IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

Kathy Melvin,	:	
	:	C.A. No. 04-04-0092
Plaintiff,	:	
v.	:	
	:	
Playtex Apparel, Inc.,	:	
A Delaware Corporation,	:	
	:	
Defendant.	:	

Upon Cross Motions for Summary Judgment

Submitted: August 17, 2004

Decided: August 17, 2004

Plaintiff's Motion for Summary Judgment is granted.
Defendant's Motion for Summary Judgment is denied.

Walter F. Schmittinger, Esquire, Schmittinger & Rodriguez, P.A., 414 South State Street, Post Office Box 497, Dover, Delaware 19903-0497, attorney for plaintiff.

J.R. Julian, Esquire, 824 Market Street, Suite 1001, Post Office Box 2171, Wilmington, Delaware 19899-2171, attorney for defendant.

Trader, J.

In this civil case involving a *Huffman* claim, I hold that Playtex Apparel (Playtex) may not offset future benefits for the amounts paid to Kathy Melvin (Melvin) during the pendency of a petition for termination of benefits. I also hold that Melvin is entitled to medical witness fees since she obtained an award for medical witness fees from the Industrial Accident Board.

On September 9, 1983, the plaintiff, Kathy Melvin injured her low back in an accident while employed by the defendant, Playtex. Melvin and Playtex subsequently entered into an agreement for the payment of temporary total disability payments at the rate of $228.53 per week. On January 26, 2001, Playtex filed a petition seeking to terminate Melvin's total disability benefits. On September 7, 2001, the Board granted Playtex's petition and retroactively terminated Melvin's entitlement to total disability payments. The Board ordered the defendant to pay partial disability benefits for four weeks at $219.80 per week and thereafter at the rate of $96.80 per week. The Board also awarded medical witness fees to Melvin. In a series of ten letters beginning October 3, 2001 and through May 13, 2002, the plaintiff through her attorney, submitted demands for payment of all workman's compensation benefits due her. Playtex has failed to pay the lost wage benefits and medical witness fees in a timely manner. On March 15, 2004, Melvin filed a civil action seeking unpaid workman's compensation benefits, medical witness fees, liquidated damages, plus interest thereon, and attorney's fees. Playtex has filed a motion to dismiss the complaint which I will treat as a motion for summary judgment and Melvin has filed a cross motion for summary judgment.

Playtex contends that it is entitled to an offset for the overpayments it made to the plaintiff while Playtex's petition for termination of benefits was pending. I disagree. The

Workman's Compensation Act does not require claimants to reimburse the employer for interim payments while the employer's petition for termination of benefits is pending.

In order to place this dispute in context, a history of the legislative enactments relating to workman's compensation is necessary. The Workers' Compensation Fund was enacted in part to reverse a practice whereby the claimant's lost wage benefits would be stopped unilaterally during the pendency of a petition for review. This meant that the injured worker suffered a substantial hardship since he had no money during the pendency of the petition. To remedy this situation, the legislature provided that the fund would continue payments to the claimant while the petition for review was pending.

19 Del.C.Sec. 2347 implements this remedy and provides in part as follows: "[c]ompensation payable to an employee… shall not terminate until and unless the Board enters an award ending the payment of compensation after a hearing upon review of an agreement…" The statute also provided that "[c]ompensation shall be paid by the Department [of Labor] to the employee after the filing of the employer's petition to review from the Workers' Compensation Fund until the parties to an award or agreement consent to the termination or until the Board enters an order upon the employer's petition to review." In *Hopkins v. Evans,* 575 A.2d 1172, 1174 (Del. 1990), the Court stated that "[t]he legislative policy behind the Contingency Fund is to provide compensation to an injured employee until such time as the employee is found not to be entitled to receive the compensation."

The Workers' Compensation Fund is funded through regular and special assessments by insurance carriers who write workers' compensation insurance in our state. 19 Del. C. Sec. 2395. These assessments were also previously levied upon self-

insured employers. In1997, however, legislative amendments to the Workers' Compensation Act exempted self-insured employers from both the assessments under the prior 19 Del.C. Sec. 2395 as well as the payouts to those employers' injured workers under 19 Del.C. Sec. 2347. These legislative changes left in place the requirements that a claimant continue to receive benefits until the Board issues a decision on a petition for review. *See* 19 Del.C. Sec. 2347, ¶ 4. The net result of these changes is that claimants employed by a self-insured employers continue to receive ongoing benefits directly from the self-insured employers while the petition is pending.

