IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT J. SEINSOTH, JR.,	)	
	)	
Claimant Below, Appellant,	)	
	)	**CIVIL ACTION NUMBER**
v.	)	
	)	**00A-09-006-JOH**
RUMSEY ELECTRIC SUPPLY CO.,	)	
	)	
Employer Below, Appellee.	)	

Submitted: January 17, 2001
Decided: April 12, 2001

MEMORANDUM OPINION

Upon Appeal from a Decision of an Industrial Accident Board Hearing Officer - AFFIRMED

Gary S. Nitsche, Esq., Weik, Nitsche & Dougherty, attorney for claimant below, appellant

Anthony M. Frabizzio, Esq., of Heckler & Frabizzio, attorney for employer below, appellee

HERLIHY, Judge

Robert J. Seinsoth, Jr., appeals the decision of an Industrial Accident Board hearing officer denying his petition for benefits. The officer held Seinsoth could not recover for injuries sustained during some vigorous horseplay because he was a willing participant in it and it was outside the course and scope of employment.

Under Delaware law, an employee not participating in such horseplay may recover compensation for injuries sustained as a result of another employee's horseplay. An employee who participates, however, in such horseplay, which is prohibited by the employer, may not recover for injuries suffered as a result of horseplay, since the activity is determined to be outside the course and scope of employment.

In this case, Seinsoth, a warehouse employee, injured his left knee and ankle as a result of participating in some form of "wrestling" at his job site. He argues that a company manager participated in the horseplay and/or condoned it; therefore, this case is distinguishable from other Delaware decisions barring recovery of benefits. The employer, Rumsey Electric Supply Co., contended that person managed a different department and area within the work site and had no control or authority over the warehouse employees.

The hearing officer found the warehouse managers were unaware of the wrestling matches by the warehouse employees and decided the injury occurred from horseplay that was outside the course and scope of employment. The issue presented is whether the nature and extent of the horseplay and Seinsoth's participation, despite

the manger's possible participation, disqualify him from benefits, as the hearing officer found. The Court holds that they do and the hearing officer's decision is AFFIRMED.

FACTUAL BACKGROUND

Rumsey is an electrical supply company which maintains a warehouse where contractors and the public may purchase electrical supplies. At the time of this incident, the public purchased supplies through a counter sales area; managed by Tony Cassetta. Cassetta had no direct managerial duties over the warehouse employees. Thomas Logue and Warner Jester managed the warehouse.

Approximately twenty people worked in the warehouse. It tended to be busier in the summer than in the winter and during the afternoon, rather than the morning. During the slow periods, the warehouse employees would perform odd jobs such as cleaning and straightening up the warehouse. Occasionally, at the end of the day, the employees would toss a football around, but never inside the warehouse.

Seinsoth worked for Rumsey in the warehouse as a "warehouse picker." His duties mainly consisted of filling orders for customers. On February 3, 1999, Seinsoth was injured while engaged in some rough-housing with co-workers. There was no indication there was any intention to injure him. Rumsey's policy supposedly forbad horseplay and all the employees engaging in this incident knew and were aware it could lead to disciplinary action.

As a result of the injuries he sustained in this incident, Seinsoth filed a petition with the Board to determine compensation due for two periods of total disability and medical expenses. Dr. Paul Kupcha, an orthopaedic surgeon, who

examined Seinsoth on February 4, 1999, concluded that Seinsoth suffered a tear of the medial meniscus of his left knee and an acute avulsion fracture of the malleolus of the left ankle. Seinsoth underwent two surgeries, one on May 14, 1999 and the other on May 25, 1999. Rumsey did not dispute these injuries, but argued they were not sustained in the course and scope of employment. The parties stipulated the dispute would be heard and decided by a Worker's Compensation hearing officer in lieu of the Board.[1]

Seinsoth told the hearing officer that he was injured during what was loosely described by all involved as a wrestling match on February 3, 1999. While exiting a bathroom around lunchtime, he stated several employees tackled him. He told them he did not want to participate. The incident continued and, when they were trying to take him to the ground, his left leg snapped. He testified that there was regular pushing, shoving and wrestling consistently on the job. He stated that Logue, the warehouse manager, knew of the wrestling and Cassetta, the public sales counter manager, participated in the wrestling. Seinsoth knew, however, that wrestling was prohibited in the workplace and testified he told those attacking him that he did not want to participate. For some reason, he felt more comfortable participating when manager Cassetta was involved.

