

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

BETTY BENSON,	:	
	:	C.A. No. 06A-06-002 WLW
Claimant Below,	:	
Appellant,	:	
	:	
v.	:	
	:	
GENESIS HEALTH VENTURES,	:	
	:	
Employer Below,	:	
Appellee.	:	

Submitted: December 8, 2006

Decided: March 12, 2007

ORDER

Upon an Appeal of the Industrial Accident Board.

Affirmed in part; Denied in Part; Remanded.

Walt F. Schmittinger, Esquire, Schmittinger and Rodriguez, P.A., Dover, Delaware;
attorneys for the Appellant.

R. Stokes Nolte, Esquire, Nolte & Associates, Wilmington, Delaware; attorneys for
the Appellee.

WITHAM, R.J.

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Betty Benson, the Claimant Below, filed an appeal from the May 25, 2006 decision of the Industrial Accident Board (“IAB” or “Board”). The IAB considered Ms. Benson’s Petition to Determine Additional Compensation Due seeking payment of medical expenses and permanent partial disability benefits. The Board awarded Ms. Benson permanent partial disability benefits, certain medical expenses, medical witness fees and certain attorney’s fees. Appellant Benson’s appeal is limited to the Board’s decision denying recovery for certain medical bills totaling \$690.25, and the IAB’s award of only a single attorney’s fee based on two separate compensation awards. Genesis Health Ventures (“Genesis”), Ms. Benson’s employer, did not respond to the Appellant’s opening brief.

Decision of the IAB

Ms. Benson was injured in the parking lot of her employer when she fell on snow and ice. Ms. Benson sought to have Genesis pay for \$28,219.92 in unpaid medical bills that stemmed from the injury. The Board found that, under *Porter v. Insignia Management Group*¹, Genesis was liable for all medical expenses that were reasonable, necessary and related to the Claimant’s work accident. The medical experts agreed that the Appellant’s treatment was reasonable and necessary. However, the Board found that they were unable to determine the relatedness of certain bills, because the bills were reiterations from collection agencies and did not identify the services rendered. The Board specified that bills under Tabs A and B fell into the above category. The Board stated that “Without more, the Board is unable

¹*Porter v. Insignia Management Group*, 2003 WL 22455316 (Del. Super.).

to determine relatedness,” [concerning bills under Tabs A and B].² The IAB determined that the remainder of the bills presented were compensable.³

After weighing conflicting testimony, the Board also found that the Claimant had sustained 19% permanent impairment of her left shoulder. The Board awarded Ms. Benson \$22,103.17 for the permanent impairment of her left shoulder.

The Board further awarded an attorney’s fee. The Board stated that whenever a claimant is awarded compensation, she is entitled to payment of reasonable attorney’s fee in an amount not to exceed thirty percent of the award or ten times the weekly wage as announced by the Secretary of Labor, which is currently \$8,152.90.⁴ The Board then addressed the *Cox*⁵ factors in determining an appropriate attorney’s

²The bills under Tabs A and B, which the Board examined, were not provided as part of the underlying record. The Court will rely on assertions made by Claimant’s Counsel that exhibits provided to the Court, as part of Appellant’s opening brief, were before the IAB in the underlying proceeding.

³The Board found that another bill, under Tab G, totaling \$14,677.17 was related to the Claimant’s injury, but the Board requested additional information clarifying the bill in order to determine the amount actually due. This bill is not at issue in the Appellant’s current appeal.

⁴See 19 *Del. C.* § 2320(10).

⁵See *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). The Factors are as follows: (1) The time and labor required, the novelty and difficulty of the legal questions involved, and the skill required to perform the legal service properly; (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) The fees customarily charged in the locality for similar legal services; (4) The amount involved and the results obtained; (5) The time limitations imposed by the client or by the circumstances; (6) The nature and the length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (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

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fee. Specifically, the Board found that Claimant's Counsel spent 33 hours preparing for the IAB hearing, which lasted three and one-half hours. Counsel was not precluded from accepting other employment because of the case, although he could not work on other cases at the same time he was working on this case. Counsel had been in practice for 39 years, most of which have included the practice of workers' compensation, and he has represented the Claimant since March 3, 2003. Further, Counsel did not expect to receive compensation from any other source, and there was no evidence that Genesis would be unable to pay an award of attorney's fee. The Board also found that the issues in the case were not particularly novel or difficult. After considering the *Cox* factors, the Board determined that an attorney's fee of thirty percent of the awards or \$8,152.90, whichever is less, was reasonable.

Standard of Review

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's finding of fact and conclusions of law.⁶ Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁷ This Court will not weigh the evidence,

be received from any other source.

⁶*Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

⁷*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolov v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

determine questions of credibility, or make its own factual findings.⁸ Errors of law are reviewed *de novo*. Absent error of law, the standard of review for a Board's decision is abuse of discretion.⁹ The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."¹⁰

The appropriate standard of review concerning attorney's fees is whether, in awarding a single attorney's fee under 19 *Del. C.* § 2320(10)¹¹, the Board abused its discretion.¹²

Discussion

I. Medical Expenses

The record below lacks substantial evidence to support the Board's denial of certain medical expenses "under tabs A and B," totaling \$690.25. The Court is unable to determine what materials the Board considered when making its decision concerning the medical expenses is question. The IAB's only discussion concerning the bills is as follows: "Upon review of the bills, the Board finds that some are

⁸*Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

⁹*Digiacombo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

¹⁰*Willis v. Plastic Materials*, 2003 Del. Super. LEXIS 9 at *2-3.

¹¹19 *Del. C.* § 2320(10) states: "A reasonable attorney's fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party."

¹²*Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1248 (Del. Supr. 2003).

reiterations from collection agencies and do not identify the services rendered, e.g. those under tabs A and B. Without more, the Board is unable to determine relatedness.”¹³

The Appellant points to supporting documentation that supplements and explains the “reiterations from collection agencies” under tabs A and B. The supplemental material consists of bills and medical records explaining the expenses that were listed in the “reiterations.” Consequently, there is “more” evidence in the record than merely the “reiterations from collection agencies” concerning bills under tabs A and B. The Board abused its discretion, because the Board’s decision does not reflect the existence of (nor any reliance on) the supplemental (non-reiteration) material. Therefore, the matter must be remanded to the Board for further consideration of the denied medical expenses based on all of the relevant material (not just the reiterations), or for clarification of its decision, if the Board did in fact consider all relevant material previously.

II. *Attorney’s Fees*

Delaware law clearly requires the Board to allow an attorney’s fee for each separate award of compensation.¹⁴ If the Board grants one attorney’s fee, when there are multiple awards of compensation, then the Board’s decision must “clearly and

¹³The record of the underlying proceeding, before this Court, does not contain tabs A and B, which the IAB examined in denying the medical expenses. This Court cannot determine exactly what materials the Board considered in making their decision. As discussed above, the Court accepts Counsel’s assertions concerning what was before the Board.

¹⁴*Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1248 (Del. Supr. 2003).

unambiguously disclose how the attorney's fee award was determined."¹⁵ The Board has discretion in deciding the number of issues it will treat separately for purposes of attorney's fees.¹⁶

In *Scheers*, the Board awarded one attorney's fee when two compensation awards were made.¹⁷ The Board's decision did not clearly and unambiguously disclose how the attorney's fee award was determined.¹⁸ The Supreme Court explained: Although the Board did take into account all of the attorney's time expended (consistent with an allowance of two fees expressed as a single award), it awarded only a single fee (equally consistent with a fee allowance for only one compensation award).¹⁹ Thus, it is unclear from the record whether the Board intended to (and did) award two separate attorney's fees (expressed as a single award) based on both compensation awards, or whether it intended to (and did) award a single attorney's fee based solely on the disability compensation award.²⁰ Therefore, the Supreme Court remanded the case for further findings, because the record was not

¹⁵*Tucker v. State of Delaware*, 2006 WL 1680028, *2 (Del. Super.) citing *Scheers*, 832 A.2d at 1248.

¹⁶*Darnell v. BOC Group, Inc.*, 2001 WL 879911, *8 (Del. Super.).

¹⁷The Superior Court affirmed the Board's decision concerning attorney's fees, and an appeal was brought before the Supreme Court.

¹⁸*Scheers*, 832 A.2d at 1248.

¹⁹*Id.*

²⁰*Id.*

sufficient to conclude that the Board *intended* to award two attorney's fees expressed as a single award.²¹

This Court, in *Darnell v. BOC Group, Inc.* and *Tucker v. State of Delaware*, found that the Board did not abuse its discretion when it awarded a single attorney's fee following multiple compensation awards.²² The *Darnell* Court explained that the Board found that the issues presented were "relatively complex" but that the question of medical expenses was subsumed within the issues of causation.²³ The *Tucker* Court found that any further inquiry regarding multiple issues and multiple attorneys' fees was not required, because the Board indicated that only one issue existed when it stated that "the dispute involved causation only."²⁴ The Court further explained that any award for medical expenses was subsumed within the broader issue of causation.²⁵

The Claimant argues that the Board erred in granting only one attorney's fee, because two attorney's fees should have been granted based on the two compensation awards.²⁶ The Board found that an attorney's fee of thirty percent of the *awards* or

²¹*Id.* at 1249. (Emphasis added).

²²*Darnell*, 2001 WL 879911 at *8.; *Tucker*, 2006 WL 1680028 at *3.

²³*Darnell*, 2001 WL 879911 at *8.

²⁴*Tucker*, 2006 WL 1680028 at *3.

²⁵*Id.*

²⁶The two compensation awards were the \$22,103.17 for the Claimant's partial permanent disability, and the award for medical expenses.

\$8,152.90, whichever is less, was reasonable. Since the Board granted one attorney's fee when there were multiple awards of compensation, then the Board's decision must clearly and unambiguously disclose how the attorney fee was determined.

The Board addressed the *Cox* factors effectively²⁷, and expressly noted that "the issues in this case were not particularly novel or difficult." The Board's decision clearly shows that the Board intended to award two attorney's fees expressed as a single award, because the Board found that an attorney's fee equal to thirty percent of [both compensation] awards...was reasonable. By employing the word *awards*, it is apparent that the Board intended to award two separate attorney's fees (expressed as a single award) based on both of the compensation awards together, because the Board found that the attorney's fee granted was reasonable for the combined compensation awards.

The Board has discretion in deciding the number of issues it will treat separately for purposes of attorney's fees. The Board has treated two issues (the two compensation awards) as one for the purposes of attorney's fees in this case, because the Board granted a "reasonable" attorney's fee for the combined compensation awards. The Board has not abused its discretion, because its decision does not exceed the bounds of reason in view of the circumstances. The Board clearly accounted for both compensation awards when granting an attorney's fee that it felt was reasonable. The attorney's fee awarded was therefore two attorney's fees expressed as single award, and the Board's decision on the this issue must stand.

²⁷See *Tucker*, 2006 WL 1680028 at *3.

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Based on the foregoing, the Industrial Accident Board's Decision is *affirmed* in part and *denied* in part. The matter is *remanded* to the Board for further proceedings consistent with this Order.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution