

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

RALPH WILLIS,)
) C.A. No. 01A-10-001 JTV
 Claimant-Below,)
 Appellant,)
)
 v.)
)
 PLASTIC MATERIALS, CO.,)
)
 Employer-Below,)
 Appellee.)

Submitted: December 7, 2002
Decided: January 13, 2003

Walt F. Schmittinger, Esq., Dover, Delaware. Attorney for Claimant-Below, Appellant.

Erik C. Grandell, Esq., Wilmington, Delaware. Attorney for Employer-Below, Appellee.

Upon Consideration of Appellant's Appeal From
The Industrial Accident Board
REVERSED and REMANDED

VAUGHN, Resident Judge

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ORDER

Upon consideration of the parties briefs and the record of the case, it appears that:

1. On September 11, 2001, after a hearing, the Industrial Accident Board (“Board”) awarded the appellant, Ralph Willis (“claimant”), \$46,904.22 for medical expenses relating to a work related accident. It also awarded \$2,580 for his attorney’s fees pursuant to 19 *Del. C.* § 2320(10).¹ The claimant has appealed the award of attorney’s fees. He contends that the Board abused its discretion by failing to consider all of the factors which it is required to consider under *General Motors Corp. v. Cox*² when making an award of attorney’s fees. He also contends that the Board abused its discretion by awarding an inadequate amount. The appellee, Plastic Materials Co. (“employer”) contends that the Board acted within its discretion in awarding the sum of \$2,580. It contends that the claimant offered evidence relevant to some of the *Cox* factors but not others and that the Board acted properly in basing its decision upon those *Cox* factors for which the claimant offered evidence.

2. The scope of review for appeal of a Board decision is limited to examining

¹ 19 *Del. C.* § 2320(10) Attorney's fee. --

a. 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.

² 304 A.2d 55 (1973).

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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.³ "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴ On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."⁵ The court is simply reviewing the case to determine if the evidence is legally adequate to support the agency's factual findings.⁶ The court must give "due account of the experience and specialized competence of the Board and of the purposes of our workers' compensation law."⁷ Absent an error of law, the standard of review on appeal 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

³ *Robinson v. Metal Masters, Inc.*, 2000 Del. Super. LEXIS 264 (Del. Super. 2000); *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).

⁴ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

⁵ 213 A.2d at 66.

⁶ *ILC of Dover, Inc. v. Kelley*, 1999 Del. Super. LEXIS 573, at *3 (Del. Super. 1999).

⁷ 621 A.2d at 342.

⁸ *Digiacombo v. Board of Public Education*, 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).

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3. A claimant who receives a compensation award has a statutory right to an award of reasonable attorney's fees.¹⁰ The purpose of the statute is to reduce or eliminate the amount which a successful claimant must use from his or her compensation award to pay legal fees.¹¹ The Board has discretion in determining the amount of the attorney's fees which it will award, provided it acts in a manner consistent with the purpose of the Worker's Compensation Act.¹² The factors which the Board must consider in deciding upon the amount of an award are set forth in *General Motors Corp. v. Cox*.¹³ They are as follows:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite 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

¹⁰ 19 *Del. C.* § 2320(10).

¹¹ 2000 *Del. Super.* LEXIS 264.

¹² *Id.* at *7.

¹³ 304 A.2d 55, 57 (Del. 1973).

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circumstances;

- (6) The nature and 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;
- (10) Whether the attorney for the claimant has received or expects to receive from any other source.¹⁴

This Court has previously held that all factors must be considered.¹⁵

4. The Board's findings on the issue of attorney's fees in this case, set forth in full, are as follows:

Having received an award, Claimant is entitled to a reasonable attorney's fee assessed as costs against Plastic, pursuant to 19 *Del. C.* § 2320(g). Claimant's attorney attested that he spent 17.2 hours preparing for the hearing, which lasted approximately one hour. His first contact with Claimant was on August 28, 2000. Claimant's attorney has been practicing law in Delaware for over five years. Based on these factors, and on the results obtained, the Board awards one attorney's fee in the amount of \$2,580. 19 *Del. C.* § 2320(10)(b).¹⁶

¹⁴ *Id.*

¹⁵ 2000 Del. Super. LEXIS 264.

¹⁶ *Willis v. Plastic Materials*, IAB Hearing No. 1050901, at 9 (September 11, 2002).

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The Board's decision touches on the first, fourth, sixth and seventh factors, although in only summary fashion. It does not appear that the second, third, fifth, eighth, ninth or tenth factors were considered at all.

5. The court cannot exercise its function on appeal if the Board does not make adequate findings concerning each of the *Cox* factors.¹⁷ In several recent cases the court has reversed the Board's decision concerning attorney's fees due to the Board's failure to do so.¹⁸ The Board's failure to consider all of the *Cox* factors is an abuse of discretion which requires reversal in this case as well.

6. The employer's contention that the Board need consider only those *Cox* factors for which the claimant offers evidence has previously been rejected by this Court, at least by implication, in *Taylor v. Walton Corporation*.¹⁹ In that case the Board's decision discussed some of the *Cox* factors but not others. Specifically, it did not contain any discussion of the eighth, ninth and tenth factors. As to those factors, its decision did state that "[n]o evidence was provided to the Board pertaining to the remaining *Cox* factors and the Board shall not speculate concerning them." In its order remanding the case, however, the court directed the Board to address all factors, including the eighth, ninth and tenth. The Board should do so

¹⁷ *Taylor v. Walton Corp.*, 2002 Del. Super. LEXIS 63 (Del. Super. 2002).

¹⁸ *Id.*; *Woodall v. Playtex Products, Inc.*, 2002 Del. Super. LEXIS 425 (Del. Super. 2002); *Thomason v. Temp Control*, 2002 Del. Super. LEXIS 422 (Del. Super. 2002); 2000 Del. Super. LEXIS 264; *Vaughn v. Genesis Health Ventures*, 2000 Del. Super. LEXIS 253 (Del. Super. 2000).

¹⁹ 2002 Del. Super. LEXIS 63 (Del. Super. 2002).

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in this case also.

7. On remand the Board should reassess the award of attorney's fees on the basis of all ten *Cox* factors. The claimant should provide the Board with sufficient information to enable it to do so.

8. The Board's decision on attorney's fees is ***reversed*** and the matter is ***remanded*** for further proceeds consistent with this order.

IT IS SO ORDERED.

Resident Judge

oc: Prothonotary
cc: Order Distribution
File