

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR KENT COUNTY**

<b>MARILDA PRICE,</b>	:	
	:	<b>C.A. No. 05A-07-003 (RBY)</b>
<b>Claimant-Below,</b>	:	
<b>Appellant,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>SARA LEE CORP./PLAYTEX</b>	:	
<b>APPAREL,</b>	:	
	:	
<hr style="width: 20%; margin-left: 0;"/>	:	
<b>Employer-Below,</b>	:	
<b>Appellee.</b>	:	

**Submitted: January 23, 2007**  
**Decided: March 14, 2007**

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for Claimant-Below, Appellant.

Linda L. Wilson, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware for Employer-Below, Appellee.

*Upon Consideration of Appellant's Appeal  
from Decision of Industrial Accident Board*  
**AFFIRMED**

***OPINION AND ORDER***

Young, J.

\_\_\_\_\_ Claimant-Below/Appellant (“Appellant”), Marilda Price, appeals the June 21, 2005 decision of the Industrial Accident Board (“the Board”), along with the December 15, 2004 order by the Board recessing the hearing on the Appellant’s July 7, 2004 Petition to Determine Additional Compensation Due (“the Petition”). The Board ultimately denied the Petition. Appellant appeals the Board’s decision arguing that she was denied due process at the December 15, 2004 hearing and that the Board erred when it concluded that the issues of pre-authorization and medical bills were never in dispute or properly before it. For the following reasons, however, the Board’s decision is **AFFIRMED**.

### **FACTUAL AND PROCEDURAL HISTORY**

On April 15, 2002, while employed as a Quality Control Inspector by the Employer-Below/Appellee, Sara Lee Corp./Playtex Apparel, the Appellant squatted down to pick up a box and, as she stood up, heard her knee pop and felt immediate pain. Dr. Lawrence Piccioni diagnosed the Appellant with a torn left medial meniscus. On May 15, 2002, he performed surgery to repair the Appellant’s injury. She returned to work approximately three months later, but continued seeing Dr. Piccioni until he released her from treatment in November 2002 with instructions to return on an “as needed” basis. Shortly before the surgery, the parties entered an Agreement as to Compensation that required the Appellee to pay benefits for the Appellant’s total disability until such time as she was no longer totally disabled. In September 2004, the parties also entered an Agreement as to Compensation that required the Appellee to pay permanent partial disability benefits for an 8.5% permanent impairment of the Appellant’s left leg.

Between November 2002 and June 2004 the Appellant thrice returned to Dr.

Piccioni with complaints of left knee pain: once in May 2003, once in July 2003 and once in February 2004. On June 24, 2004, she again attempted to see Dr. Piccioni, however, the visit was canceled because it was not “authorized” by the workmen’s compensation insurance carrier. A few days later, on July 2, 2004, the Appellant filed a Petition on the grounds that the carrier refused to allow the Appellant to see Dr. Piccioni.<sup>1</sup> Of course, the carrier did not and could not prevent Appellant or anyone else from seeing any physician anytime she cared to. The carrier merely rejected authorization prior to the visit to pay for the visit. This is a distinction frequently lost by some claimants. At any rate, on August 9, 2004, the Appellant checked boxes on the Pre-Trial Memorandum that indicated she was seeking medical expenses, transportation expenses, medical witness fees and attorney’s fees. The words “Authorization to see Dr. Piccioni” were also written in this section.

At the December 15, 2004 hearing on the Petition, the Board heard opening statements from both parties.<sup>2</sup> These opening statements became, in the words of the Board, “contentious and argumentative” with the parties making reference to a flurry of correspondence regarding the submission and payment of the Appellant’s medical bills.<sup>3</sup> Without hearing any evidence, the Board granted the Appellee’s request for a recess to obtain a copy of the insurer’s payment ledger in order to assist the Board in determining whether these medical bills were actually paid.<sup>4</sup> The Board ordered

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<sup>1</sup> This is the reasoning supplied by the Appellant on the Petition.