Cassetta did not testify during the hearing. He apparently gave a statement to someone in connection with the incident which was read, in part, to Logue

---

[1] **19 *Del.C.* §2301B(a)(4).**

when he was being cross-examined. Cassetta indicated he saw the initial part of Seinsoth getting jumped, wished him luck but proceeded to walk away. While Logue said he would not expect a manager such as Cassetta to behave this way, and even though Cassetta had no supervisory role over the employees engaged in this incident, apparently no disciplinary action was taken.

Christopher Woodin, who worked at the Rumsey warehouse for three years, testified on behalf of Seinsoth that the week before the February 3rd incident, the warehouse employees teamed up and conducted three or four so-called wrestling matches on the job in the warehouse. He stated that the matches consisted of three or four persons per team and lasted a couple of minutes. Woodin further testified that manager Cassetta previously wrestled with the warehouse employees, but Cassetta had no authority over him because he was the counter sales manager and not the warehouse manager. The incident, according to Woodin, occurred sometime around lunchtime.

Michael Barlow, a former Rumsey employee of five years, testified on behalf of Seinsoth. He stated the employees regularly pushed each other and played around for approximately three days before the wrestling on February 3rd. He testified employees would form wrestling teams and frequently switched team members, but confirmed the wrestling took place when nobody was around. He stated that manager Cassetta knew of the wrestling activities and Seinsoth was injured while engaged in the so-called wrestling incident.

Matthew Murray, another former Rumsey employee of two years, testified that during the slow periods of work, to pass the time, the employees conducted

wrestling matches. He stated Logue, the warehouse manager, never discovered the wrestling because he was a hard worker and does not have much time to watch over the employees. He had just clocked out for lunch when the incident started, so he concluded it occurred between 12:05 and 12:10 p.m.

Eric Fleming, an employee of Rumsey for three years, testified the incident happened a little bit after noon. He stated that Seinsoth was an active participant, and Seinsoth, James Hinton, Barlow, Woodin, Mike Lane, Murray and himself were all involved in the "WWF" style wrestling match on February 3rd. He testified they would never wrestle out in the open and these matches occurred once or twice a day. Earlier in the day, Seinsoth had cornered him during a wrestling match.

Hinton testified on behalf of Rumsey. He continues to work for Rumsey and has been an employee for approximately six years. He stated wrestling matches previously occurred in the days before the February 3rd injury. He testified that if Jester or Logue, the only managers to whom he answered, knew or saw the wrestling, it would have stopped. He firmly believed the incident occurred at lunchtime because he was at the counter.

Tom Logue, an employee for about five and one-half years, is the materials distribution manager of the warehouse. His employment duties consist of the warehouse administrative work, such as handling employee mishaps, accidents and taking disciplinary action. He was unaware of the wrestling matches before Seinsoth's injury, but he told the hearing officer:

> **The couple days before that I didn't see anything. In the past, the guys are younger there. You know, they like to flex their muscles every once in a while. You know, sometimes tempers flare. Anytime Warner [Jester] or myself ever say anything, we would stop it right there and say you known, there is no horseplay.[2]**

He testified that as a manager, Cassetta, instead of wrestling, should have stopped the wrestling matches. He confirmed horseplay was not tolerated at the workplace; it was a Rumsey employee handbook violation.

The final Rumsey witness was Warner Jester, a public counter sales manager for the last six years. From his investigation of the incident, he concluded that the wrestling matches were going on for longer than two or three days. He testified that there had been an incident of wrestling down at the shipping desks, but the employees stopped when he yelled at them. He further testified that Cassetta, as the public counter sales manager, had no authority over the warehouse employees.

The hearing officer concluded that the wrestling incident was outside the course and scope of employment. He stated Seinsoth was an active participant in the wrestling when injured, rejecting his testimony that he told the others he did not want to participate. Instead, he accepted the testimony of Woodin, Barlow, Hinton and Fleming all of whom testified that Seinsoth never said he did not want to participate. Additionally, Seinsoth cornered Fleming earlier in the day indicating he was an active participant. The time of the incident ranged from 11:30 a.m. to 12:10 p.m. It is unclear

---

[2]Hearing Transcript (October 10, 2000) at 147.

if it happened before or during lunch. Seinsoth stated he usually washed his hands in the bathroom before going to lunch and the incident started when he exited the restroom and a co-worker grabbed him. On the other hand, the co-worker claimed Seinsoth ran out of the bathroom and grabbed him starting the wrestling. The hearing officer also determined the time of the incident was irrelevant in determining that the injury was outside the scope of employment.

