IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JOHNNY JACKSON,	)	
	)	C.A. No.: K10A-09-010 JTV
Appellant,	)	
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

Submitted: July 5, 2011
Decided: October 31, 2011

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

Susan List Hauske, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware. Attorney for Appellee.

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

VAUGHN, President Judge

Jackson v. State of Delaware
C.A. No. K10A-09-010 JTV
October 31, 2011

ORDER

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

1. This is an appeal from a decision of the Industrial Accident Board which denied Johnny Jackson's petition for attorney's fees. An understanding of the procedural history of the case in the proceedings before the Board is necessary to understand the issue on appeal.

2. On February 25, 2002, the appellant sustained a compensable work injury. Some years later he filed a Petition to Determine Additional Compensation Due. The petition sought a determination that a particular proposed surgery was reasonable, necessary and causally related to the 2002 injury. A hearing on the petition was held in February 2009. On August 5, 2009, while the Board's decision on the petition was still pending, the appellant filed a second Petition to Determine Additional Compensation Due. The second petition sought permanent impairment arising from the same work injury. A hearing on the second Petition was scheduled for December 7, 2009. Next, a motion was filed by appellee State of Delaware on August 28, 2009 to dismiss the second petition on the grounds that it was premature because a decision on the first petition was needed before the second petition could be decided. A hearing on the motion was held on September 30, 2009. At the hearing, counsel for the appellant opposed dismissal but acknowledged that the second petition was impacted by the decision on the first petition. Appellant also agreed that continuance of the December 7, 2009 hearing on the second petition would be appropriate if a decision on the first petition was not received within a

reasonable time before the December 7, 2009 hearing date. On October 1, 2009, the Board issued an order continuing the second petition's December 7, 2009 hearing date. Counsel for the appellee then wrote a letter to appellant's counsel confirming that the continuance of the December 7, 2009 hearing date also continued the 30-day rule, discussed hereinafter. This letter apparently drew no response from appellant's counsel. The hearing on the second petition was rescheduled for March 5, 2010. On January 4, 2010, counsel for the appellee wrote counsel for appellant an email noting that they were still waiting for a decision on the first petition and asking whether appellant's counsel would agree to a continuance of the second petition's March 5, 2010 hearing date. On the same day, appellant's counsel responded by email that he agreed. The 30-day rule was not mentioned. The March 5, 2010 hearing date was then continued to May 26, 2010. On February 25, 2010, the Board issued its decision on the first petition, which was in the appellant's favor. On March 12, 2010, the appellee filed a motion for reargument of the February 25, 2010 decision. On April 7, 2010, while the motion for reargument was pending, counsel for the appellee wrote a letter to counsel for appellant asking whether appellant would be willing to stipulate to a continuance of the May 26, 2010 hearing date on the second petition if necessary due to the pendency of the motion to reargue. On April 13, 2010, counsel for appellant responded by letter that he would be willing to stipulate to a continuance of the May 26 hearing date if the motion for reargument was not decided. On April 23, 2010, counsel for appellee forwarded counsel for appellant a stipulation and order for continuance of the May 26, 2010 hearing date. On April 30, 2010, counsel for the appellant returned the signed stipulation to appellee's counsel. The 30-day rule was

again not mentioned. On May 12, 2010, the Board approved the stipulated request for a continuance of the May 26, 2010 hearing date. A hearing on the second petition was then set for August 18, 2010. On May 13, 2010, the Board denied the appellee's motion for reargument of its decision on the first petition. On July 19, 2010, 30 days before the August 18, 2010 hearing date on the second petition, the appellee made an offer of settlement. It did not include an offer of attorney's fees. By letter dated July 27, 2010, the appellant accepted the offer, and by copy of the letter to the Board, informed the Board that the August 18, 2010 hearing was moot, but that a hearing would be necessary on attorney's fees. On August 11, 2010, a hearing was held at which appellant contended that he was entitled to an award of attorney's fees on the now-settled second petition for time he spent preparing for the May 26, 2010 hearing before it was continued. The appellee opposed his request. On August 17, 2010, the Board issued its decision denying the appellant's request for attorney's fees.