The statute only imposes upon the employer an obligation to reimburse the Workers' Compensation Fund in the event that the Board determines that the claimant is entitled to benefits. 19 Del. C. Sec. 2347 specifically states: "[A]fter the parties to an award or agreement consent to the reinstatement of compensation or, after the employer withdraws its petition, or, if the Industrial Accident Board orders the employer's petition dismissed, the employer shall repay the Workers' Compensation Fund the amount paid out by the Department." Furthermore, neither the statute nor any case law imposes upon the claimant the obligation to repay any monies to the Workers' Compensation Fund under any circumstances.

The 1997 legislative amendments created a new class of claimants: employees of self-insureds who received payments from those self-insured employers (in lieu of Fund payments) during the pendency of a petition for review. Playtex, a self-insured employer, contends that it is entitled to credit for benefits paid during the petition for review. The Industrial Accident Board ruled on this question in *Dobrzynski v. City of Wilmington*, IAB Hearing NO. 928839 (August 5, 1998).

The *Dobrzynski* case is applicable to the issue before me. In that case, the City of Wilmington, a self-insured employer, filed a petition for review seeking to end total disability benefits. The Board's decision on that petition terminated total disability benefits retroactively to the date of filing, and ordered payment of temporary partial disability benefits. The employer refused to pay partial disability benefits claiming that it was due an offset for the overpayment of benefits while the petition was pending. The Board declined to grant such a credit and held that the statute does not provide the Board with authority to order claimants to reimburse employers for payments made during the pendency of a petition for review. *Id*. at 2. The Board also held that the statute does not authorize any offset against future benefits for the alleged "overpayment". *Id.* The Board noted that:

> [p]rior to the recent changes in the Act, claimants were not required to reimburse the Fund for interim payments when the employer's Petition for Termination of Benefits was ultimately granted. The amendments to the Act do not change that policy with respect to the Fund[,] nor do the changes appear to favor self-insured employers by requiring reimbursement to them.

The Board ordered the employer to pay partial disability benefits, without any reduction, in accordance with the Board's prior order. *Id.* at 3.

Therefore, under *Dobrzynski* claimants are in the same position as they were before the 1997 statutory amendments. They continue to receive the benefits irrespective of whether the employer in a particular case is self-insured or an insured participant in the Fund. Employers who are self-insured bear the expense of payment of benefits to injured workers during the pendency of a petition for review just as insured employers bear that expense. In either case, there is no refund or credit against benefits paid during the pendency of a petition for review. To grant such a credit to self-insured employers

would treat those employers and their employees disparately, and would create substantial incentive that would favor self-insured status. Such a situation is at odds with the legislative intent underlying the workers' compensation system as a whole, and the Workers' Compensation Fund in particular. The Board has recognized that there is no indication of legislative intent to create a disparity of benefits depending on the employer's insured status. *Id.*

Furthermore, the employer's unilateral action in withholding sums lawfully due the claimant pursuant to a Board Order, is exactly the harm the Legislature intended to prevent in enacting 19 Del.C. Sec. 2347. The Supreme Court in *Huffman v. Oliphant*, held that:

> If the employee does not consent to the termination of compensation, payments must be continued until such time as the Board determines, after a hearing on the merits, that compensation should be terminated. In short, absent the employee's consent, the determination of whether an employee continues to be entitled to compensation under the law is to be made by the Board before compensation is suspended or terminated, and not by the employer or its insurer.

