record remained open following the hearing until the Board concluded its deliberations on April 29, 2015. Pursuant to Del. Code Ann. tit. 19, § 2348(k), the Board required an extension of time to complete the decision.

PRESENT:

TERRENCE SHANNON

ROBERT J. MITHCELL

Joan Schneikart, Workers' Compensation Hearing Officer, for the Board

APPEARANCES:

Cynthia H. Pruitt, Attorney for the Employee

Joseph Andrews, Attorney for the Employer

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NATURE AND STAGE OF THE PROCEEDINGS

On October 16, 2014, Catherine Taylor ("Claimant") filed a Petition to Determine Compensation Due alleging she sustained injuries to the low back and left hip on August 10, 2014, while she was working as a janitor for Wilmington Friends School, Inc. ("WFS"). Claimant seeks a finding of compensability and total disability benefits. WFS denies compensability on the basis that the work accident did not arise out of and in the course of her employment. *See* Del. Code Ann. tit. 19 § 2304.

At the hearing, WFS provided a memorandum of law in support of its position in the case. Because the legal memorandum was not provided to Claimant's counsel until the day of the hearing, the Board allowed the record to remain open for her to submit a written legal response. Claimant submitted her memorandum in response on April 13, 2015. The Board members reviewed the submission and then concluded their deliberations on April 29, 2015.

The parties submitted a joint Stipulation of Facts, pursuant to *Rules of the Industrial Accident Board of the State of Delaware* ("I.A.B. Rules") Rule 14(A).

SUMMARY OF THE EVIDENCE

Claimant, age fifty-nine, testified she worked as a housekeeping custodian for WFS for over twenty years. She regularly worked 40 hours a week. On Sunday, August 10, 2014, she began work at 8 a.m. because she had to allow other workers into the cafeteria to perform certain jobs. (She normally worked 10 a.m. to 6 p.m.) She then began performing her regular cleaning duties starting on the first floor. At one point, her supervisor stopped by briefly. At approximately 11:30 a.m., as she was cleaning in the business office bathroom, she urgently had to use the toilet. As she began pulling down her pants to urinate, she missed the toilet seat and fell onto her left hip and buttocks. She cried out in pain and knew immediately that

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she had injured herself. She then cleaned up the urine on the floor with a mop, put away the cleaning equipment, and called her supervisor,

Rickey Morrison. She asked him to come and relieve her, as she could not leave with the other workers still there.

Claimant had to wait for the other workers to finish and leave. She then tried to go to a medical aid unit, but it was closed. She returned home to provide caretaking duties for her mother. The next day, she visited the emergency room at Christiana Care, and described the incident at work. She was disabled from all work by the medical staff, told to rest, and referred to her family doctor. She saw Dr. Ogunwande on August 19, 2014, and told him her "back struck the edge of the commode" she was attempting to use and she landed on her left hip. She was referred to Dr. Chong, a chiropractor, for treatment and provided the same accident description. Claimant did not improve with chiropractic care and was referred to Dr. Meyers in November 2014. He prescribed muscle relaxants, ibuprofen, physical therapy and home exercises, and recommended a hip injection. (She also consulted Dr. Glassman, whose practice Dr. Meyers had joined.) She saw Dr. Meyers again on April 16, 2015. While her condition had improved following his treatment, she still was not "all better."

Claimant identified a note (Claimant's Exhibit No. 1, page one) she later wrote upon the request of WFS describing the work accident. However, she did not fill out the Lyons Companies WC Incident Report (Claimant's Exhibit No. 1, pages two & three), which described the fall as occurring in the "nurse's office bathroom." She confirmed she fell in the business office bathroom.

Claimant also did not fill out the Hartford Life Insurance form (Claimant's Exhibit No. 2, pages one & two) for long term disability income benefits, but she did complete the

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"Information About the Condition Causing Your Disability" sheets (Claimant's Exhibit No. 1, pages three & four).

Before the work accident, Claimant required no medical treatment for the low back other than for a 2003 and a 2006 motor vehicle accident. However, such treatment stopped after her recovery for those prior events.

Claimant received some short term disability benefits from the date of accident until February 27, 2015, but no wages since then. She is still receiving treatment, but surgery has not been recommended. She would like to return to work.

On cross examination, Claimant agreed the toilet she was using when she fell was not broken but she was hurrying to use it. She was familiar with the bathroom facilities at the school. She confirmed she fell in the business office bathroom, not in the nurse's office as indicated on the Lyons Companies report (Claimant's Exhibit No. 1). She was terminated on February 28, 2015. She was involved in a prior work accident in 2004 when the cord on the school vacuum she was using got tangled and she fell.

