IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

DORIS WILLIAMS,	)
	) C.A. No. 04A-05-002 JTV
Claimant-Below,	)
Appellant,	)
	)
v.	)
	)
KRAFT FOODS,	)
	)
Employer-Below,	)
Appellee.	)

Submitted: October 4, 2004
Decided: January 28, 2005

Francis Nardo, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware. Attorney for Appellee.

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Appellant.

Upon Consideration of Appellant's Appeal From
Decision of Industrial Accident Board
REVERSED & REMANDED

VAUGHN, President Judge

Williams v. Kraft Foods, et al.
C.A. No. 04A-05-002 JTV
January 28, 2005

OPINION

Doris Williams ("the claimant") suffered a compensable injury while working at Kraft Foods ("the employer") in 2002. In January of 2004, she filed a Petition to Determine Additional Compensation. This appeal from the decision of the Industrial Accident Board ("the Board") on that petition is a narrow one, presenting only a question as to whether the Board erred by deciding not to award the claimant medical witness fees for one of her witnesses. It is not necessary, therefore, to discuss all the facts in the case and only the relevant facts are included below.

The issues raised by the claimant's petition were: 1) whether the claimant was entitled to an award of medical expenses for services rendered by Dr. Upadhyay; and 2) whether the claimant was permanently impaired as a result of her compensable injury and thus entitled to additional compensation. Two doctors testified on her behalf. Dr. Rodgers testified regarding the claimant's alleged permanent impairment. Dr. Upadhyay testified concerning the same issue and also outstanding medical expenses which the claimant incurred for his services. The Board awarded the claimant the outstanding medical expenses but denied the request for a permanency award. The employer was taxed the claimant's witness fees for Dr. Upadhyay but not for Dr. Rodgers. In its decision, the Board stated it was not taxing Dr. Rodger's fees to the employer because they did not find any permanent impairment and did not accept the testimony of Dr. Rodgers.[1]

The issue is whether the Board properly denied the claimant's medical witness

[1] *Williams v. Kraft*, IAB Hearing No. 1213087 (Apr. 30, 2004), at 13.

fees for Dr. Rodgers.

I. STANDARD OF REVIEW

The scope of review for appeal of a board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.[2] "Substantial evidence" is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[4] The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.[5] The court must give "due account of the experience and specialized competence of the Board and of the purposes of our workers' compensation law."[6] When reviewing the Board's findings, the reviewing court should accept those findings, even if acting independently, the reviewing court would reach contrary conclusions.[7] Absent an error of law, the

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[2] *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. LEXIS 264; *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[3] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

[4] *Johnson*, 213 A.2d at 66.

[5] *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3.

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

[7] *H&H Poultry v. Whaley*, 408 A.2d 289, 291 (Del. 1979).

standard of review is abuse of discretion.[8] An abuse of discretion arises only where the Board's decision has "exceeded the bounds of reason in view of the circumstances."[9] Only where no satisfactory proof exists to support the factual finding of the Board may the Superior Court overturn it.[10]

II. DISCUSSION

The relevant statute is 19 *Del. C.* § 2322(e) which reads:

> The fees of medical witnesses testifying at hearings before the Industrial Accident Board on behalf on an insured employee shall be taxed as a cost to the employer or the employer's insurance carrier in the event the injured employee receives an award.

Despite the mandatory language of the statute, the Delaware Supreme Court in *Brandywine School District v. Hoskins*[11] held that the Board has some discretion when taxing medical witness fees as a cost to an employer. The court further stated that it would be inappropriate to require an employer to pay fees of medical witnesses whose testimony is unreasonably cumulative or redundant.[12] The employer argues that Dr. Rodger's medical witness fee was properly denied under *Hoskins*. The Board, however, did not base its decision not to tax Dr. Rodgers medical witness fees

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[8] *Digiacomo v. Bd. of Publ. Educ.*, 507 A.2d 542, 546 (Del. 1986).

[9] *Floundiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999); *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

[10] *Johnson*, 213 A.2d at 64.

[11] 492 A.2d 1247 (Del. 1985).

[12] *Id*. at 1252.

on *Hoskins*. It did not tax his fees because it did not rely on his testimony and a permanency award was not given.