<sup>2</sup> *Price v. Sara Lee Corp./Playtex Apparel*, IAB Hearing No. 1209587 (Dec. 15, 2004), Order at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2.

the Appellee to submit the ledger to it within one week from its order.<sup>5</sup> If the ledger did not resolve the issue to Appellant's satisfaction, she was to contact the Board, in which event the hearing would be reconvened.<sup>6</sup> As to the issue of pre-authorization, the Board stated that, if the parties did not reach an agreement as to this issue before the Appellant contacted the Board to continue the hearing, then the Appellant could notify the Board that further hearing was necessary on this issue as well.<sup>7</sup>

Immediately following that order, the Appellee provided the ledger along with a letter dated December 21, 2004, which showed that three of the Appellant's medical bills had not been paid.<sup>8</sup> The Appellee then provided a letter dated December 23, 2004, including insurance checks for those three unpaid medical expenses.<sup>9</sup> The letter also indicated that an insurance adjuster had contacted Dr. Piccioni's office to resolve the pre-authorization issue.<sup>10</sup> The Appellant contacted the Board, informing it of the necessity of reconvening the December 15, 2004 hearing due to existence of outstanding medical bills, and the fact the Appellee's letter was not sufficient authorization. Before the Board reconvened, Dr. Piccioni saw the Appellant in February 2005, and treated her complaints related to her left knee.<sup>11</sup> Dr. Piccioni did

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2-3.

<sup>8</sup> *Price v. Sara Lee Corp./Playtex Apparel*, IAB Hearing No. 1209587 (May 28, 2005), Decision at 3.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Price v. Sara Lee Corp./Playtex Apparel*, IAB Hearing No. 1209587 (May 28, 2005), Tr. at 61.

not bill the Appellant for these services.<sup>12</sup> When the Board reconvened on May 28, 2005, the hearing continued and evidence was heard. The Board issued its decision in the matter on June 21, 2005.

### **DECISION OF THE INDUSTRIAL ACCIDENT BOARD**

At the May 28, 2005 hearing, the Board heard extended opening statements from counsel for both parties on an exchange of letters that occurred between them after the Petition was filed and before the first hearing. The Board also heard from Dr. Piccioni by deposition and Ms. Price in person.

In its June 21, 2005 decision on the Petition, the Board held that there was no matter in dispute at the time of the first hearing on December 15, 2004.<sup>13</sup> First, as to the pre-authorization issue, the Board stated that the Petition sought authorization for a follow-up visit to Dr. Piccioni. That following the filing of the Petition, counsel for the Appellee wrote a letter on July 12, 2004 stating that “the employer will pay all reasonable and necessary medical expenses that are related to the April 15, 2002 left knee injury.”<sup>14</sup> The Board held that the language of this letter provided authorization to see Dr. Piccioni.<sup>15</sup> Additionally, Appellee’s counsel stated in the letter that “since no bills have been presented for payment, there can be no agreement to pay specific bills at this time.”<sup>16</sup> The Board found this statement to be a reasonable

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<sup>12</sup> *Id.* at 61-62.

<sup>13</sup> *Price v. Sara Lee Corp./Playtex Apparel*, IAB Hearing No. 1209587 (May 28, 2005), Decision at 6.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

request to see actual bills before paying them in keeping with I.A.B. Rule 9(D)(2).<sup>17</sup> The Board further supported its decision by referring to Dr. Piccioni's deposition testimony, in which he stated that, had he seen the July 29, 2004 letter from the Appellee, he probably would have seen the Appellant.<sup>18</sup> Based on these findings, the Board concluded that the pre-authorization issue was moot as of the date of the Appellee's July 29, 2004 letter.<sup>19</sup>