Jeffrey S. Meyers, M.D., a physical medicine and rehabilitation specialist, testified on behalf of Claimant. He saw Claimant for treatment on November 5, 2014. He reviewed Claimant's medical records, from both before and after the work accident. Dr. Meyers opined that Claimant developed low and mid back pain and left hip pain related to the August 2014 work accident, and she has been disabled from all work since he began seeing her, except for a short period in January 2015, when she was temporarily released by Dr. Glassman. Dr. Meyers concluded that her medical treatment, in the amount of $22,846.95, has been reasonable, necessary and causally related to the work accident.

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At the first visit for treatment, Claimant reported working as a custodian for WFS on August 10, 2014, when she attempted to sit on a toilet but fell backwards and developed an onset of pain in the low back and left hip region. She reported the incident to a supervisor and then went home. Overnight she developed increasing

symptoms and visited the emergency room the next day with complaints of pain in the back region. She began conservative treatment for soft tissue injuries. She was diagnosed with a low back and hip strain, excused medically from work, and directed to follow-up with her family doctor.

A few days later, she saw Dr. Clement Ogunwande, D.O., who continued conservative treatment and excused her from all work for about a month. Dr. Ogunwande's diagnoses were acute lumbosacral strain and sprain, acute thoracal and lumbosacral contusions, and acute left hip contusion, as status post work-related injury, with multi-level disc bulge with annular tear and acute thoracal strain and sprain with multi-level disc bulges.

Upon physical examination, Dr. Meyers noted Claimant walked with a limp and was using a single-point cane. While she had no abnormalities in the low back or lower extremities, there was hypertonicity on palpation in the lumbar paraspinals and over the left lateral hip area. There was tenderness over the lumbar region and lumbosacral junction and the left hip. She had a positive sacroiliac compression test and pressure at the sacral sulci on both sides. She had a positive straight leg raising test on the right. Seated root test elicited increased low back pain. She also had significant decreases to range of motion of the low back and left hip. Dr. Meyers diagnosed low back pain with radiation, aggravation of lumbar degenerative disease, lumbar radiculitis, left hip/pelvic pain, and lower extremity pain on the left.

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Dr. Meyers recommended that Claimant initiate physical therapy and continue on the medication provided by Dr. Ogunwande. However, by December 2014, she switched her treatment to Delaware Back Pain and Sports Rehabilitation Center, which practice Dr. Meyers had joined. Going forward, he continued her on medications, chiropractic treatment, an exercise program, and interventional pain management with Dr. Glassman in February 2015.

During the period of treatment, Dr. Meyers opined she remained disabled from all work, other than for a short period from January 9 through 21, 2015, when Dr. Glassman had released her to return to work with restrictions. But due to increasing symptoms, she again returned to a no work level.

Claimant last saw Dr. Glassman on February 18, 2015, when she reported her pain was getting better. But her physical examination at that time continued to noted paraspinal muscle tenderness and decreased range of motion in the lumbar spine secondary to pain. She also continued with a positive Patrick's test, suggestive of hip pathology. Dr. Glassman's diagnoses included low back pain, lumbosacral radiculitis and somatic dysfunction, lower limb pain, and thoracic spine pain.

In reviewing Claimant's prior medical records, including previous motor vehicle accidents, Dr. Meyers concluded that she had prior back problems but had not been treated for them in three years prior to the work accident.

In reviewing the defense medical examination notes of Dr. Ali Kalamchi, Dr. Meyers agreed Claimant had undergone a lumbar MRI in 2003 and one again in September 2014. Dr. Meyers concluded the most recent study shows some mild degenerative changes consistent with a person of her age. But those pre-existing degenerative changes can be easily aggravated with an incident like the work accident. Dr. Kalamchi believed she had sustained

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a blunt injury to the low back causing soft tissue strain requiring treatment for four to six weeks. However, Dr. Meyers disagrees with the limited time period as to recovery for musculoskeletal problems offered by Dr. Kalamchi as to the injuries Claimant sustained.

On cross examination, Dr. Meyers agreed that Claimant described attempting to sit on a toilet at work when she fell backwards developing

on onset of pain to the low back and left hip area. At the emergency room on August 11, 2014, the records reflect she was "sitting down on the toilet, missed and hit back on toilet." She described no acute distress that day when a general physical was performed. When she saw Dr. Ogunwande on August 19, she described the process of sitting on the commode, falling backwards and her back striking the edge of the toilet. She told Dr. Kalamchi that she was in a hurry and she missed the toilet. The toilet was not broken and she did not catch it but was just "off target."

Dr. Meyers agreed that Dr. Glassman released Claimant to part-time sedentary duty work on January 9, 2015, for a few weeks, but later again restricted her from all work. A January 15, 2015 EMG was normal with no evidence of radiculopathy, suggesting her lower extremity complaints are soft tissue or related to the hip. A December 11, 2014 MRI of the left hip found normal soft tissues. She has attended thirty-six chiropractic visits since the work accident and she is crossing the six-month period for chronic pain provided in the applicable healthcare guidelines. Dr. Meyers agreed that Claimant is overweight with a BMI of 38, which could cause back pain. But she had a discrete and specific injury and did not have back pain before that event.

Rickey Morrison, the supervisor of building services at WFS, testified on behalf of the employer. He was Claimant's supervisor and made an injury report about Claimant on

August 10, 2014. She called him at home at around 1 p.m. to tell him that she was injured when she was using the nurse's bathroom.

On cross examination, Mr. Morrison agreed that it may be his handwriting on the Lyons Companies WC Incident Report form (Claimant's Exhibit No. 1). She told him the incident occurred at 11:30 a.m. She said she was working in the business office, but went to the nurse's office to use the toilet when she hit her back on the front of the toilet. He did not think it made sense for Claimant to use the toilet in the nurse's office when she was cleaning in the business office. Claimant told him she felt numbness and he asked her if she wanted to go to the emergency room. She told him she was putting ice on her body.

Claimant was working alone doing cleaning that day and she did not ask him to come in. However, he had stopped by the school after church that morning to prepare a classroom for the use of another group and he spoke briefly in person with her.

Leslie C. Tryon, the acting business manager for WFS, testified on behalf of the employer. In August 2014, she was the director of accounting and benefits. Claimant received her full wages after the work accident. In a letter dated February 25, 2015, Ms. Tryon advised Claimant of her FMLA rights, which were unpaid, and that her short term disability would pay her full salary for 6 months. Her short term disability began on August 11, 2014, and expired on February 11, 2014. WFS held her job open for her during the short term disability period. Claimant also applied for long-term disability.

On cross examination, Ms. Tryon explained there is no charge to the employee for short-term disability for six months. However, long term disability is paid by the employee 100% with after tax dollars. There has been no acceptance of the work accident claim by the

employer. However, because of her continued absence from work, Claimant was terminated as of February 27, 2015.

Ali Kalamchi, M.D., an orthopedic spine surgeon, testified by deposition on the employer's behalf. He evaluated Claimant on February 27, 2015, and reviewed her medical records. Dr. Kalamchi opined Claimant has a nonorganic presentation inconsistent with her clinical examination findings. Relying on the medical records, he agreed she sustained a blunt injury to

the low back on in August 2014 and that up to eight weeks of conservative treatment for acute soft tissue sprain would be reasonable. Regardless of causation, Dr. Kalamchi opined she was capable of returning to work after that six to eight week time frame. He conducted a physical capacities evaluation in February 2015 and concluded she was capable of returning to work to her regular work status.

Claimant told the doctor while working at WFS as a janitor she had an urge to urinate. She was in a hurry and missed the toilet. The toilet was not broken and she did not catch it or hit the edge and slide off, she was just "off target." She fell onto her buttock more on the left side. After she gathered herself she got up and tried to call her supervisor who had left the building. She did not continue working and sat in her car as there were other persons working in the building and she was responsible for locking the door. Later, she tried to find an urgent care center but none were open. Because she experienced increasing pain the next day, she visited the emergency room. Subsequently, she sought treatment from Dr. Ogunwande.

Dr. Kalamchi agreed that the description Claimant provided to other care givers, such as Dr. Meyers, were similar to what she told him.

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Dr. Kalamchi discussed the subjective and objective nature of Waddell's signs which can show a patient is exaggerating symptoms or has psychosomatic or emotional issues which are inconsistent with clinical findings or abnormalities.

Upon physical examination, Dr. Kalamchi found positive Waddell's sign for trunk rotation and straight leg raising, but Claimant did not have any gross sensory or motor deficit in the lower limbs. He also found positive Waddell's sign for overreaction of pain to the lumbar spine. In addition, she was walking with a cane and leaning forward with guarded movements. Otherwise, he found active ranges of motion. There was no palpable paraspinal spasm and lordosis was maintained. Even if he accepts that she sustained soft tissue sprain as a result of the work accident some six months before, she should not be that limited in range of motion for the lumbar spine. She also told the doctor that she was able to take care of her house and perform activities of daily living without assistance, which was inconsistent with her subjective complaints. Dr. Kalamchi also found that some of her presentations were nonorganic, including facial grimacing with simple movement, and symptom magnification. He found it difficult to perform a hip examination due to Claimant's subjective complaints. Furthermore, her left hip MRI was normal.

Regardless of causation, Dr. Kalamchi allowed for four to six to eight weeks of conservative treatment for Claimant's acute soft tissue sprain. He disagrees that she continues to require treatment six months after the work accident. After the initial period of conservative treatment, she would have been able to return to her pre-injury status at work. His work capacity opinion is supported by the physical capacities evaluation he conducted on February 27, 2015 (Deposition Exhibit No. 1 to Employer's Exhibit No. 1).

