

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

FREDERICK LEHTO,	:	
	:	C.A. No. 08A-11-004 WLW
Claimant Below-	:	
Appellant,	:	
	:	
v.	:	
	:	
BARRETT BUSINESS SERVICES,	:	
INC.,	:	
	:	
Employer Below-	:	
Appellee.	:	

Submitted: July 2, 2009
Decided: October 23, 2009

ORDER

Upon an Appeal of the Decision of the
Industrial Accident Board. *Affirmed.*

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

Scott A. Simpson, Esquire of Elzufon Austin Reardon Tarlov & Mondell, P.A., Wilmington, Delaware; attorneys for the Appellee.

WITHAM, R.J.

Frederick Lehto v. Barrett Business Services, Inc.

C.a. No. 08A-11-004 WLW

October 23, 2009

Frederick Lehto (“Lehto”), the Claimant Below, filed an appeal from the October 22, 2008 decision of the Industrial Accident Board (“IAB” or “Board”). The IAB considered Lehto’s Petition to Determine Additional Compensation Due. The Board awarded Lehto outstanding medical expenses in the amount of \$6,593.32, and ordered Lehto’s employer, Barrett Business Services (“Barrett”), to pay for Lehto’s prescription medication on an ongoing basis. The Board also awarded \$1,978.00 in attorney’s fees. Lehto filed this appeal claiming that the Board abused its discretion by making an award of attorney’s fees that was improper, unreasonably small and not proportionate to the time spent on the case and the results achieved.

Decision of the IAB

On December 18, 1999, Lehto was injured in a compensable industrial accident while employed by Barrett. On February 11, 2008, Lehto filed a Petition to Determine Additional Compensation Due with the IAB seeking payment of outstanding medical expenses for treatment rendered by Dr. Ganesh Balu. The Board conducted a hearing on Lehto’s petition on August 29, 2008.

The Board, after hearing all of the evidence, concluded that Barrett was liable for Lehto’s outstanding medical expenses in the amount of \$6,593.32. The Board further determined that Barrett shall compensate Lehto for prescription medication on an ongoing basis. The Board concluded that Lehto was entitled to a “reasonable attorney’s fee.”

The Board, citing 19 *Del. C.* § 2320, concluded that the attorney’s fees awarded must not “exceed thirty percent of the award or ten times the average weekly wage,

Frederick Lehto v. Barrett Business Services, Inc.

C.a. No. 08A-11-004 WLW

October 23, 2009

whichever is smaller.”¹ The Board then addressed the *Cox*² factors in determining an appropriate attorney’s fee.

The Board acknowledged Lehto’s claim that his counsel spent 22.4 hours to prepare for the two hour hearing, but noted that the case was “not novel or difficult” and “did not require exceptional legal skills to try properly.”³ The Board also acknowledged the relative experience, reputation, and ability of Lehto’s counsel, that Lehto’s counsel was precluded from other employment by accepting this case, and that this case placed time limitations upon Lehto’s counsel. In addition, the Board considered the fees customarily charged in the locality for similar legal services, the amounts involved and the results obtained. Finally, the Board noted that the fee was contingent, that Lehto’s counsel did not expect to receive compensation from any other source, and that Barrett was able to pay an award.

After considering the *Cox* factors, the Board concluded that an award of

¹ *Lehto v. Barrett Bus. Servs., Inc.*, IAB No. 1157783 (Oct. 22, 2008).

² See *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 be received from any other source.

³ *Lehto*, IAB No. 1157783 (Oct. 22, 2008), at 12.

Frederick Lehto v. Barrett Business Services, Inc.
C.a. No. 08A-11-004 WLW
October 23, 2009

\$1,978.00 was reasonable. This amount is thirty-percent of the award for outstanding medical expenses. The Board noted that this award was reasonable “given [Lehto’s] counsel’s level of experience and the nature of the legal task.”⁴

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 findings of fact and conclusions of law.⁵ Substantial evidence equates to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁶ This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.⁷ Errors of law are reviewed *de novo*. Absent error of law, the standard of review for a Board’s decision is abuse of discretion.⁸ The Board has abused its discretion only when its decision has “exceeded the bounds of reason in view of the circumstances.”⁹

The appropriate standard of review concerning attorney’s fees is whether, in

⁴ *Id.*

⁵ *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

⁶ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Federal Mar. Comm’n*, 383 U.S. 607, 620 (1966)).

⁷ *Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

⁸ *Digiacomio v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

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

Frederick Lehto v. Barrett Business Services, Inc.
C.a. No. 08A-11-004 WLW
October 23, 2009

awarding a single attorney's fee under 19 *Del. C.* § 2320(10), the Board abused its discretion.¹⁰

Discussion

The issue before the Court is whether the Board abused its discretion when it awarded a single attorney's fee of \$1,978.00. The IAB has authority to award attorney's fees pursuant to 19 *Del. C.* § 2320(10).¹¹

Section 2320(10) provides, in pertinent part:

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 . . . 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 party¹²

An employee is entitled to attorney's fees under Section 2320(10) where the employee experiences "any favorable change of position or benefit, as a result of a Board decision."¹³

In the case *sub judice*, Lehto filed with the Board a Petition to Determine Additional Compensation Due. In his petition, Lehto sought only "[m]eds due - Dr. Balu." The Board determined that Lehto was entitled to outstanding medical

¹⁰*Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1248 (Del. 2003).

¹¹ *See Mitchell v. Purdue, Inc.*, 2009 WL 1418127 (Del. Supr.).

¹² 19 *Del. C.* § 2320(10).

¹³ *Mitchell*, 2009 WL 1418127 (Del. Supr.) (quoting *Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591 (Del. 2008)).

Frederick Lehto v. Barrett Business Services, Inc.
C.a. No. 08A-11-004 WLW
October 23, 2009

expenses in the amount of \$6,593.32 and “prescription medication on an ongoing basis.”¹⁴ The Board then awarded Lehto “one attorney’s fee” of \$1,978.00, which is thirty-percent of \$6,593.32.¹⁵

Delaware law requires the Board to allow an attorney’s fee for each separate award of compensation.¹⁶ If the Board grants one attorney’s fee when there are multiple awards of compensation, then the Board’s decision must “clearly and unambiguously disclose how the attorney’s fee award was determined.”¹⁷ The Board, however, has discretion in deciding the number of issues it will treat separately for purposes of attorney’s fees.¹⁸

Lehto cites *Scheers v. Independent Newspapers*,¹⁹ for the proposition that the Board erred by failing to indicate whether it considered the ongoing prescription medication when determining attorney’s fees. Lehto, however, is incorrect in this assertion. In *Scheers*, the Board awarded one attorney’s fee when two compensation awards were made.²⁰ The Board’s decision did not clearly and unambiguously

¹⁴ *Lehto*, IAB No. 1157783 (Oct. 22, 2008), at 12.

¹⁵ *Id.* at 13.

¹⁶ *Scheers*, 832 A.2d at 1248.

¹⁷ *Tucker v. State of Delaware*, 2006 WL 1680028, *2 (Del. Super.), *citing Scheers*, 832 A.2d at 1248.

¹⁸ *Darnell v. BOC Group, Inc.*, 2001 WL 879911, *8 (Del. Super.).

¹⁹ 832 A.2d 1244 (Del. 2003).

²⁰ *Id.* at 1248.

Frederick Lehto v. Barrett Business Services, Inc.

C.a. No. 08A-11-004 WLW

October 23, 2009

disclose how the attorney's fee award was determined.²¹ 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). 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.²²

The Supreme Court remanded the case for further findings, because the record was not sufficient to conclude that the Board intended to award two attorney's fees expressed as a single award.²³

Here, the Board clearly intended to award one attorney's fee based upon the award of \$6,593.32 for outstanding medical expenses. Not only did the Board expressly award "one attorney's fee," but it also expressly noted that the award it found to be reasonable was "thirty-percent of the award," or \$1,978.00. The question, therefore, is whether the Board is required to include Lehto's ongoing prescription medication in an award for attorney's fees.

In *Pugh v. Wal-Mart*, the Delaware Supreme Court reviewed the issue of

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1249. (emphasis added).

attorney's fees based upon monetary and non-monetary benefits.²⁴ The Court concluded that the Board, in determining attorney's fees, "may (although it is not required to) include the value of a finding of compensability and related unliquidated benefits."²⁵ The Court noted further that, "non-monetary benefits do not automatically translate into an additional sum beyond the amount determined by reference to the monetary award."²⁶ The Court recently reaffirmed its position in *Pugh* by noting in *Mitchell v. Purdue, Inc* that, "while the Board is *permitted* to consider the non-monetary benefits gains for the claimant by counsel, the Board is not *required* to do so in its fee calculation."²⁷

In the case *sub judice*, the Court finds that the Board was not required to include the ongoing prescription medication in its fee calculation. Lehto, in his opening brief, argued that, "[i]t was an error of law for the Board to limit the fee awarded based only on the monetary benefits secured for the Claimant." He, citing *Pugh*, noted further that "[i]ntangible, nonmonetary benefits are the proper basis for an award of attorneys' fees." Similar to the situation in *Mitchell*, however, Lehto did not request that the Board consider non-monetary benefits.²⁸ Instead, Lehto simply

²⁴ 945 A.2d 588 (Del. 2008).

²⁵ *Id.* at 590.

²⁶ *Id.* at 591.

²⁷ 2009 WL 14181127, at *2 (emphasis in original) (citing *Pugh*, 945 A.2d at 591).

²⁸ *See Mitchell*, 2009 WL 1418127, at *2.

Frederick Lehto v. Barrett Business Services, Inc.

C.a. No. 08A-11-004 WLW

October 23, 2009

requested “meds due - Dr. Balu.” Consequently, the Board did not abuse its discretion by not including the ongoing prescription medication.²⁹

In addition, Lehto contends that the Board’s award of attorney’s fees is disproportionately low in relation to the time spent and the results achieved. This same argument was also recently rejected by the Delaware Supreme Court in *Mitchell*.³⁰ The Court held that an award is reasonable where “the Board thoroughly and adequately address[es] the *Cox* factors.”³¹ Here, the Board noted:

Claimant’s counsel submitted an affidavit attesting to 22.4 hours of preparation for this two hour hearing. This case was not novel or difficult, nor did it require exceptional legal skills to try properly. It was argued that acceptance of this case precluded other employment by Claimant’s counsel. The Board considered the fees customarily charged in this locality for similar legal services, the amounts involved and the results obtained. The Board also considered the argument that this case posed time limitations upon Claimant’s counsel, the date of initial contact on February 10, 2000, and the relative experience, reputation, and ability of Claimant’s counsel. It was argued that the fee was contingent, that Claimant’s counsel does not expect to receive compensation from any other source and that the employer is able to pay an award.³²

The Court is satisfied that the Board has thoroughly and adequately addressed the

²⁹ *See id.*

³⁰ *Id.* at *3.

³¹ *Id.*

³² *Lehto*, IAB No. 1157783 (Oct. 22, 2008), at 12.

Frederick Lehto v. Barrett Business Services, Inc.

C.a. No. 08A-11-004 WLW

October 23, 2009

Cox factors. Following this review of the *Cox* factors, and based on the results obtained, information presented and Barrett's failure to argue that an attorney's fee award was not appropriate, the Board then found that one attorney's fee in the amount of \$1,978.00 was reasonable.

Conclusion

For the foregoing reasons, the decision of the Industrial Accident Board must be AFFIRMED.

IT IS SO ORDERED.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution