

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

MICHAEL SHORT, :  
 : C.A. No: K11A-03-002 (RBY)  
 Claimant Below- :  
 Appellant, :  
 :  
 v. :  
 :  
 REED TRUCKING CO., :  
 :  
 Employer Below- :  
 Appellee. :

*Submitted: November 9, 2012*  
*Decided: February 14, 2012*

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

**OPINION AND ORDER**

Walt F. Schmittinger, Esq. and Kristi N. Vitola, Esq., Schmittinger and Rodriguez,  
P.A., Dover, Delaware for Appellant.

John Ellis, Esq., Heckler & Frabizzio, P.A., Wilmington, Delaware for Appellee.

Young, J.

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### **SUMMARY**

\_\_\_\_\_Michael Short (Appellant) appeals the Industrial Accident Board's (the Board) award of attorney's fees after being awarded Worker's Compensation benefits. The Board's award is low and without sufficient explanation. The decision below is **AFFIRMED**.

### **FACTS**

\_\_\_\_\_On March 19, 1996, Michael Short (Appellant) was injured while working for his employer, Reed Trucking Company (Appellee). As a result, Appellant has undergone four surgeries, the most recent of which occurred in May 2009. Appellant has \$2,229.58 in outstanding medical bills and additional bills outstanding that stem from CT scans performed since July 2010.

Appellant applied for Worker's Compensation benefits. On March 14, 2011, the Industrial Accident Board (the Board) conducted a hearing to determine if Appellant was entitled to compensation. Although Appellee acknowledged Appellant's injury and paid for certain Worker's Compensation benefits, it contested the outstanding debt as having stemmed from treatment that was not reasonable or necessary for Appellant's condition.

The Board found that Appellant was entitled to compensation for the outstanding medical bills and CT scan bills. In its final order, the Board discussed, in considerable detail, the nature of Appellant's injury and treatment as described by two competing expert witnesses.

After reaching a conclusion as to what benefits Appellant was entitled, the Board went on to award Appellant \$1,000 in attorney's fees. The Board explained

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that, according to *General Motors Corp. v. Cox*,<sup>1</sup> it was required to consider ten specific factors in determining the amount of attorney's fees to award to a successful claimant. The Board listed each of the ten factors and stated, albeit in conclusory fashion, that it had considered each of them.

The Board noted, that some information and some argument was presented regarding what would constitute an appropriate award. The only specific information identified in the Board's order was that Appellant's counsel submitted that he spent 19.2 hours to prepare for the two-hour hearing; that Appellant's counsel's fee was contingent; that Appellant's counsel did not expect compensation from any other source, and that Appellee could pay an award. The Board, responding, stated:

"In the case at hand, based on the results obtained, information presented and Reed's failure to argue that an attorney's fee award is not appropriate, the Board finds that one attorney's fee in the amount of \$1,000.00 is reasonable. *Del. Code Ann. tit. 19, § 2320*. This award is reasonable given Claimant's counsel's level of experience and the nature of the legal task. In accordance with § 2320(10)a, the attorney's fee awarded shall act as an offset against fees that would otherwise be charged by counsel to Claimant under their fee agreement."

### **STANDARD OF REVIEW**

\_\_\_\_\_ "The duty of the Court on appeal from the Industrial Accident Board is to determine whether the Board's decision is supported by substantial evidence and free from legal error."<sup>2</sup> "The Court does not weigh the evidence, determine credibility or

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<sup>1</sup> 304 A.2d 55 (Del. 1973).

<sup>2</sup> *Cabrera v. JDH Construction*, 2010 WL 2677301, at \*3 (citing *Gen. Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. May 16, 1985)).

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make its own factual findings.”<sup>3</sup> “The Court must give deference to ‘the experience and specialized competence of the Board.’”<sup>4</sup> “Absent an abuse of discretion or an error of law, the Court will not disturb an award of attorney’s fees.”<sup>5</sup> “The Board commits an abuse of discretion when it ‘exceeds the bounds of reason’ in light of the circumstances, or ‘so ignores recognized rules of law or practice’ as to produce an injustice.”<sup>6</sup> “If the record reveals that the Board based its decision on improper or inadequate grounds, an abuse of discretion has occurred and the Court must reverse the decision.”<sup>7</sup>

### **DISCUSSION**

\_\_\_\_\_The issue raised on appeal challenges the award of attorney’s fees only. Specifically, Appellant contends that the amount of the award was unreasonably low, and that the Board erred by failing to explain the basis for the award satisfactorily.

\_\_\_\_\_“A claimant who receives an award of compensation becomes entitled to seek an award of reasonable attorney’s fees.”<sup>8</sup> The purpose of the award is to ‘relieve a

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<sup>3</sup> *Bd. of Educ. of Capital Sch. Dist. v. Johns*, 2002 WL 471175 (Del. Super. Mar. 27, 2002).

<sup>4</sup> *Taylor v. Walton Corp.*, 2002 WL 264447 (Del. Super. Feb. 22, 2002) (quoting *Histed v. E.I. DuPont De Nemours & Co.*, 621 A.2d 340 (Del. 1993)).

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

<sup>6</sup> *Id.* (quoting *Floudiotis v. State*, 726 A.2d 1196 (Del. 1999)).

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

<sup>8</sup> *Day v. Zimmerman Sec.*, 965 A.2d 652, 659 (Del. 2008).

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successful claimant of the burden of legal fees and expenses, at least in part.”<sup>9</sup>  
“Whether to award attorney’s fees in Worker’s Compensation cases is within the discretion of the Board.”<sup>10</sup> In determining what constitutes a reasonable amount, the Board, and the Court, must consider the following factors:

- 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 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; and
- 10) whether fees and expenses have been received, or will be received, from any other source.<sup>11</sup>

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<sup>9</sup> *Lofland v. Econo Lodge*, 2009 WL 3290450 (Del. Super. Aug. 31, 2009) (quoting *Ham v. Chrysler Corp.*, 231 A.2d 258 (Del. 1967)).

<sup>10</sup> *Day*, 965 A.2d at 659.

<sup>11</sup> *Gen. Motors Corp.*, 304 A.2d at 57.

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To receive an award of attorney's fees, the claimant's attorney must submit an affidavit "that responds to the various *Cox* factors."<sup>12</sup> While "the Board's failure to account for all of the factors is an abuse of discretion;"<sup>13</sup> "the *Cox* factors are guidelines, not mandatory rules."<sup>14</sup> Generally, "the record need only show that the Board considered the *Cox* factors in reaching its decision."<sup>15</sup>

\_\_\_\_\_ In its decision, the Board stated expressly that it considered each of the *Cox* factors. The Board, having dealt with countless fee applications, is not required to discuss its analysis on each *Cox* factor so long as the record reflects, as it does here, that those factors were in fact considered in reaching a conclusion.

Whether or not the fee awarded was generous is not the issue.<sup>16</sup> The Board expressly contemplated the requirements to reach a determination. It is not the function of the reviewing Court to substitute its evaluation for that of the Board.

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<sup>12</sup> *Day*, 965 A.2d at 659.

<sup>13</sup> *Lofland*, 2009 WL 3290450 at \*2.

<sup>14</sup> *Day*, 965 A.2d at 659.

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

<sup>16</sup> *Cravens v. Wal-Mart Distribution Center*, Del. Super., No. 07A-06-005 (Sept. 22, 2008) (requiring additional explanation where the Board awarded attorney's fees in the amount of \$162.79 per hour when the Board awarded up to \$325 per hour customarily).