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On cross examination, Dr. Kalamchi agreed that Claimant sustained a blunt injury to her low back. At the time of the defense medical examination, the doctor saw no lasting effect regarding the left hip, but she may have sustained blunt injury to the left hip.

He personally reviewed the September 2014 MRI of the lumbar spine, which showed a broad, flat bulge with a very small chronic tear and recessed stenosis at the L4 level. At the L5-S1 level, there was a prominent central bulge with chronic mild bilateral stenosis. At the L3-4 level, there was a central bulge with a small annular tear in addition to facet arthritis. Dr. Kalamchi agreed that the 2014 MRI of the lumbar spine showed changes and a progression in degeneration compare to the 2003 lumbar MRI.

With respect to his discussion of Waddell's signs, the defense doctor agreed that Dr. Waddell wrote in a 1998 journal article[1] that the signs have been misinterpreted and misused in both the clinical context and in medico legal assessment. However, Dr. Kalamchi doctor explained again that Claimant does not have a major herniation compressing on the nerve to make her have radiculopathy, numbness or weakness.

He conceded that an asymptomatic degenerative condition in the lumbar spine can become symptomatic as a result of an injury, and the Claimant had a pre-existing degenerative condition to the lumbar spine before the August 2014. In general, a soft tissue sprain would require no more than six to eight weeks of treatment. In Claimant's case, he believes that after that time, her subjective presentation was not in line with her positive clinical findings. But he conceded that the mechanism of injury was consistent with the presentation of symptoms she reported.

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On redirect examination, Dr. Kalamchi confirmed that when Claimant saw Dr. Ogunwande on October 15, 2014, she denied any radiation of symptoms and that she was in no acute distress on August 11, 2014, when she visited the emergency room.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

"Arising Out of and in the Course of Employment" under Section 2304

The primary issue presented to the Board is whether the injuries suffered by Claimant in an incident that occurred on August 10, 2014, arose out of and in the course of her employment with WFS.[2] *See Histed v. E.I. DuPont de Nemours & Co,* 621 A.2d 340, 343 (Del. 1993). The employer acknowledges that while working her shift as a janitor on that date she went to the restroom and fell while attempting to sit on the toilet. But WFS contends that Claimant should be denied compensation, because she was engaging in an activity that did not arise from her employment although it may have occurred at a time and place in the course of her employment. Claimant counters that she is entitled to compensation based on the "personal comfort doctrine."

The Workers' Compensation Act ("Act") states that an employee will be compensated "for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence." Del. Code Ann. tit.19, § 2304. The requirements "arising out of and "in the course of employment are two separate prongs both of which must be met for workers' compensation to be available under the statute. *Stevens v. State,* 802 A.2d 939, 945 (Del. Super. 2002). For employees with a fixed time and place of employment, workers' compensation benefits are generally only available for injuries that occur "...while the employee is engaged in, on or about the premises where the employee's services are being

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performed, which are occupied by, or under the control of, the employer." *See* Del. Code Ann. tit.19, § 2301(18)(a).

Ultimately, whether a claimant's injuries arose within the course and scope of employment is a legal conclusion determined by the facts under a totality of the circumstances analysis. *Stevens,* 802 A.2d at 945; *Histed,* 621 A.2d at 342. *See also Spellman v. Christiana Care Health Services,* No. 315,2012, slip op. at 8, 12 (Del. Apr. 8, 2013) (en banc). The Supreme Court in *Spellman* recently cautioned that the fundamental inquiry in deciding scope of employment issues is to consider whether, under the totality of the circumstances, the employment contract between the employer and the employee contemplated that the employee's activity at the time of injury should be regarded as work-related and therefore compensable. *Id.* at 12. When the contract-related evidence is insufficient to resolve the issue, the Board may resort to secondary default presumptions and rules of construction,

such as the "going and coming rule" and its various exceptions, including the premises rule, that further the purpose of the workers' compensation act. *Id.* at 12-13.

After considering the totality of the circumstances, the Board finds that Claimant's injuries arose out of and within the course of employment her employment with WFS on August 10, 2014, and are therefore compensable.

The Board first addresses whether Claimant's injuries were "in the course of employment" when she fell at work attempting to use the toilet. "[I]n the course of employment refers to the time, place and circumstances of the injury. *Stevens,* 802 A.2d at 945. "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,* 45 A.2d at 543-44. The Board determines that the time of the accident placed

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Claimant within the course of employment, based on Claimant's unrebutted testimony that the accident occurred at approximately 11:30 a.m. as she was cleaning offices at the school on a scheduled work shift. The employer concedes to these facts.

