

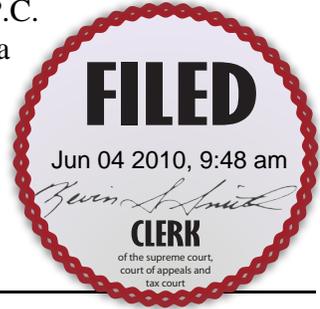
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**IN THE
COURT OF APPEALS OF INDIANA**

CELADON TRUCKING SERVICES)
OF INDIANA,)
)
Appellant/Defendant,)
)
vs.)
)
KENNETH SHARON,)
)
Appellee/Plaintiff.)

No. 93A02-0912-EX-1286

APPEAL FROM THE FULL WORKER'S COMPENSATION BOARD OF INDIANA
Application No. C-194945

June 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issue

Celadon Trucking Services of Indiana (“Celadon”) appeals a decision of the Full Worker’s Compensation Board of Indiana (“the Board”) affirming the single hearing member’s award of worker’s compensation benefits to Kenneth Sharon. Celadon essentially challenges the sufficiency of evidence supporting the full Board’s determination that Sharon’s injury arose out of and in the course of employment. We affirm.

Facts and Procedural History

Sharon was employed as a truck driver for Celadon. During his seven months’ employment with Celadon, he had driven approximately 112 loads. Of those, seven or eight involved his assistance with the loading or unloading process. Celadon utilizes a “Qualcom” communication system to provide instructions to its drivers. Each driver has a duty to check the Qualcom system to determine whether a given load is an “assist” load or a “no assist” load.

On August 26, 2008, Celadon sent Sharon a message indicating that his current load was a “no-assist” load. However, Sharon did not retrieve the message. On August 27, 2008, he suffered a lower back injury while loading cargo onto his truck in Santa Fe, New Mexico. The load was to be taken to Fort Worth, Texas for delivery. Although his common practice was to check with dispatch if any doubt existed regarding his duty to assist or refrain from assisting, he testified that he did not check on August 27, 2008, because he wanted to get the truck loaded and back out on the road. Tr. at 25. Although the client did not request his assistance, he gave it and was injured.

Celadon initially paid Sharon temporary total disability benefits from September 4, 2008, through September 17, 2008, but terminated the benefits upon learning that Sharon's injury occurred while he was loading a "no assist" load. On October 15, 2008, Sharon filed a worker's compensation claim alleging that he was injured on August 27, 2008, as the result of an accident arising out of and in the course of his employment with Celadon. On March 4, 2009, a hearing ensued before a single hearing member. On April 14, 2009, the single hearing member entered an award in favor of Sharon.

On April 27, 2009, Celadon filed a petition for review by the full Board. On October 20, 2009, the full Board held a hearing, and on December 2, 2009, the Board issued a decision affirming the determination of the single hearing member, with modification.¹ Celadon now appeals. Additional facts will be provided as necessary.

Discussion and Decision

Celadon challenges the sufficiency of evidence supporting the Board's conclusion that Sharon's injury arose out of and in the course of his employment. When reviewing a

¹ The modification consisted of the deletion of paragraph 5 of the single hearing member's findings and conclusions, which states:

As Plaintiff has established a prima facie case of compensability under our Act, the burden then shifts to the Defendant to establish a recognized exception or affirmative defense to the Plaintiff's claim. There being no such evidence in this case, the undersigned concludes that Plaintiff suffered an accidental injury arising out of and occurring in the course of his employment with Defendant on August 27, 2008.

Appellant's App. at 53. To the extent Celadon argues that this conclusion is contrary to law and reversal is required, we note that the Board's deletion of it clearly indicates that its decision was not based on it. Because the remainder of the Board's decision is sufficient to support its ruling, we need not address that issue.

