IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MARY MARACLE,	)	
	)	
Appellant,	)	
	)	C.A. No. 09A-11-002 PLA
v.	)	
	)	
INTERNATIONAL GAME TECHNOLOGY,	)	
	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE
REVERSED AND REMANDED

Submitted: January 4, 2010
Decided: February 1, 2010

Walt F. Schmittinger, Esquire, and Kristi N. Vitola, Esquire, SCHMITTINGER AND RODRIGUEZ, P.A., Dover, Delaware, Attorneys for Appellant.

John W. Morgan, Esquire, and John J. Ellis, Esquire, HECKLER & FRABIZZIO, Wilmington, Delaware, Attorneys for Appellee.

ABLEMAN, JUDGE

This is an appeal from a decision of the Industrial Accident Board ("the Board"), in which the Court must decide whether counsel fees should have been awarded based upon the Board's award of medical expenses to the Claimant, Mary Maracle. Ms. Maracle challenges the Board's award in her favor on the limited basis that the Board's decision to deny attorneys' fees in connection with its award of medical expenses was contrary to law and an abuse of discretion.

I. Factual and Procedural Background

On August 28, 2007, Maracle injured her shoulder while working as a field technician for International Game Technology ("IGT"), a position that required her to lift heavy equipment in the process of refurbishing, installing, and maintaining casino game machines. On January 29, 2008, Maracle filed a Petition to Determine Compensation Due, wherein she sought total disability benefits from the date of her injury, as well as payment of her medical expenses.

Following a May 2008 hearing, the Board rendered its decision on January 14, 2009, wherein it found Maracle's injury to be compensable. The Board awarded Maracle all of the medical expenses she sought and total disability benefits based upon her proposed average weekly wages. The Board also awarded Maracle attorneys' fees in connection with the award of total disability benefits; however, it specifically denied any award of counsel fees associated with the award of medical expenses on the basis that the employer,

IGT, had extended a settlement offer to Maracle within thirty days of the May 2008 hearing date, and that the offer "for outstanding medical expenses [was] equal to the amount awarded by the Board."

IGT had in fact extended a settlement proposal to Maracle. In an April 28, 2008 letter, it specifically agreed, among other things, to "issue payment for those medical and related treatment expenses which are reasonable, necessary and causally related to the work accident, to include bills associated with the surgery by Dr. Schwartz on 1/14/08 but only to the extent that any such bills have not previously been paid."

II. Parties' Contentions

In this appeal, Maracle contends that the Board erred in finding that the employer's settlement offer with respect to medical expenses was equal to the ultimate award she received from the Board. She asserts that the offer was vague, non-specific, and insufficient, and merely reiterated IGT's statutory obligation to pay reasonable, necessary, and causally-related expenses. As such, Maracle submits that she had no choice but to proceed with her claim before the Board, because the offer left the reasonableness and necessity of the charges associated with her surgery still in dispute. Since IGT did not offer to pay either a specific bill or a specific amount, Maracle was forced to incur additional counsel fees to establish her entitlement to the medical expenses arising from

her employment-related accident. In essence, she submits that the "offer" was not really an offer at all, and therefore the Board erred in its finding that an offer existed that was equal to or greater than the Board's ultimate award.

IGT disputes Maracle's claim that the April 25, 2008 letter was not a sufficient settlement offer. It argues that the proposal that it "will issue payment for those medical and related expenses which are reasonable, necessary and causally related to the work accident" is specific enough to fit within the statutory exception of 19 *Del. C.* § 2320(10)(b). It submits that the Board's finding that an award of attorneys' fees was not required as a result of IGT's timely settlement offer was appropriate. IGT also contends that the statute does not require an offer to be for a specific monetary amount in order to qualify for the exception. Moreover, it argues that since the Board awarded medical expenses for treatment that occurred up to the May 22, 2008 date of its decision—in other words, after the 30-day settlement was submitted by the employer—it would not have been possible for IGT to have made a specific offer in an amount that included expenses incurred post-offer. Indeed, IGT contends that in a case where medical expenses are ongoing, an employer could never offer a specific amount in settlement of the claim, but could only commit to paying reasonable expenses, as IGT did in this instance.

III. Standard and Scope of Review

In considering appeals from the Industrial Accident Board, the Superior Court's scope of review is limited to correcting errors of law and determining whether substantial evidence exists in the record to support the Board's decision.[1] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] On appeal, the Superior Court "does not weigh the evidence, determine questions of credibility, or make its own factual findings."[3] Rather, the Court must give deference to the "experience and specialized competences of the Board" and must take into account the purposes of the Workers' Compensation Act.[4] The amount of attorneys' fees awarded in connection with issues on which a claimant is successful is reviewed for abuse of discretion.[5] Absent an abuse of discretion or an error of law, this Court will not disturb an award of attorneys' fees. The Board commits an abuse of discretion when it so ignores "recognized rules of law or practice" as to produce an injustice.[6] If the record reveals that the Board

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[1] *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[2] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[3] *Hall v. Rollins Leasing*, 1996 WL 659476, at *2 (Del. Super. Oct. 4, 1996) (citing *Johnson*, 213 A.2d at 66).

[4] *Histed*, 621 A.2d at 342.

[5] *Friebel v. Nat'l Glass & Metal*, 2004 WL 2829050, at *5 (Del. Super. Apr. 30, 2004).

[6] *Lofland v. Econo Lodge*, 2009 WL 3290450, at *2 (Del. Super. Aug. 31, 2009).

based its decision on improper or inadequate grounds, an abuse of discretion has occurred and the Court must reverse the decision.

IV. Discussion

The authority of the Industrial Accident Board to award attorneys' fees derives from 19 *Del. C.* § 2320(10), which provides:

> a. A reasonable attorneys' 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.[7]

The obvious intent of the foregoing provision of the workers' compensation statute is to mitigate, to the extent practicable, the diminishing effect that counsel fees would otherwise have on the actual benefits awarded to successful claimants.[8] In fact, in its 1993 synopsis to the legislation that amended the appellate attorneys' fees statute, 19 *Del. C.* § 2350, the General Assembly noted as follows:

> Current law requires insurance companies to pay worker's compensation claimant's attorney fees before the Industrial Accident Board and on appeal when the claimant is awarded compensation benefits. . . . It was the intention of the original legislation that claimant's awards not be depleted by attorney's fees whenever the claimant receives such an award. . . .[9]

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[7] 19 *Del. C.* § 2320(10) (emphasis added).

[8] *Robinson v. Metal Masters, Inc.*, 2000 WL 1211508, at *2 (Del. Super. July 14, 2000).

[9] Del. S.B. 122 syn., 137th Gen. Assem. (1993).

The legislative mandate of § 2320(10) contains a specific exception to the rule when the employer makes a timely and appropriate settlement offer. This exception provides an incentive for employers to make settlement offers that would eliminate the need for a hearing and the attendant expenses associated with further litigation:

> (b.) In the event an offer to settle an issue pending before the Industrial Accident Board is communicated to the claimant or the claimant's attorney, in writing, at least 30 days prior to the trial date established by the Board on such issue and the offer thus communicated is equal to or greater than the amount ultimately awarded by the Board at the trial on that issue, the provisions of paragraph a. of this subdivision shall have no application.[10]

In essence, the subsection (b) exception to the rule that otherwise requires the payment of counsel fees is intended to encourage settlement and to "relieve employers and employees of the expenses and uncertainties of civil litigation,"[11] in much the same way as the offer of judgment provision of Rule 68 of the Superior Court Civil Rules allows a defendant to avoid paying further costs if the ultimate judgment by verdict or order does not exceed the amount of a tender made more than ten days before trial.[12]

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[10] 19 *Del. C.* § 2320(10).

[11] *Pa. Mfrs.' Ass'n Ins. Co. v. Home Ins. Co.*, 584 A.2d 1209, 1214 (Del. 1990).

[12] Superior Court Civil Rule 68 provides:

> At any time more than 10 days before the trial begins a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect

For reasons that will be discussed more fully below, and particularly in light of the overall purpose of the workers' compensation scheme and § 2320(10)(2), the Court is persuaded that Maracle should be awarded attorneys' fees in connection with the $3,594.90 award of medical expenses to her. Thus, the Court finds that the Board erred in interpreting the April 25, 2008 letter from IGT as a settlement offer that was equal to or greater than the amount of medical expenses awarded, and that it was an abuse of discretion for the board not to engage in the appropriate analysis required by *General Motors Corp. v. Cox*[13] to calculate a proper award of counsel fees under the statute.

In the first place, the offer that IGT extended to Maracle, while timely, was not the equivalent of an offer to pay a specific medical charge or charges, nor did it fulfill the exception to the statute's intended purpose of avoiding further litigation. A general proposal to pay for medical expenses insofar as they are reasonable, necessary, and causally related to the injury is nothing more than an acceptance by IGT of its established legal obligation, and would still necessitate a costly determination by the Board of what medical costs are reasonable and necessary. Since it is routine for the issue of the reasonableness of medical expenses to be the sole dispute at trial, the "offer" was the equivalent

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> specified in the offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

[13] 304 A.2d 55 (Del. 1973).

of no offer at all. Similarly, the offer to pay all expenses "causally related" leaves open for resolution the question of causation, an issue that is frequently the focus of dispute at a trial or hearing.

As the Delaware Supreme Court explained in a somewhat different, but still meaningful, context in the case of *Rawley v. J.J. White, Inc.*:

> The General Assembly has expressly anticipated that there may be disputes over the reasonableness of medical charges and it has created a process for the IAB to resolve such disputes in § 2346. *A general agreement to pay for the expenses of a medical procedure does not preclude the employer from verifying a charge or disputing the reasonableness of the charge eventually submitted*.[14]

In the *Rawley* case, the Supreme Court was asked to review a decision of the Superior Court dismissing an action for failure of the claimant Rawley to exhaust his remedies by petitioning the Board to resolve a dispute concerning hospital charges. Rawley's employer had agreed that a surgical procedure on his knee was compensable. Rawley demanded payment of the bill and brought a claim in the Superior Court for liquidated damages and attorneys' fees pursuant to *Huffman v. C.C. Oliphant & Son, Inc.*[15] The Superior Court dismissed the action as untimely, "because Rawley had not petitioned the Industrial Accident

[14] 918 A.2d 316, 321 (Del. 2006) (emphasis added).

[15] 432 A.2d 1207 (Del. 1981).

Board to resolve the disagreement on the charges for medical services under 19 *Del. C.* § 2346."[16]

While the *Rawley* case is distinguishable from the case at bar because it involved a *Huffman* claim and a failure by the claimant to exhaust his administrative remedies, rather than an offer by the employer to settle, it is significant in that it highlights that a vague acknowledgement of responsibility to compensate a claimant does not obviate the need for litigation or counsel fees.

Likewise, the Industrial Accident Board in *Anguiano v. Lynch*[17] deemed a settlement offer insufficient because the offer did not state that certain bills would be paid, leaving the employer free to continue to dispute the reasonableness of the charges, the necessity of the charges, and whether the charges were causally related to the accident. And while IGT attempts to discredit the *Anguiano* ruling based on the fact that it is an order and not a Board decision, and also because decisions from administrative agencies are not binding upon the Superior Court, these arguments do not diminish the fact that the Board's analysis was sound and that the whole point of the exception for early settlement offers is to create an incentive to avoid further litigation, not to prolong it.

[16] 918 A.2d at 317.

[17] No. 1267305, at 2 (Del. I.A.B. Jan. 12, 2007).

The Court is similarly not persuaded by IGT's argument that the *Anguiano* case is inapplicable because it involved a petition to determine *additional* compensation due. The intent and purpose of the statutory exception for an award of attorneys' fees are the same in either instance—to eliminate or curtail additional legal expenses—and that motive is equally present whether the relief sought is the payment of initial expenses or the payment of supplemental ones.

The employer's final argument, that it could not have made a more specific offer since medical treatment was still ongoing, is equally unavailing. As of the date of IGT's proposal, the charges for Maracle's medical treatment amounted to $2,283.41. Notwithstanding that the specific amount sought was lower than the Board ultimately awarded, Maracle is not foreclosed from an award of counsel fees—which were *necessary* to establish her entitlement to an award—simply because the exact amount of the expenses was fluctuating or mounting. The critical focus in determining the right to an award of counsel fees is whether the employer's actions have or have not caused the claimant to incur additional costs and fees to assert his or her entitlement to relief. Here, as in the *Rawley* and *Anguiano* cases, the offer to "issue payment for those medical and related treatment expenses which are reasonable, necessary and causally related to the work accident, to include bills associated with the surgery by Dr.

Schwartz" left open a whole host of questions subject to dispute at a hearing or trial. To name but a few: Are Dr. Schwartz's charges reasonable? Are the physical therapy charges causally related to the accident? Are they necessary? The list could go on. The point is that the proposal fell far short of eliminating or even minimizing the claimant's legal expenses. That is the obvious purpose of the exception, which is consistent with the overriding purpose of the workers' compensation statute—to "relieve employers and employees of the expenses and uncertainties of civil litigation."[18] The requirement that the settlement offer clearly and specifically define what undisputed charges the employer will pay, rather than describing a broad category of expenses subject to further wrangling or controversy, clearly furthers the objectives of the workers' compensation statute.

In view of the language of the present version of the statute, that the Board "*shall*" award attorneys' fees to a successful claimant,[19] the Court is satisfied that the Board did not have the option or choice to deny an award to Ms. Maracle in this case.

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[18] *Pa. Mfr.'s Ass'n Ins. Co.*, 584 A.2d at 1214; *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 231 (Del. 1982).

[19] The previous version of the law provided that the Board "may" award attorneys' fees. The statute was amended by the General Assembly in 1966 by changing the word "may" to "shall," thus making an attorneys' fee award mandatory unless the limited exception of § 2320(1)(b) applies.

V. Conclusion

The employer's offer in this case did not conform either to the requirements of 19 *Del. C.* § 2320(10)(b) or to the overall goal of providing certainty and efficiency in the settlement of workers' compensation claims. Accordingly, the decision of the Board to deny Ms. Maracle attorneys' fees on the award of medical expenses must be **REVERSED and REMANDED**. On remand, the Board should consider the factors enumerated in *General Motors Corp. v. Cox*[20] in assessing an award of counsel fees to Maracle in connection with the award of medical expenses.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Walt F. Schmittinger, Esq.
Kristi N. Vitola, Esq.
John W. Morgan, Esq.
John J. Ellis, Esq.

[20] 304 A.2d 55, 57 (Del. 1973).