The Board next addresses whether Claimant's injury arose out of her employment with WFS. "[A]rising out of" (or "scope of") employment refers to the origin of the accident and its cause. *Id.* Most authorities "hold that an injury arises out of employment if it arises out of the nature, conditions, obligations or incidents of the employment, or has a reasonable relation to it." *Dravo Corp. v. Strosnider,* 45 A.2d 542, 544 (Del. Super. Ct. 1945). An essential causal relationship between the employment and the injury is unnecessary, so an employee does not have to be injured during a job-related activity to be eligible for workers' compensation benefits. *Stevens,* 802 A.2d at 945. "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. The courts have repeatedly emphasized that an "employee does not have to be injured during a job-related activity to be eligible for worker's compensation benefits." *Tickles v. PNC Bank,* 703 A.2d 633, 637 (Del. 1997) (employee injured on premises while engaging in an act of personal convenience in preparation for the workday was within the course and scope of the workers' compensation act). Acts incidental to employment are all considered to be within the course and scope of employment. *Id.*

There was no employment contract evidence presented at the Board hearing to determine if according to the Delaware Supreme Court's recent rationale in *Spellman* such contractual terms would resolve the "scope of employment" issue presented in this case.

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However, Claimant argues that the "personal comfort doctrine" followed in Delaware applies and controls under the circumstances here. "Employees, who, within the time and space limits of their employment, engage in acts which minister to personal comfort, do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred." *Stevens,* 802 A.2d at 949. The Delaware Supreme Court has held that an essential causal relationship between the employment and the injury is unnecessary. *Tickles v. PNC Bank,* 703 A.2d 633 (Del. 1997). Therefore, the employee does not have to be injured during a job-related activity to be eligible for workers' compensation benefits. *Id.* Furthermore, Delaware has more specifically recognized that incidental acts of person convenience or comfort, such as eating, drinking, smoking, *seeking toilet facilities,* and seeking fresh air, coolness or warmth, occur in the course of employment. *Dover Post v. Cook,* 2006 WL 2337359 (Del. Super. July 20, 2006)(emphasis added).

On the other hand, WFS contends that the "personal comfort doctrine" only determines whether the accident arose "in the course of employment," and does not address whether the accident "arose out of employment."

After weighing the evidence and arguments in this case, the Board disagrees with the employer's position on the "personal comfort doctrine" issue. The Board concludes that Claimant was engaged in an activity "arising out of her employment when she was injured, because she was engaged in an act ministering to her personal comfort within her scheduled work time on the school's premises, which was an expected and normal departure and did not indicate an intent to abandon her job temporarily. Specifically, Claimant was in the process using a toilet, when she missed the commode and fell to the floor. Taking a bathroom break

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is sufficiently a normal bodily function which should be an anticipated departure in her employment during the course of a regular eight-hour work shiftwork shift. As such, the Board concludes the injury arose from a situation "which is an incident or has a reasonable relation to the employment..." *Dravo,* 45 A.2d at 544.

Similar to the claimant in *Dover Post,* Claimant's accident occurred while on the work premises and during scheduled work hours. The act of using a bathroom may be considered a minor deviation from her job tasks. She did not violate any work rule by attempting to use the toilet and her use of the bathroom did not cause her to neglect her assigned work. While Claimant's situation here is distinguishable from the facts in *Tickles,* in which a claimant's slip and fall on the employer's multi-building complex prior to the start of the work day was determined to be compensable, her use of the bathroom on August 10, 2014, easily qualifies as an incident of employment under the *Tickles* analysis. The Delaware Supreme Court concluded that reasonably necessary acts of personal convenience or comfort that take place on the employer's premises, even in anticipation of the workday, are incident to employment. Claimant in the case *sub judice* was clearly within the course of her employment on August 10 and merely taking a break from her regular job duties to use the restroom at the time she was injured.

While there was some factual disagreement at the hearing with respect to whether Claimant's fall while attempting to use the toilet occurred in a business office bathroom or a nurse's office bathroom, the Board does not consider that distinction significant or legally relevant. In either case, she fell while administering to her own personal comfort in using toilet facilities located on the school's premises and during her work shift.

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Furthermore, the Board also does not find the case law supporting the position of WFS in its legal memorandum to be relevant to its conclusions here. The sole Delaware case cited, *Simms v. State,* Del. I.A.B., Hearing No. 1340237 (April 5, 2010), involves an "idiopathic fall" and does not stand for the proposition that a causal relationship between employment and an injury is necessary when the injuries result from an accident which occurs while the employee is engaged in incidental acts. There is no testimony on the record in this case to suggest that Claimant suffered an "idiopathic fall." In fact, the Board found her credible that the fall occurred while using the toilet because she was simply in a hurry due to the urgency to urinate and was "off target." Such a fall is similar to a worker simply tripping on the premises due to haste or clumsiness. Based on the *Simms* result, which is merely a Board decision that provides no binding precedent, Claimant's argument is reasonable that Delaware only requires that an employment-related activity contribute to the injuries sustained by the claimant when the claimant suffers an idiopathic incident.

With respect to the case law from other jurisdictions cited by WFS, which all involve accidents in an employer's bathroom facilities, the

Board find them to be factually distinguishable, particularly when viewed within the framework of the binding precedent set forth in the Delaware case law from the Supreme Court and Superior Court as referenced above.

Finally, the Board does not find the WFS's premise persuasive that the two prongs of Del. Code Ann. tit.19, § 2304 must be separately and distinctly applied in determining whether injuries are compensable. Indeed, Prof. Lex Larson in his treatise has warned against such a strict conjunction in explaining "it should never be forgotten that the basic concept of compensation coverage is unitarian, not dual, and is best expressed in the term 'work

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connection.'"[3] He goes on to further state "an uncompromising insistence on independent application of the two portions of the test can, in certain cases, exclude clearly work-connected injuries."[4]

Nature and Extent of Claimant's Work Injuries (Total Disability & Medical Expenses)

On her Petition to Determine Compensation Due, Claimant carries the burden of proof and must demonstrate, by a preponderance of the evidence, that but for her work accident on August 10, 2014, she would not have developed injuries to the low back and left hip. *See Reese v. Home Budget Center,* 619 A.2d 907 (Del. 1992)(defming the "but for" standard of causation). To that end a claimant must produce expert testimony relating the causation of his or her medical condition to his or her employment. *Anderson v. General Motors Corp.,* 442 A.2d 1359 (Del. 1982). A pre-existing disease or infirmity, whether overt or latent, does not disqualify a claim for workers' compensation benefits if the employment aggravated, accelerated, or in combination with the infirmity produced the disability. If the injury serves to produce a further injurious result by precipitating or accelerating a previous, dormant condition, a causal connection can be said to have been established. *Reese* at 910. *See also* 1A Arthur Larson, *Workmen's Compensation Law* §12.21.

When the medical testimony is in conflict, the Board, in its role as the finder of fact, must resolve the conflict. *General Motors Corp. v. McNemar,* 202 A.2d 803 (Del. 1964). As long as substantial evidence is found, the Board may accept the testimony of one expert over another. *Standard Distributing Company v. Nally,* 630 A.2d 640, 646 (Del. 1993).

The Board finds that Claimant has carried her burden of proof to show that she sustained a sprain or strain to the lumbar spine and a soft tissue injury to the left hip while

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performing her work duties as a janitor for WFS on August 10, 2014. The Board further concludes that these injuries restricted her from all work for a closed period from August 10, 2014, to the date of this decision.[5]

The Board accepts the opinion of Dr. Meyers that Claimant sustained a low back strain and sprain and left hip soft tissue injury on August 10, 2014, when she fell while using the toilet at work. Dr. Meyers began providing treatment to Claimant in November 2014, three months after the work accident. His diagnostic conclusions were based on Claimant's medical records from the emergency room and from prior treatment by Dr. Ogunwande along with the positive objective findings he made on clinical examination at her visits for treatment. Dr. Meyers also concluded that Claimant's pre-existing degenerative changes in the lumbar spine were aggravated by the fall at work. However, he also agreed that based on the most recent MRI and EMG studies following the work accident, Claimant demonstrated no radiculopathy and no abnormal soft tissue findings for the left hip.

The Board finds Claimant, who is fifty-nine, credible that she sustained injuries to the lumbar spine and left hip on August 10, 2014, when she

fell onto the floor while attempting to use a toilet. Before the work accident, she had required no medical treatment to the low back for at least several years before the work accident, although she had received some conservative treatment following prior motor vehicle accidents in 2003 and 2006. She has been able to work as a housekeeping custodian for WFS for over twenty years and worked without accommodation following those two prior motor vehicle accidents. While she continues to receive treatment, she would like to return to work. No surgery has been recommended for her continuing work-related complaints.

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The Board rejects the opinion of Dr. Kalamchi that Claimant's nonorganic presentation was inconsistent with her findings on clinical examination based on the medical records contemporaneous with the work accident and the opinion of Dr. Meyers, the treating doctor. The defense doctor did not examine her until February 2015, which was six months after the work accident. He concedes that she at least sustained a blunt injury to the low back, and possibly a blunt injury to the left hip, in August 2014 related to the mechanism of injury of the work accident. He agreed that there was some degeneration and progression of the lumbar spine when comparing the MRI findings from 2003 and 2014, and that an asymptomatic degenerative condition of the lumbar spine can become symptomatic as a result of an injury. He further agreed that mechanism of injury that Claimant alleges is consistent with the presentation of symptoms she reported following the work accident.

However, with respect to the period of total disability to which Claimant is entitled following the August 2010 injury, the Board is persuaded by Dr. Kalamchi's overall conclusion that Claimant is currently capable of returning to work since more than eight months have passed since the work accident and the nature and extent of those injuries. She has been diagnosed with only strain and sprain or soft tissue injuries. The doctor testified he conducted a physical capacities evaluation when he evaluated Claimant on February 27, 2015, and there were no specific findings for restrictions recorded on the report itself (Deposition Exhibit No. 1 to Employer's Exhibit No. 1). He cleared her at that time to return to regular activities and her pre-injury work status. Dr. Kalamchi's work capacity opinion is somewhat bolstered by the medical records for the prior work release of Dr. Glassman, who last provided treatment to Claimant in February 2015. Dr. Glassman had previously released Claimant to return to work with restrictions from January 9 through 21, 2015, but then later

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returned her to a "no work" level. The evidence presented is not clear as to when Dr. Meyers actually last saw Claimant for treatment, but he testified at his deposition in mid-March 2015 that she remains disabled from all work due to the work accident, presumably based on her most recent visit to Dr. Glassman in February 2015.

Given the gap in time, which is now over nine months since the work accident, and the nature of the sprain and strain or soft tissue injuries sustained in the work accident, the Board is inclined to tip the balance on the work capacity issue in favor of Dr. Kalamchi's opinion as Dr. Glassman did not testify directly at the hearing about Claimant's work capacity, her restrictions or why she was later returned to a "no work" status. Furthermore, it is not clear when Dr. Meyers actually last conducted a physical examination of Claimant or last provided treatment to her. For these reasons, the Board concludes that Claimant is now capable of returning to work to her pre-injury status in a full duty capacity without restrictions.

Nevertheless, based on the holding in *Gilliard-Belfast v. Wendy's, Inc.,* 754 A.2d 251 (Del. 2000)); *see also Delhaize America, Inc. v. Bonnie Baker,* Del. Supr., C.A. No. 108, 2005, Berger, J. (Aug. 12, 2005)(Order), the Board determines that Claimant is entitled to continue to receive total disability benefits in this case

during the period following the date of the work accident until the date of this decision since her treating physician, Dr. Meyers, continued to restrict her from all work at the time of the hearing, and there is no evidence of bad faith on the part of the doctor. "If a claimant is instructed by his or her treating physician that he or she is not to perform *any* work, the claimant will be deemed to be totally disabled during the period of the doctor's order. This rule assumes that the doctor acts in good faith, and does not extend beyond the time that the Board decides whether the claimant is disabled as a matter of fact." *Id.*

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As to the medical expenses in dispute, Claimant carries the burden of proof and must demonstrate by a preponderance of the evidence the medical expenses incurred were reasonable, necessary and causally related to the work accident. "Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board." *Bullock v. K-Mart Corporation,* Del. Super., C.A. No. 94A-02-002, 1995 WL 339025, at **3 (May 5, 1995); *see Keil's Wholesale Tire v. Marion,* Del. Supr., No. 174, 1986, Moore, J. (October 27, 1986)(Order).

The Board accepts the opinion of the treating physician Dr. Meyers that the conservative medical treatment provided to Claimant to date, totaling $22,846.95, has been reasonable, necessary and causally related to the August 2014 work accident. Either Dr. Meyers or Dr. Glassman continues to provide treatment for Claimant's continuing complaints, which she testified have improved overall. The Board rejects Dr. Kalamchi's opinion that Claimant required no more than six to eight weeks of conservative treatment following the work accident given the nature of her work injuries, her age, and her pre-existing asymptomatic condition which Dr. Kalamchi conceded may have been exacerbated by the work accident. She was not cleared by Dr. Glassman, one of her treating physicians, to return to work in any capacity until January 2015, which was well beyond the limited time period for which Dr. Kalamchi would have approved of conservative care. However, the Board makes no determination on future ongoing medical treatment at this time.

Attorney's Fees and Medical Witness Fees

A claimant who receives an award is entitled to a reasonable attorney's fee in an amount not to exceed thirty percent of the award or ten times the average weekly wage in

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Delaware as announced by the Secretary of Labor at the time of the award, whichever is less. Del. Code Ann. tit. 19, § 2320.

The term "compensation," for the purposes of awarding an attorney's fee, refers to "any favorable change of position or benefits, as the result of a Board decision, rather than just being limited to contemporaneous financial gain." *Willingham v. Kral Music, Inc.,* 505 A.2d 34, 36 (Del. Super. 1985), *aff'd.,* 508 A.2d 72 (Del. 1986). Nevertheless, when dealing with an award for a non-monetary benefit, such as a determination on course and scope of employment, the Board must still value the award with reference to an actual monetary amount affected by the ruling, so that there is some actual number against which to apply the statutory 30% calculation. *See Scott v. E.I. DuPont de Nemours & Co.,* Del. Super., C.A. No. 97A-06-008, Lee, J., 1998 WL 283455, at **4(March 30, 1998).