Second, as to the issue of the unpaid medical bills, the Board began by setting out the arguments of the Appellant and the Appellee. The Board stated that the Appellant argued the medical bills were part of the Petition, since copies of the outstanding bills were provided to the Appellee by correspondence dated September 10 and November 15, 2004.<sup>20</sup> The Appellee argued the issue raised by the Petition was pre-authorization, and medical bills were never properly before the Board.<sup>21</sup> Furthermore, the Appellee contended that, if medical bills were a part of the Petition, the Appellant did not prove that the unpaid bills were reasonable, necessary and causally related.<sup>22</sup> The Board pointed out that counsel for the Appellant had stated in a November 12, 2004 letter to counsel for the Appellee that if, authorization for the visit were provided, the Petition would be withdrawn.<sup>23</sup> Based on these findings, the

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 8.

Board concluded that the Appellant had not amended the pre-trial memorandum to raise an issue of unpaid medical bills.<sup>24</sup> The Board added that even if the matter was properly before it, the issue was moot because the Appellee had paid all outstanding medical bills.<sup>25</sup>

Thus, based on the foregoing rulings, the Petition was denied. The Board added that, because it did not make an award, the Appellant was also denied attorney's fees and a medical witness fee.<sup>26</sup>

### **STANDARD OF REVIEW**

On appeal, this Court reviews a decision of the Board to determine whether the Board's decision was supported by substantial evidence and free from legal error.<sup>27</sup> Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>28</sup> In addition, substantial evidence is "more than a scintilla but less than a preponderance."<sup>29</sup> On appeal, this Court does not have the "authority to weigh evidence, determine the credibility of witnesses or make independent factual findings."<sup>30</sup> If the Board's decision is

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Methodist Country House v. Wright*, 2005 WL 1654354, at \*2 (Del. Super.).

<sup>28</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981)(quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

<sup>29</sup> *Id.* (quoting *Cross v. Califano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

<sup>30</sup> *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005)(citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

supported by substantial evidence, this Court “must affirm the ruling unless it identifies an abuse of discretion or a clear error of law.”<sup>31</sup> Questions of law are reviewed *de novo*.<sup>32</sup>

## DISCUSSION

First, the Appellant argues that her due process rights were violated when the Board ended the December 15, 2004 hearing without allowing her to present any evidence before it made a decision at this hearing as to the issue of pre-authorization. The Appellant contends that this decision was not supported by substantial evidence. The Appellee argues that the Board made no final decisions and, even if it did, the time for appealing those decisions has expired. In her reply brief the Appellant contends that the Board’s decision states unambiguously that the July 12, 2004 letter constituted sufficient pre-authorization. Also, the Appellant argues that, because the Board continued the hearing to May 28, 2005, the Board did not reach a final decision. As such, the Board’s December 15, 2004 decision is an interlocutory order and is not appealable until a final order is made.

To begin, the Court notes that the Appellant argues both that the Board unambiguously reached a final decision on the issue of pre-authorization and that this final decision was actually interlocutory and not appealable until the June 21, 2005 decision. The Court finds that the Board’s December 15, 2004 order unambiguously reached no final decisions. Instead, the only decision made in the order was to recess

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<sup>31</sup> *Bolden v. Kraft Foods*, 2005 WL 3526324, at \*2 (Del.)(citing *DiGiacomo v. Bd. of Public Educ.*, 507 A.2d 542, 546 (Del. 1986)).

<sup>32</sup> *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998)(citing *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994)).



the matter to allow the Appellee to procure a copy of the insurer's payment ledger so that the Board and the parties could determine whether any medical bills were outstanding. The Board stated that, if the ledger did not settle the issues raised by the Appellant, then the Appellant was to notify the Board and the hearing would be continued. Additionally, the Court notes that the December 15, 2004 hearing transcript also indicates that the Board made no final decisions, but was merely recessing the matter.<sup>33</sup> The Court finds that the Board's order to recess was interlocutory in nature. As such, this order is properly before the Court at this time, because interlocutory orders of the Board are appealable not when issued, but when a final determination is made.<sup>34</sup>