After reviewing Delaware case law, the hearing officer decided the injury was a result of horseplay outside the scope of employment because: (1) the wrestling matches were not a continued practice in the employment so that engaging in that practice would be considered an accepted part of the employment; (2) there was no intent to cause injury; (3) Seinsoth was an active participant when injured, rejecting his testimony that he told his attackers he did not want to participate; (4) the matches were preformed in and kept secret; and (5) the employees knew they would be reprimanded if caught, indicating the wrestling matches were a substantial deviation from the scope of employment.

The hearing officer denied Seinsoth's contention that warehouse manager Logue knew about the wrestling matches. The hearing officer also denied compensation under the Larson[3] approach, which is a four-part test to determine whether or not horseplay constitutes a deviation from the course of employment.

PARTIES' CLAIMS

---

[3]1A Arthur Larson, *The Law of Workmen's Compensation*, §23.

Seinsoth argues that the hearing officer's determination that his injury did not occur during the course of employment was not supported by substantial evidence and is an error of law. He contends that the decision to deny compensation "is erroneous and misunderstands and misstates the summary of the evidence." He asserts the hearing officer failed to notice factual differences between this case and other Delaware cases and that a "plethora" of authority supports the reversal of the hearing officer's decision. Seinsoth's main contention is the management of Rumsey knew and even participated in the wrestling matches and this alone warrants reversal of the hearing officer's decision. Additionally, Seinsoth contends that the four-factor Larson test should be used in determining whether or not the wrestling constitutes horseplay outside the scope of employment.

Rumsey contends the hearing officer's decision was properly based on Delaware law; an injury occurring in the workplace is not compensable, if the injury was a result of horseplay outside of the course and scope of employment. Rumsey argues Seinsoth was an active participant in the horseplay, was not performing any specific work duties and knew that Logue or Jester would reprimand any horseplay activity. Lastly, Rumsey contends Delaware law is sufficient to determine whether the horseplay was outside the course and scope of employment, but even if the Larson factors were applied to this case, the horseplay would still be considered outside the scope of employment.

STANDARD OF REVIEW

As a result of a recent enactment of the General Assembly, parties to a contested compensation proceeding may stipulate to the use of a hearing office in lieu of the Board.[4] The hearing officer's decision has the same affect as a Board decision and "[i]s subject to judicial review on the same basis as a decision of the Board."[5]

---

[4] **19 *Del.C.* §2301B(a)(4).**

[5] ***Id.***

When there is an appeal from the Board, the function of this Court is to determine whether the Board's decision is supported by substantial evidence and free from legal error.[6] This requires the Court, as a reviewing court, to search the entire record to determine whether, based on all of the evidence and testimony, the Board could have reached the decision it did.[7] Substantial evidence is defined as evidence that a reasonable mind might accept as sufficient to support a conclusion.[8] This Court does not sit as a trier of fact making its own credibility determinations or factual findings.[9] These standards, therefore, will be used to review the hearing officer's decision in this matter.

---

[6] ***Lemmon v. Northwood Construction*, Del.Supr., 690 A.2d 912, 914 (1996).**

[7] ***National Cash Register v. Riner*, Del.Super., 424 A.2d 669, 674-75 (1980).**

[8] ***Oceanport Industries v. Wilmington Stevedores, Inc.*, Del.Supr., 636 A.2d 892, 899 (1994).**

[9] ***Keeler v. Metal Masters Food Service Equipment Co., Inc.*, Del.Supr., 712 A.2d 1004, 1006 (1998).**

DISCUSSION

A

To be eligible for benefits, Seinsoth must establish by a preponderance of the evidence that he suffered an injury as a result of an accident occurring in the course of his employment.[10] The term "in the course of his employment" relates to the time, place and circumstances of the accident.[11]

---

[10] ***Johnson v. Chrysler Corp.*, Del.Supr., 213 A.2d 64, 66 (1965).**

[11] ***Dravo Corporation v. Strosnider*, Del.Super., 45 A.2d 542, 543 (1945).**

Admittedly, Delaware case law, as it relates to horseplay injuries in the workplace, is sparse on this issue. In 1975, the Delaware Supreme Court in *General Foods Corp. v. Twilley*,[12] held a "non-participating victim of 'horseplay' may recover compensation."[13] The victim in *Twilley* was hit on the head by a hard aluminum-foil ball about the size of a softball, which caused her to suffer an ear and neck injury.[14] The court stated the victim previously had participated in the ball-throwing activity, but agreed with the Board that no evidence was presented that the employee was a participant at the time of the accident.[15]

In this case, the hearing officer determined Seinsoth was a willing participant in the immediate incident during which he was injured. He found Seinsoth had engaged in the so-called wrestling earlier in the day and rejected Seinsoth's testimony that he told his co-workers, when first grabbed, that he did not want to participate.