worker's compensation decision, we are bound by the factual determinations of the Board and may not disturb them unless the evidence is undisputed and leads inescapably to a contrary conclusion. *Christopher R. Brown, D.D.S., Inc. v. Decatur County Mem'l Hosp.*, 892 N.E.2d 642, 646 (Ind. 2008). We must disregard all evidence unfavorable to the decision and consider only the evidence and reasonable inferences supporting the Board's findings. *Kovatch v. A.M. General*, 679 N.E.2d 940, 942 (Ind. Ct. App. 1997), *trans. denied*. We neither reweigh evidence nor judge witness credibility. *Id.* at 942-43. In recognition of the Board's expertise, we employ a deferential standard regarding its interpretation of the Worker's Compensation Act ("the Act"). *Brown*, 892 N.E.2d at 646. Thus, we will reverse only if the Board has incorrectly interpreted the Act. *Id.* The question of whether an injury arises out of and in the course of employment is a question of fact to be determined by the Board. *Kovatch*, 679 N.E.2d at 943. As such, if the Board reaches a legitimate conclusion based on the evidence, we cannot disturb that conclusion even though we might prefer another conclusion that is equally legitimate. *Id.*

The Act authorizes compensation to employees for "personal injury or death by accident arising out of and in the course of the employment." Ind. Code § 22-3-2-2(a). The employee bears the burden of proof, and the employee's proof of one element of the claim does not create a presumption in favor of the employee regarding another element of the claim. Ind. Code § 22-3-6-1(e).

"An injury 'arises out of' employment when a causal nexus exists between the injury sustained and the duties or services performed by the injured employee." *Outlaw v. Erbrich*

Products Co., Inc., 742 N.E.2d 526, 530 (Ind. Ct. App. 2001). Such nexus may be established by showing that the injury resulted from a risk specific to the employment, meaning that the person’s employment increased the hazard that led to the injury. *Global Constr., Inc. v. March*, 813 N.E.2d 1163, 1169 (Ind. 2004). “An accident occurs ‘in the course of employment’ when it takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is fulfilling the duties of employment or while engaged in doing something incidental thereto.” *Outlaw*, 742 N.E.2d at 530. Risks incidental to employment include: (1) risks distinctly associated with employment; (2) risks distinctly personal to the employee; and (3) risks that are neither distinctly employment-related nor distinctly personal. *Milledge v. Oaks*, 784 N.E.2d 926, 930 (Ind. 2003). If the risk falls within either the first or the last category, it is generally covered under the Act. *Id.* Thus, an employee’s activity will be considered incidental to his employment if the activity either directly or indirectly advances the employer’s interests. *Ski World v. Fife*, 489 N.E.2d 72, 75 (Ind. Ct. App. 1986).

Here, Celadon argues that because Sharon was injured while loading a “no assist” load, he was acting in disobedience of an instruction and therefore was not acting in the course of his employment.² The Board affirmed the following findings and conclusions regarding this issue:

FINDINGS

² Celadon essentially challenges the “course of employment” element. We note, however, that the record supports a conclusion that Sharon’s injury “arose out of” his employment, due to his increased risk based on his position with Celadon.

....

9. [Sharon] received his pickup and delivery instructions (his dispatch) on August 26, 2008 from [Celadon] via an in-truck electronic communication device known as a Qualcom. Included with these instructions was a line that read: DRIVER LOAD N. This was [Celadon's] instruction to [Sharon] that he was not to assist with the loading of the Cummings Electrical cargo. He was simply to deliver the empty trailer to Cummings for loading, wait while it was loaded, then transport the loaded trailer to Cummings' Fort Worth facility for unloading.

10. [Sharon] did not scroll down far enough on the Qualcom screen to see this particular instruction when he received his dispatch. Thus, he did not know, until after his injury, that this was a "no assist" load; meaning that he was not to assist with the loading of the cargo to be transported. Consequently, [Sharon] offered to help load, and did help load, the cargo when he arrived at Cummings Electrical on August 27th. [Sharon] testified that he did so "to be a nice guy" and to keep from getting bored by just sitting in his truck while the Cummings employee(s) loaded the truck.

....

12. [Sharon's] delivery on the date of his accident was not a drop and hook delivery.^[3] Rather, [Sharon] was to deliver an empty trailer to Cummings Electric, Cummings Electric was to load the cargo in question while [Sharon] waited, and [Sharon] was to then transport the cargo to Cummings' Texas facility by the next day.

....

15. [Sharon] was not disciplined for his failure to follow the "no assist" instruction.

CONCLUSIONS

....

³ In a drop and hook delivery, the driver simply drops the trailer at the shipper's location for loading by the shipper.