432 A.2d 1207, 1209-1210 (Del. 1981).

In *National Union Fire Insurance v. McDougall*, 773 A.2d 388 (Del. 2001), the Supreme Court has again considered the suspension of benefits in the context of an alleged "credit" asserted by the employer. In that case, the employer unilaterally asserted a credit against an alleged third-party recovery in a related tort suit. The Supreme Court held that the employer's alleged 'good faith' belief that the employee is not entitled to compensation is irrelevant under the statute. *Id*. at 393. The Supreme Court held that the obligation to pay the Board's award attached when the Board's decision became final. In language that applies equally to the case before me , the Supreme Court concluded,

> In light of the unappealed 1995 Order, which does not establish a credit, there is no basis for National Union's refusal to pay the medical expenses that would preclude awarding statutory damages to McDougall. The award under the Board's 1995 Order is an "amount due" under the Act regardless of National Union's good faith objections based on its view that a credit existed. National Union's attempt in this case to relitigate whether it truly owes a Board award that has become final is incompatible with the statutory remedy outlined in *Huffman*.

Id.

Thus, the employer's alleged belief that it is entitled to a credit is an insufficient basis to justify the unilateral withholding of benefits properly awarded by the Board. If the employer desires a credit, it must petition the Board to have the credit recognized and enforced against the claimant. Playtex has not obtained an order from the Board recognizing the alleged credit. The employer therefore may not simply withhold other benefits awarded by the Board in order to collect its alleged credit.

In the absence of a Board Order establishing a credit, there is no credit that can be asserted against other benefits due Melvin. Additionally, this is not the proper forum in which to assert a credit. Under 19 Del. C. Sec. 2301A(i), the Industrial Accident Board is granted jurisdiction concerning any alleged credit asserted by the employer. Since the employer may not claim a credit against benefits, the plaintiff is entitled to enforce the Board's award in the courts. The failure of the employer to pay the amount due after due notice entitles Melvin to liquidated damages as well as unpaid benefits.

Playtex next contends that Melvin is not entitled to a medical witness fee for the testimony of a psychiatrist. Playtex's contention is incorrect. 19 Del. C. Sec 2322(e) addresses medical witness fees and provides as follows:

> [t]he fees of medical witnesses testifying at hearings before the Industrial Accident Board in [sic.] behalf of an injured 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.

19 Del. C. Sec. 2322(e) (emphasis added). The statutory language provides that payment of medical witness fees is mandatory once the claimant receives "an award." The Delaware Supreme Court ruled on this issue in *Brandywine School District v. Hoskins*, 492 A.2d 1247 (Del. 1985). The Supreme Court's decision in *Hoskins*, *supra*, holds that all medical witness fees are payable under 19 Del.C. Sec. 2322(e), to a claimant who receives "an award" from the Board. It is immaterial to claimant's entitlement to costs under Sec. 2322(e) that a medical witness' testimony may be related to an issue on which claimant was unsuccessful. Those expenses are properly awarded as well. The only exception to that rule is that the Board may refuse to grant an award for witness fees when an unreasonable number of witnesses is called by the claimant and their testimony is unreasonably cumulative or redundant because of the testimony of other medical witnesses. *Hoskins, supra* at 1252. In *Thelma Kemp v. ILC of Dover,* IAB Hearing No. 733976 (March 8, 1989), the Industrial Accident Board applied *Hoskins* and granted a medical witness fee even though the witness' testimony was not the basis of an award.

In the case at bar, the Board ordered payment of medical witness fees. It did not distinguish between witness fees relating to the Melvin's physical condition and witness fees relating to her psychiatric condition. The three doctors called by the plaintiff were not an unreasonable number of witnesses and their testimonies were not cumulative or redundant. Playtex did not appeal the award granted by the Board nor did it file a petition for reargument of the Board's decision.

In the instant case, Melvin received an award of medical witness fees and is entitled to enforce this award in a court of competent jurisdiction. Since the defendant

failed to pay these medical witness fees in a timely manner after due notice, the plaintiff is entitled to her medical witness fees, as well as liquidated damages for the non-payment of that award.

In accordance with these findings of fact and conclusion of law, summary judgment is granted in favor of the plaintiff for the unpaid benefits, medical witness fees, liquidated damages, interest thereon from November 3, 2001, as well as reasonable attorney's fees and the costs of these proceedings. The defendant's motion for summary judgment is denied. I will schedule an inquisition at the bar to determine damages.

IT IS SO ORDERED.

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Merrill C. Trader
Judge