3. There are two statutory provisions which are relevant to this appeal. They are 19 *Del. C.* § 2320(10)a. and § 2320(10)b., which read, respectively, in relevant part as follows:

> A reasonable attorney's fee . . . shall be allowed by the Board to any employee awarded compensation.
>
> In the event an offer to settle an issue pending before the . . . Board is communicated to the claimant or the claimant's attorney . . . at least 30 days prior to the trial date . . . and the offer . . . is equal to or greater than the amount ultimately awarded by the Board at the trial, . . . the provisions of a. of this subdivision shall have no application.

In other words, if a claimant is awarded compensation, the claimant is also entitled to recover attorney's fees; except he is not entitled to recover attorney's fees if the employer offered a settlement at least 30 days before the trial date which was equal to or greater than the amount ultimately awarded by the Board. The Delaware Supreme Court has stated that the purpose of the attorney's fees provisions is "(1) to encourage early settlement by employers before claimants' attorneys must engage in substantial pre-hearing preparation, and (2) to prevent abuses by claimants' attorneys, who do not accept valid settlement offers, and thereby force unnecessary Industrial Accident Board hearings."[1]

4. An early case involving a claimant-initiated petition suggested that the phrase "awarded compensation" in the statute referred only to compensation paid as a result of a litigated hearing before the Board.[2] A later case recognized that an "award" included compensation awarded by the Board where the employer conceded liability at the hearing, thereby eliminating the need for formal litigation.[3] More recent cases have established that an "award" includes a voluntary settlement where the employer's settlement offer is made less than 30 days before the trial date.[4]

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[1] *State v. Drews*, 491 A.2d 1136 (Del. 1985).

[2] *Kelly v. J & J Corp.*, 447 A.2d 427 (Del. 1982).

[3] *State v. Drews*, 491 A.2d 1136 (Del. 1985).

[4] *Baughan v. Wal-Mart Stores, Inc.*, 2008 WL 1930576 (Del. Supr. May 2, 2008); *Pugh v. Wal-Mart Stores, Inc.*, 2008 WL 424049 (Del. Super. Mar. 5, 2008); *General Motors Corp. v. Alcaraz*, 1998 WL 729631 (Del. Super. July 22, 1998).

5. Where the case involves an employer-initiated petition to terminate benefits, it seems to be established that an "award" includes a claimant's successful, defensive efforts to preserve his existing award, including instances where the employer voluntarily withdraws its petition at any point after the claimant has incurred attorney's fees.[5]

6. The issue presented in this case involves the application of 19 *Del. C.* § 2320(10)a. and b. where the proceeding is initiated by the claimant and there have been continued hearing dates under the circumstances involved here.

7. The scope of review for an appeal from the IAB is limited to an examination of the record for errors of law, and a determination of whether substantial evidence is present to support the IAB's findings of fact and conclusions of law.[6] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[7] When the issue raised on appeal is exclusively a question of the proper application of the law, the review by the court is *de novo*.[8]

8. In its decision, the Board concluded that it had made no award of

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[5] *Lattis v. Blackwell and Son, Inc.*, 1992 WL 53435 (Del. Supr. Feb. 28, 1992); *Riley v. State*, 1995 WL 654132 (Del. Super. Oct. 31, 1995).

[6] *Porter v. Insignia Mgmt. Group*, 2003 WL 22455316, at *3 (Del. Super. Sept. 26, 2003) (citing *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993)).

[7] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

[8] *Porter*, 2003 WL 22455316 at *3.

compensation and that, therefore, there would be no award of attorney's fees. In reaching this conclusion, it took into account and analyzed the principles and authorities mentioned hereinabove. Factors which the Board also observed and considered in reaching its conclusion included: that the parties agreed that the second petition was directly impacted by the decision on the first petition; that the second petition was not ripe until the Board's decision on the first petition was issued; that premature filing of the second petition coupled with the Board's own delay in deciding the first petition led to the repeated, stipulated continuances of the hearing on the second petition; that each continuance was agreed to by both parties; that the appellant made no objection to the appellee's expressed position at the first continuance that the continuance also continued the 30-day rule; that subsequent continuances were for the same reasons as the first; and that an award of attorney's fees would "behoove every attorney working on behalf of claimant's to file a Petition seeking compensation for permanent impairment contemporaneous to the filing of every initial Petition to Determine Compensation Due," placing employers in a position where they would "then either have to concede compensability in every instance (moving directly on to the issue of permanency) or forego the opportunity to settle a claim and avoid attorney's fees in the potential impairment action."

9. Before the Board and on this appeal the appellant relies upon the case of *Seaford Feed Co. v. Moore*.[9] In that case the claimant suffered a compensable injury and received benefits. He later requested that the employer pay for a program

[9] 537 A.2d 184 (Del. 1988).

of vocational rehabilitation training. The employer refused and the claimant filed a petition with the Board seeking compensation from the employer for the program. The hearing was scheduled for January 11, 1985. On January 2, nine days before the hearing, the employer offered to pay for the program but refused to pay the claimant an attorney's fee. Because of the employer's refusal to pay an attorney's fee, the claimant refused the offer and no agreement was reached. The January 11 hearing date had to be rescheduled to January 28 because of inclement weather. After a hearing held on that later date, the Board awarded the claimant the cost of the program and an attorney's fee. At the time, what is now the 30-day rule was a 21-day rule. The employer appealed, contending that the claimant was not entitled to an attorney's fee because it had made its offer to pay for the program 26 days before the hearing, that is, 26 days before the January 28 hearing. The claimant contended that the award of attorney's fees was correct because the employer had made its offer only nine days before the original, January 11 hearing date. The Delaware Supreme Court agreed with the claimant. The court reasoned that it was "obvious that the employee's attorney had to be prepared for the hearing as scheduled for January 11 well in advance of that date since the hearing was not postponed until that very day."[10] The court held as follows:

> We hold, therefore, that when the hearing is rescheduled within twenty-one days of the scheduled hearing date due to unforseen circumstances and not through any request or fault of the parties, the constraints of Rule 24(D) [a Board

[10] *Id.* at 186.

> rule] refer to the twenty-one-day time period prior to the scheduled date of the hearing, and the later date when the hearing actually takes place is not relevant.

10. The appellant contends that the appellee did not make an offer of settlement at least thirty days prior to the scheduled May 26, 2010 hearing date; that the appellee requested a continuance of the May 26, 2010 hearing date; that the continuance was granted on May 12, 2010, just 14 days prior to the scheduled hearing date; that the continuance was not the fault of the appellant; that appellant's counsel spent 14.4 hours preparing for the May 26 hearing before it was continued on May 12; that the original hearing date, May 26, is the relevant hearing date for application of the 30-day rule; that under *Seaford Feed Co.* the later date, the August 18 date, is not relevant; and that he is, therefore, entitled to an award of attorney's fees.

11. The Board considered and distinguished *Seaford Feed Co.* I agree with the Board that *Seaford Feed Co.* is distinguishable. The December 7, 2009 hearing date and the March 5, 2010 date were both continued by stipulation of the parties and Board approval because the parties were waiting on a decision on the first petition. When a decision on the appellee's motion for reargument was still pending in April, the possible need to continue the May 26 hearing date became very foreseeable, unlike the situation in *Seaford Feed Co*. The employer set into motion the process for obtaining a continuance of the May 26 hearing date more than 30 days before the hearing and the parties again stipulated to a continuance. The Board had previously approved two continuances for the same reason and the appellee was not reasonably in a position to decide upon an offer until the Board ruled upon the motion for

reargument. Under these circumstances, the fact that the appellee did not make an offer at least 30 days before the May 26 hearing date, and the fact that the Board did not approve the continuance request until 14 days before the May 26 hearing date, should not be deemed to have deprived the employer of making an offer under 19 *Del. C.* § 2320(10)(b) at least 30 days before the next hearing date.

12. Hearing dates can be continued under many circumstances. I am not inclined to attempt to set forth a general rule of applicability governing the 30-day rule and continuances. I conclude in this case only that *Seaford Food Co.* is distinguishable and that for the reasons given by the Board and the reasons given herein, the decision of the Board should be ***affirmed***.[11]

IT IS SO ORDERED.

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

oc: Prothonotary
cc: Order Distribution
File

[11] To the extent that the Board's comments regarding what it characterizes as "premature" filing of the second petition might be construed as criticism of appellant's counsel, I do not agree. There is nothing in the record that has been brought to my attention which suggest that the appellant did not have the right to file his second petition when he did. Any issue which the Board has on this point should be addressed by it in the management of its docket. But I agree with the balance of the Board's reasoning.