The Board is granted the power to recess hearings.<sup>35</sup> When the Board uses this power, it takes a discretionary action. This Court may reverse such an action only if the Board abuses its discretion, for that abuse would constitute a legal error.<sup>36</sup> Here, the Board recessed in order for the Appellee to obtain information the Board felt was necessary to complete the hearing. The Board ordered the Appellee to obtain this information within one week. The Board provided that, should this information not

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<sup>33</sup> *Price v. Sara Lee Corp./Playtex Apparel*, IAB Hearing No. 1209587 (Dec. 15, 2004), Tr. at 41 (“No we haven’t ruled as a matter of law on that issue [referencing pre-authorization]. The Board considered what was proffered to it by Employer’s Attorney with respect to that in considering what to do procedurally at this point in time. Mr. Schmittinger if you are not satisfied or you have not resolved the matter completely all you need to do is send a letter to my attention requesting that we continue, that we reschedule this for completion.”).

<sup>34</sup> *See Eastburn v. Newark School Dist.*, 324 A.2d 775, 776 (Del. 1974).

<sup>35</sup> *See 19 Del. C. § 2348(j)* (“The Board may recess the hearing to a date certain and direct the parties, or any of them, to provide such further information as may be necessary to decide the matter.”)

<sup>36</sup> *In re: Gresick*, 1988 WL 116411, at \* 8 (Del. Super.).

resolve the dispute to the Appellant's satisfaction, the Appellant was to contact the Board to continue the hearing. The Appellee presented the information, and the Appellant informed the Board of the necessity of continuing the hearing. This Court finds that the Board certainly did not abuse its discretion in continuing the hearing. Therefore, the Board did not commit legal error in its December 15, 2004 order. Any issue before the Board at that time was properly continued pending the presentation of the insurance ledger.

Second, the Appellant argues that the Board erred when it held, in its June 21, 2005 decision, that the issues of unpaid medical bills and pre-authorization were not properly before it. This whole matter was precipitated by the Appellant's not having been to see Dr. Piccioni on June 24, 2004. A few days later the Petition was filed in which Appellant claimed the additional injuries, asserting that the insurance carrier "refused to allow her" to see Dr. Piccioni. On the Pre-Trial Memorandum, the Appellant wrote that she was seeking authorization to see Dr. Piccioni. On November 12, 2004, counsel for the Appellant wrote counsel for the Appellee, stating that if authorization to see Dr. Piccioni was provided then the Petition would be dismissed. Based on this evidence, the Board held that the issue of medical bills was not properly before it at the December 15, 2004 hearing. The Court finds the presence of evidence reasonably substantial and adequate to support the Board's decision.

Turning to the issue of pre-authorization, following the filing of the Petition, counsel for the Appellee informed the Appellant that the Appellee would "pay all reasonable and necessary medical expenses that are related to the April 15, 2002 left knee injury." After reviewing this letter Dr. Piccioni stated that he probably would have seen the Appellant based on the letter. Based on this evidence, the Board decided the Appellee's letter was sufficient authorization for treatment, concluding

that no issue on pre-authorization was before the Board. The Court agrees. Dr. Piccioni's concern was that treatment for the Appellant's left knee injury was no longer being covered. The Appellee's letter stated that treatment for the left knee injury would continue to be covered. This Court believes substantial evidence existed to support the Board's decision.

Having found substantial evidence, this Court can only reverse the Board if the Board committed an abuse of discretion or made a clear error of law. The Appellant has made, presumably because she can make, no attempt in her opening and reply briefs to demonstrate to this Court how the Board committed an abuse of discretion or made a clear error of law. Clearly, the Court has been able to find neither. Therefore, the Court holds that the Board's June 21, 2005 decision, denying the Appellant's Petition, is supported by substantial evidence and free from legal error.

Based on the foregoing, the decision of the Board is **AFFIRMED**.

**SO ORDERED.**

/s/ Robert B. Young

J.

RBV/sal

oc: Prothonotary

cc: Opinion Distribution