Since the Board determined that Claimant sustained a compensable injury within the course and scope of employment, which represents a favorable change in position, it must look to the resulting entitlement to workers' compensation benefits related to that determination. In this case, Claimant only seeks a finding of compensability, total disability benefits and medical treatment expenses.

In determining an award of attorney's fees, the Board must consider ten factors.[6] *See General*

Motors Corp. v. Cox, 304 A.2d 55, 57 (Del. 1973)(applied to I.A.B. hearings by *Jennings v. Hitchens,* 493 A. 2d 307, 310 (Del. Super. 1984)); *Thomason v. Temp Control,*

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Del. Super., C.A. No. 01A-07-009, Witham, J., *slip op*. at 5 - 6 (May 30, 2002). It is an abuse of the Board's discretion to fail to give consideration to these factors. *Thomason* at 7. When claimants seek an award of attorney's fees, they bear the burden of establishing entitlement to such an award. *Dowries v. Phoenix Steel Corp.,* Del. Super., C.A. No. 99A-03-006, 1999 WL 458797 at **4, Goldstein, J. (June 21, 1999)(the burden of proof in a workers' compensation case is on the moving party). Since the Board must consider the *Cox* factors when reviewing a request for fees, it follows that claimants must address these factors in their applications. The failure to do so deprives the Board of the facts it needs to properly assess a claimant's entitlement to fees.

Counsel for Claimant seeks a fee up to the statutory maximum. Counsel submitted an affidavit attesting that she spent 24.5 hours preparing for the evidentiary hearing held on April 1, 2015, which lasted approximately three hours. Her association with Claimant began in August 2014. Counsel has a one-third contingency fee arrangement with Claimant. Counsel did not attest that the case was novel, complex or difficult to prosecute, but to date she was also required to defend a prior motion to dismiss. The attorney agrees she was not precluded from representation of other clients while working on the case. Counsel has been admitted to the practice of law in Delaware since 2003 and has prior experience handling workers' compensation matters. Counsel attested that she did not expect to receive fees from any other source in the case and that there is no evidence or argument of the employer's inability to pay. WFS had no objection to the attorney fee affidavit.

Taking into consideration the *Cox* factors set forth above, the Board concludes that an attorney's fee award of $6,850.00 or 30% of the combined award for total disability benefits

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and medical expenses, whichever is less, represents an appropriate fee in this case and does not exceed the statutory maximum.

Having received an award, the Claimant is entitled to have her medical witness fees taxed as costs against the employer, pursuant to Del. Code Ann., tit.19, §2322(e).

STATEMENT OF THE DETERMINATION

Based on the foregoing, the Board hereby GRANTS Claimant's Petition to Determine Compensation Due and concludes she sustained compensable injuries to the lumbar spine and left hip on August 10, 2014, in a work accident "arising out of and in the course of course of employment," per Del. Code Ann. tit.19, § 2304. As a result, she is awarded total disability benefits from August 11, 2014, until the date of this decision, at the stipulated compensation rate, and medical expenses in the amount of $22,846.95. The Board also awards Claimant one attorney's fee and her medical witness fees.

IT IS SO ORDERED this 13th day of May, 2015.

/s/ Terence Shannon

/s/ Robert J. Mitchell

I hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

/s/_____
Joan Schneikart
Workers' Compensation Hearing Officer

Mailed Date: 5-15-15

/s/_____
OWC Staff

Notes:

[1.] Chris J. Main, PhD., and Gordon Waddell, DSc., M.D., "Spine Update Behavioral Responses to Examination," **Spine**; 23(21), 2367-2371.

[2.] Both parties submitted well-researched legal memoranda to the Board, which are part of the record, detailing their respective arguments as to Section 2304.

[3.] 1 Lex K. Larson, *Larson's Workers' Compensation,* Desk Edition, §3.01 (Matthew Bender, Rev. Ed. 2014).

[4.] *Id.* at §3.01, n.8 (referring to Ch. 29).

[5.] The Board notes that WFS is entitled to a credit for any employer-provided short-term disability benefits paid to Claimant during the closed period of total disability awarded.

[6.] The factors to be considered are: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill needed to perform the services properly; (2) the likelihood (if apparent to the client) that acceptance of the employment would preclude other employment by the attorney; (3) the fees customarily charged in the locality for such services; (4) the amount involved and the results obtained; (5) time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the attorney; (8) whether the fee is fixed or contingent; (9) the employer's ability to pay; and (10) whether fees and expenses have been or will be received from any other source.