3. [Celadon] contends that [Sharon's] injury did not arise out of nor occur in the course of [Sharon's] employment with [Celadon] as [Sharon] had been instructed not to assist with the loading of the trailer in question. [Celadon] further argues that [Sharon's] act of assisting with the loading of the trailer actually harmed (not benefitted) [Celadon], as it caused [Celadon] to lose detention charges that might have otherwise been assessed and it may create unrealistic client expectations in future business transactions. The undersigned finds these arguments novel but not persuasive. [Sharon] was clearly performing an act incidental to his employment (helping to load the trailer he was hired to haul) when his injury occurred. This selfless act (as [Sharon] was not paid to help load the trailer) facilitated and expedited the movement of the cargo in question. Consequently, the undersigned concludes that [Sharon's] accidental injury occurred in the course of [Sharon's] employment with [Celadon], as [Sharon] was engaged in an act incidental to the employment when his injury occurred.
4. The evidence is undisputed that [Sharon's] back injury resulted from his loading of the trailer in question; specifically the loading of a 40-45 pound bundle of pipes. As [Sharon's] loading of the trailer was an activity incidental to the employment, the undersigned further concludes that [Sharon's] accidental injury arose out of his employment with [Celadon].

Appellant's App. at 51-53.

The evidence supports the Board's conclusion that Sharon was injured in the course of his employment. Celadon does not dispute that Sharon's injury occurred within the time and place of his employment;⁴ instead, Celadon cites Sharon's disobedience of the "no assist" instruction in challenging the conclusion that Sharon was engaged in activities *incidental to* his employment. We conclude that the evidence is sufficient to support the Board's decision.

⁴ To the extent Celadon relies on *Construction Management & Design, Inc. v. VanDerWeele*, 660 N.E.2d 1046 (Ind. Ct. App. 1996), *trans. denied*, we find that case factually distinguishable. There, VanDerWeele left his job site to assist a motorist on an adjacent property, when he fell and was injured. Thus, in contrast to Sharon, VanDerWeele was neither in the location of his employment nor engaged in any task that could be deemed incidental to it.

First, the evidence most favorable to the decision indicates that at the time Sharon was injured, he was unaware of the “no assist” instruction. Tr. at 9-10, 14. Although the majority of his loads were drop and hook loads, which required no loading, he testified that each time there was a trailer to be loaded, he assisted. *Id.* at 22-23. Moreover, he testified that he had nothing personal to gain by helping Cummings’s employees load the truck. *Id.* at 10-11. When he was unsure whether he was to assist with a given load, he would send a message to dispatch to confirm; yet he testified that often he did not receive a timely response from dispatch. *Id.* at 17. He testified that the Qualcom messages often left the “assist” or “no assist” portion blank. *Id.* at 23. Thus, although he did not check with dispatch or scroll down on his Qualcom messages to see the “no assist” instruction, he chose to assist with loading in order to get the truck on its way to Cummings’s Fort Worth location as soon as possible. *Id.* at 25. Thus, loading was an incidental part of Sharon’s job as a driver.

Further, Sharon did not receive a personal benefit in the form of increased wages for this particular job. Although Celadon presented evidence that Sharon’s acts were in some ways detrimental, in terms of potential loss of additional fees and unrealistic future expectations on the part of clients, the evidence most favorable to the decision indicates that Cummings would have benefitted in the form of the earlier departure of its cargo. Thus, a reasonable inference can be drawn that the benefit to Cummings would inure to Celadon. As a result, Celadon’s interests were indirectly advanced when its drivers assisted with loading. To the extent Celadon argues that the Board’s conclusion amounts to interference with its private contractual rights with employees, we note the testimony of both Sharon and

Celadon's representative that there was no written safety rule prohibiting drivers from assisting with "no assist" loads. *Id.* at 12, 29. Finally, Celadon's representative testified that, to his knowledge, Celadon had never disciplined Sharon for failing to follow the "no assist" instruction. *Id.* at 48.

In sum, Sharon was injured while engaging in acts that were not distinctly personal. Rather, he was indirectly advancing the interests of his employer Celadon by engaging in work that, at the time, appeared to be beneficial to Celadon's client. As such, the evidence and inferences most favorable to the Board's decision are sufficient to establish a compensable injury under the Act. Accordingly, we affirm.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.