Wade v. Chrysler Corp.[13] clarified the Delaware Supreme Court's position and is dispositive in this case. The court held "[a] medical witness' testimony need not be the basis of an award in order to assess fees against the employer under 19 *Del. C.* § 2322(e), as long as the claimant procures an award."[14] The *Wade* case presented an issue similar to the one before the Court today and the Supreme Court determined the claimant was "entitled to an award for medical witness fees notwithstanding denial of other claims presented to the Board."[15] After *Wade*, a long line of Superior Court decisions have followed this precedent and awarded medical witness fees so long as the claimant receives "an award" whether or not the witness' testimony was the basis for that award.[16] To hold otherwise would result in the "claimant being forced to make an important decision as to which medical witnesses he should rely upon . . . ."[17]

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[13] 533 A.2d 1254 (Del. 1987).

[14] *Id.* At 1254.

[15] *Id.*

[16] *Adams v. Shore Disposal, Inc.*, 1997 Del. Super. LEXIS 471; *Baker v. Allen*, 1997 Del. Super. LEXIS 512; *Hart v. Columbia Vending Serv.*, 1998 Del. Super. LEXIS 143; *Keeler v. Conco Tellus*, 1996 Del. Super. LEXIS 476; *Keeler v. Metal Masters Inc.*, 1997 Del. Super. LEXIS 571; *Goldsborough v. New Castle County*, 1999 Del. Super. LEXIS 217; *Nanticoke v. Miller*, 2003 Del. Super. LEXIS 333; *Walbert v. General Metalcraft*, 1997 Del. Super. LEXIS 585.

[17] *Hudson*, 1997 Del. Super. LEXIS 512, at *13.

The employer argues two cases which at first glance appear to depart from this principle but, upon further examination, are distinguishable. In *State v. Hodges-Walker*,[18] the employer appealed the award of medical witness fees taxed against it. The court reasoned that the language in *Hoskins* was not all-inclusive and that the Board may deny medical witness fees for some reason other than redundancy or cumulativeness. The court did not, however, make any further findings and reversed for further clarification because the Board failed to state its reasons for awarding fees.[19] In the present case, the Board clearly stated its reasons for denying the medical witness fees for Dr. Rodgers:

> [s]ince the Board found that Claimant does not have any permanent impairment related to her industrial injury and did not accept Dr. Rodgers' testimony, Claimant is not entitled to payment of Dr. Rodger's medical witness fees.[20]

As discussed above, this rationale for denying medical witness fees has been specifically rejected in *Wade.*

The employer also relies upon *Van Pelt v. Beebe Medical Center*.[21] In *Van Pelt*, the Delaware Supreme Court found that a determination that the claimant was

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[18] 1991 Del. Super. LEXIS 149.

[19] *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 652 (Del. Super. Ct. 1973)("The record must clearly show the basis on which the administrative agency acted in order that its exercise of discretion may be properly reviewed.").

[20] *Williams*, IAB Hearing No. 1213087 (Apr. 30, 2004), at 13.

[21] 2004 Del. LEXIS 409.

entitled to mileage reimbursement was not an "award" for purposes of § 2322(e) and thus did not entitle the claimant to medical witness fees.[22] The court explained that the words "award" and "compensation" within § 2322(e) "refer specifically to the cost of surgical, medical, dental, optometric, chiropractic and hospital services . . ." and "the term 'compensation,' as used throughout the chapter, cannot be read to encompass travel expenses."[23] In this case, the claimant was awarded outstanding medical fees, an award that clearly falls within the parameters of § 2322(e) and entitles the claimant to medical witness fees.

The employer also puts forth a policy argument and contends that requiring the employer to pay the medical witness fees of Dr. Rodgers would frustrate the purpose of the Worker's Compensation Act. The court in *Keeler v. Metal Masters* addressed this issue and the same rationale is guiding here:

> [t]he purpose of the Worker's Compensation Act is to provide a means by which compensation is made readily available to injured employees and to ensure that employees will not suffer excessive charges for services rendered in obtaining the compensation. There exists a narrowly circumscribed pro-employee set of exceptions under which the Board may deny the grant of medical witness fees - and those exceptions do not include situations where the claimant receives an award despite the Board's rejection of the testimony of the claimant's

[22] The court found Claimant was entitled to reimbursement for her mileage pursuant to 19 *Del. C.* § 2343(a) rather than § 2322(e).

[23] *Van Pelt*, 2004 Del. LEXIS 149, at *4-5.

medical witnesses.[24]

The claimant is entitled to an award for medical witness fees for the testimony of Dr. Rodgers notwithstanding the denial of the permanency claim presented to the Board. The Board's decision to deny fees for Dr. Rodgers was legal error and the decision is ***reversed and remanded*** for the limited purpose of having the Board tax Dr. Rodgers fees to the employer.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[24] *Keeler*, 1997 Del. Super. LEXIS 571, at *21-22 (citing *Huff v. Indus. Accident Bd.*, 430 A.2d 796, 798 (Del. 1981)).