---

[12]**Del.Supr., 341 A.2d 711 (1975).**

[13]***Id.*** **at 712 (citing 1A Arthur Larson, *The Law of Workmen's Compensation*, §23.20).**

[14]***Id.*** **at 711.**

[15]***Id.*** **at 712.**

Resolution of conflicting evidence are responsibilities properly left to the Board (hearing officer).[16] Fleming's testimony that Seinsoth cornered him earlier in the day proved Seinsoth was an active participant in the wrestling. More importantly, none of the employees testified that Seinsoth stated he did not want to participate in the wrestling matches or that he did not or refused to participate in the February 3rd match during which he was injured. While each participant had a reason to testify about Seinsoth's willingness or unwillingness, there was ample evidence, if believed, to support the conclusion that he was an active participant.

This Court addressed the issue of whether or not horseplay is within the course and scope of employment in *Lomascolo v. RAF Industries*.[17] In *Lomascolo*, the claimant was injured while wrestling with another employee, John Stubbs. The claimant testified, during the wrestling, he dropped to his knees and upon standing up, his right knee popped out of place.[18] Stubbs, however, testified the claimant grabbed him from behind and, after the claimant refused to release him, he forcefully repelled the claimant, who fell onto the floor and injured his knee.[19] This Court affirmed the Board's decision that the claimant was the perpetrator of the horseplay and his injury did not rise out of the course of and within the scope of his employment. This Court stated that although the injury occurred during work hours, and at the location where

---

[16] ***Simmons v. Delaware State Hospital*, Del.Supr., 660 A.2d 384, 388 (1995).**

[17] **Del.Super., C.A.No. 93A-11-013, Alford, J. (June 29, 1994).**

[18] ***Id.* at 1.**

[19] ***Id.***

the claimant was scheduled to perform his duties, the claimant's horseplay could be deemed to have arisen out of or within the course of his employment because the employer's work rules prohibit horseplay and the claimant was aware of these rules.[20]

[20] ***Id.*** **at 2.**

In *Cave v. Perdue Farms*,[21] the claimant was injured when he was involved in a forklift collision on the employers's premises during working hours, as here. The Board decided the claimant was engaged in horseplay at the time of the accident because he was following his co-worker too closely from behind colliding with him.[22] This Court upheld the Board's decision by simply stating the injuries resulted from the claimant's horseplay that was outside the course of employment.[23]

The Court concurs with the hearing officer's factual/legal conclusion that it was irrelevant when Seinsoth was hurt, namely, it was or was not his lunchtime. It was disputed whether Seinsoth had "punched out" for lunch or was on his way to lunch. It is uncontradicted that the injury occurred on the employer's premises, where Seinsoth performed his job and within the time parameters of his normal working hours. But, the location of the horseplay does not help Seinsoth.[24]

---

[21]Del.Super., C.A.No. 94A-11-002, Graves, J. (August 28, 1995).

[22]*Id.* at 4.

[23]*Id.*

[24]Compare *Histed v. E. I DuPont deNemours & Co.*, Del.Supr., 621 A.2d 340 (1993) (Allowing benefits for an employee traveling to work who was specially summoned. This was an exception to the normal no-benefits rule for injuries suffered

while traveling to or from work.).

He points to other circumstances in *Cave* and *Lomascolo* which makes his claim distinguishable and recoverable. Similar to *Lomascolo*, the workplace rules prohibited horseplay and Seinsoth testified he was aware of these rules. Seinsoth argues *Lomascolo* and *Cave* are distinguishable, however, from this case because the horseplay was not an isolated incident and management knew it. He asserts management knew of the wrestling because manager Cassetta participated in the wrestling and saw the beginning of this particular incident. Although true, Cassetta was only the public counter sales manager, but if the employees thought it was permissible to wrestle in front of the warehouse managers, they would not have performed the wrestling matches when no one was around. Cassetta maintained no power to control or discipline the warehouse employees. Jester and Woodin both testified Cassetta had no authority over the warehouse employees.

But, warehouse manager Logue testified that he was unaware of the wrestling matches. Murray stated Logue never had time to watch over the warehouse employees. Logue and Jester were the only two managers in charge of the warehouse employees. Hinton testified that, if either Jester or Logue knew or saw the wrestling, it would have been stopped. It was never stopped by anyone having the proper authority and knowledge of the "wrestling" activities.

It seems, however, that Logue tolerated a certain amount of physical horseplay other than the specific three days of "wrestling" leading up to Seinsoth's injuries. Further, despite the injuries and probable physical force needed to inflict them, the record indicates no one was disciplined for this incident creating concerns,

therefore, about laxity in management. None of this helps Seinsoth. Whatever Cassetta's participation or knowledge, it cannot be imputed to Logue or Jester nor does it make the "wrestling" an expected part of the employment.

The vigorous horseplay here, even though occurring over several days prior to the injuries, was outside the course and scope of employment. All of the employees testified the wrestling was prohibited horseplay. Seinsoth was injured as a direct result from participating in an activity that was prohibited by work rules. Fleming and Barlow also stated the employees would never wrestle out in the open, but only when nobody was around. This was so they would not be reprimanded for their behavior.

While admittedly sparse in number, the limited Delaware precedents were correctly applied in this case to deny Seinsoth's petition for benefits. On that basis, the hearing officer's decision is free from legal error and, since there is substantial evidence to support his factual findings, it must be affirmed.[25]

---

[25]*Buckley v. Delaware Valley Rehabilitation Services, Inc.*, Del.Supr., 711 A.2d 789, 792 (1998).

B

Seinsoth argues, however, that these precedents are inadequate to support the hearing officer's decision or uphold it on appeal. He says this Court should look to decisions in other jurisdictions upholding an award of benefits in cases of horseplay.[26] Because this Court finds even the few Delaware cases are sufficient to decide the legal issues presented in this case, there is no need to look at decisions outside of Delaware.

In addition to seeking support form those out-of-state cases, Seinsoth argues in this Court as he did before the hearing officer that Larson's four-part test should be utilized to determine compensation for horseplay. No court in Delaware has adopted it. Seinsoth cites a 1990 Board decision which apparently utilized it to award benefits. That decision was not appealed and appears to be isolated. *Lomascolo* and *Cave* were decided after the Board decision but neither applied the Larson test.

---

[26]***See, e.g., Carvalho v. Decorative Fabrics Co.*, R.I.Supr., 366 A.2d 157 (1976); *Trotter v. County of Monmouth*, N.J.Super., 365 A.2d 1374 (1976); *County Commissioners of Anne Arundel Co. v. Cole*, Md.Ct.App., 206 A.2d 553 (1965).**

Seinsoth notes Vermont has adopted the four-part Larson test.[27] While the test has some appeal, this Court sees no basis under current Delaware precedent to adopt it. Because of that precedent, any adoption must come from the Supreme Court. The Larson factors are: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (*i.e.*, whether it was co-mingled with the performance of duty or involved an abandonment of duty); (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay.[28]

While not required to do so, the hearing officer applied the Larson test to the facts before him. Applying it, he still determined no compensation was due. He found the "wrestling" activity to be a substantial deviation from the work of Rumsey, especially in the number of people involved, efforts to hide it from supervisors and the like. There was no "co-mingling" of the "wrestling" with other duties. Since it had only gone on for a few days, it had not become an accepted part of the work at Rumsey. All involved knew it was wrong and that they could be disciplined for participating in it. Even though there were idle moments which could lead to some horseplay, this kind of activity did not come with the job. Even Cassetta's apparent knowledge and possible

---

[27] ***Clodgo v. Rentavision, Inc.*, Vt.Supr., 701 A.2d 1044 (1997).**

[28] **1A Arthur Larson, *The Law of Workmen's Compensation*, §23.01.**

participation, the hearing officer found, did not raise a few days' of it to an accepted part of the job.

While again, this Court need not review these conclusions, it concurs with the hearing officer's views. Simply put: (1) organized team wrestling matches that lasted for a couple of minutes each match is a serious deviation from filling customer's orders in a warehouse; (2) the wrestling was not co-mingled with the performance of any duties; (3) as the hearing officer held, the wrestling occurred for a period of two-to-three days, the employees were cautious to undertake the matches when no one was around because they would be reprimanded if caught, and concluded it was not a continued practice in the employment; and (4) it is expected that some type of horseplay would occur in the context of this employment, but not organized team wrestling. The horseplay in this situation is determined to be outside the course and scope of employment.

CONCLUSION

Based on the reasons stated herein, the decision of the hearing officer is AFFIRMED.

IT IS SO ORDERED.

J.