

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY
COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

David C. Malatesta, Jr., Esquire
David A. Arndt, Esquire
Kent & McBride, P.C.
1105 Market Street, Suite 500
Wilmington, Delaware 19801
Attorneys for Appellant/Employer

Jessica Lewis Welch, Esquire
Tara E. Bustard, Esquire
Doroshow, Pasquale, Krawitz & Bhaya
1202 Kirkwood Highway
Wilmington, Delaware 19805
Attorneys for Appellee/Employee

Re: **Pepsi Bottling Group, Inc. v. Robin Meadow**
C.A. No.: 08A-07-006 RRC

Submitted: June 2, 2009
Decided: August 28, 2009

On Appeal from a Decision of the Industrial Accident Board.
REMANDED.

Dear Counsel:

Before this Court is the appeal of Pepsi Bottling Group, Inc. (“Employer”) from a June 26, 2008 decision of the Industrial Accident Board (“IAB” or “Board”) awarding workers’ compensation benefits to Robin Meadow (“Employee”). The issues raised on appeal are: 1) whether the Board erred in its April 3, 2008 order granting Employee’s request for a continuance of the first hearing date that had been scheduled for April 23, 2008; and 2) whether the Board incorrectly calculated its award of attorneys’ fees. For the reasons that follow, this Court finds that the Board’s record as to the reasons that it granted a rescheduling of the April 23rd hearing is incomplete because of an apparently erased or discarded tape of the legal hearing at which time the Board granted the continuance. Thus, in order for this Court to consider this part of the record in its appellate review, the case is **REMANDED** for the limited purpose of the Board completing the record.

I. FACTS AND PROCEDURAL HISTORY.

The facts of this case are set forth in detail in the transcript of the IAB hearing held on June 24, 2008, as well as the Board’s decision dated June 26, 2008. Only the facts relevant to this decision are included below.

Employee had worked for Employer in various positions relating to Employer’s bottling operations since 1990. Employee first noticed a pain in his right arm, the injury giving rise to this appeal, in December 2005. Shortly thereafter, Employee reported his injury to Employer and was referred to Occupational Health. After showing signs of carpal tunnel and ulnar nerve problems, Employee was referred to Dr. Leo Raisis, an orthopedic doctor. In January 2006 Employee visited Dr. Raisis who confirmed the diagnosis of carpal tunnel and ulnar nerve entrapment, and surgery was recommended. A few days later, Employee received a second opinion from Dr. George Namey who concluded that Employee’s injury was directly related to repetitive wrist and hand movements required by his jobs with Employer. At that time, Employee took no action and continued to work.

On December 14, 2007, Employee filed a Petition to Determine Compensation Due alleging a compensable work injury, as well as seeking payment for Dr. Raisis’ recommended surgery. A Pre-Trial Hearing was held in January 2008. On February 5, 2008, a Notice of Hearing was mailed

to the parties, and the hearing was scheduled for April 23, 2008.¹ On March 19, 2008, Employee emailed Employer's counsel and advised that Dr. Rasis would not be available for a deposition prior to the hearing date, and requested that Employer stipulate to a continuance.² However, Employer was unwilling to agree to a continuance. Employee then filed a Motion for Continuance,³ and a hearing on the motion was heard before the Board on April 3, 2008.

After considering the parties' filings and hearing oral argument on the parties' positions regarding Employee's request to continue the April 23rd hearing, the Board granted Employee's motion. However, there is no transcript of the hearing, and apparently the audio recording of the hearing was not preserved. The hearing on the merits of Employee's claim for benefits was rescheduled for June 24, 2008. The hearing proceeded on that date, and two days later the Board issued a decision in favor of Employee. Employer's appeal followed.

II. PERTINENT FINDINGS OF THE BOARD

There is no record of the Board's deliberations for its April 3, 2008 hearing. The Order issued by the Board (apparently prepared in draft form by Employee's counsel) that granted the continuance stated, among other things, that the Board granted the continuance because "despite due diligence on behalf of the Claimant in attempting to obtain acceptable deposition dates for their medical witness, Dr. Rasis, no deposition dates were available for Dr. Rasis prior to the April 23, 2008 hearing."⁴ No other reasons are stated by the Board for granting the continuance. Employer represents that Employee's counsel told the Board that attempts to schedule the deposition of Dr. Rasis before the hearing date of April 23, 2008 had failed.

With respect to attorney's fees, the Board analyzed the factors set forth in *General Motors Corp. v. Cox*⁵ in calculating a reasonable fee.⁶ In

¹ Employer Opening Br. at Ex. 1.

² Employee's Answering Br. at Ex. B.

³ *Id.* at Ex. E.

⁴ *Id.* at Ex. D.

⁵ 304 A.2d 55 (Del. 1973).

⁶ *Meadow v. Pepsi Bottling Group*, Hearing No. 1278966, at p. 9; Employee's Answering Br. at Ex. A p. 9.

determining the fee, the Board considered the following *Cox* factors: that Employee's counsel spent had 16.25 hours preparing for the hearing, and that the hearing itself lasted less than three hours; that Employee's counsel had represented Employee since February 2006, and that Employee's counsel had been a member of the Delaware Bar since 1996 with experience representing clients in workers' compensation disputes; that the case involved straightforward questions of law, but did involve questions of fact; that Employee's counsel was not subject to unusual time limitations in connection with this case, although counsel could not simultaneously work on this case and other cases; that the fee arrangement was that counsel would charge thirty percent of the gross amount recovered plus costs; and that counsel was not precluded from accepting other employment accept for representation of the Employer. The Board further found that Employee's counsel did not expect to receive compensation from any other source in connection with this litigation, and that there was no evidence that the Employer lacked the financial ability to pay the attorney's fee. Taking those factors into consideration, the Board determined that a reasonable fee in this case would be the lesser of \$5,225 or thirty percent of the value of the award to be paid by Employer.⁷

III. CONTENTIONS OF THE PARTIES

Employer argues that the Board erred as a matter of fact and law when it granted Employee's request for a continuance. Employer asserts that the Board incorrectly found that there was "good cause" to grant the continuance because, according to Employer, Employee did not offer any evidence that due diligence was used in order to have timely scheduled Dr. Rasis' deposition before April 23, 2008. Further, Employer argues that the Board did not apply 19 Del. C. § 2348(h)(2)⁸ because no evidence was

⁷ *Meadow v. Pepsi Bottling Group*, Hearing No. 1278966, at p. 10; Employee's Answering Br. at Ex. A p. 10.

⁸ 19 Del. C. § 2348(h)(2) states, among other things:

With respect to any request for an extension of a hearing beyond 180 days from the date of the petition, the party seeking the continuance must demonstrate that good cause for such an extension exists under a specific rule of the Industrial Accident Board and extraordinary circumstances exist which warrant the award of such continuance in the interests of justice. If such extension is to be granted, the Board's order shall be accompanied by the following:

offered by Employee that “extraordinary circumstances” prevented Employee from proceeding with the hearing on April 23, 2008.

Employer also argues that the Board did not satisfy its requirements under 19 Del. C. § 2348(h)(2)(a) because the Board did not explain its reasons for granting the continuance. Further, Employer argues that the Board did not follow 19 Del. C. § 2348(h)(2)(b) because the Board did not make a specific finding or inquiry as to whether Employee prosecuted his claim with due diligence. Employer also alleges that the Board’s calculation of attorney’s fees was erroneous because when it considered the time Employee’s counsel spent on this case, it included the time counsel spent in connection with seeking a continuance. Employer contends that it “cannot be the legislative intent” to award attorney’s fees for the time a party spends seeking a continuance or other “collateral issues arising outside the employer’s control.”⁹ Thus, Employer asks this Court to “overturn the Board’s two decisions and Orders.”¹⁰

Employee argues in response that the Board’s decision should be affirmed because the Board acted within its discretion when it granted the continuance. Employee claims that “substantial evidence” was submitted to the Board that prompt and due diligence were used in effort to take Dr. Rasis’ deposition before April 23, 2008.¹¹ Moreover, Employee argues, the Board gave both parties an opportunity to present argument in consideration of the motion for continuance, and that the Board reached its decision to grant the continuance only after deliberation and consideration of the parties’ arguments. Employee further represents that the Board orally explained its reasons for granting the continuance shortly after its deliberations on the matter; therefore, Employee contends, the Board fulfilled its obligations under 19 Del. C. 2348(h).¹²

-
- a. A specific finding stating that good cause for such an extension exists under a Rule of Procedure of the Industrial Accident Board and stating the reasons why a continuance, rather than the use of other case management measures (including, but not limited to, precluding the presentation of certain witnesses or other evidence by the party responsible for the delay), is necessary in the interests of justice;
 - b. In any instance where such a continuance is sought by the petitioner, a specific finding that the petitioner has demonstrated that the petitioner has prosecuted its petition with due diligence . . .

⁹ Employer’s Opening B. at 10.

¹⁰ *Id.* at 11.

¹¹ Employee’s Answering B. at 7.

¹² *Id.* at 10.

Further, Employee argues that substantial evidence was presented to the Board showing that there were extraordinary circumstances that merited the continuance because Dr. Rasis, whose testimony was essential to Employee, was unable to give a deposition prior to April 23, 2008. Employee also contends that the Board met its obligation under 19 Del. C. § 2348(h)(2) and 2348(h)(2)(b) because it gave its reasons for finding the existence of extraordinary circumstances and that Employee exercised due diligence in prosecuting his claim during the April 3, 2008 hearing.

With respect to the award of attorney's fees, Employee argues that the Board properly applied the *Cox* factors, and that the Board considered and rejected the same argument Employer makes here.¹³ Thus, Employee contends, the Board's award was reasonable.

IV. STANDARD OF REVIEW

The Superior Court has a limited appellate review of the factual findings of the IAB. The function of the reviewing Court is to determine whether the IAB's decision on the merits is supported by substantial evidence.¹⁴ Substantial evidence means such relevant evidence as a reasonable person might accept as adequate to support a conclusion.¹⁵ In reviewing an IAB decision, the Superior Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.¹⁶ The Superior Court must view the facts in a light most favorable to the prevailing party below.¹⁷ Thus, the Court merely determines if the evidence is legally adequate to support the IAB's factual findings.¹⁸

A discretionary ruling by the IAB, such as whether to grant a continuance, will not be set aside unless it is unreasonable or capricious.¹⁹

¹³ *Id.* at 18-19; *See also* Transcript of Hearing p. 80-81

¹⁴ *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. Super. Ct. 1965).

¹⁵ *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

¹⁶ *Johnson*, 213 A.2d at 66.

¹⁷ *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

¹⁸ 29 Del. C. § 10142(d).

¹⁹ *Electronic Hose & Rubber Co. & Dravo Corp. v. Nai*, 2004 WL 304356, *4 (Del. Super. Feb. 6, 2004) (citing *In re Kennedy*, 472 A.2d 1317, 1331 (Del. 1984)). Both parties erroneously argue that the "substantial evidence" standard in connection with the continuance being granted should be applied. However, merely because the Court will

The party challenging the Board's decision granting or denying a continuance bears the burden of proof.²⁰ The Board's discretion in deciding whether to grant or deny a continuance is governed by Section 2348(h), which states that "[r]equests for continuance may be granted only upon good cause."²¹

V. DISCUSSION

The Board has the discretionary power to grant a continuance only if the party requesting the continuance can show "good cause."²² Where, as here, a party requests a continuance beyond 180 days from the date of the petition, the party seeking the continuance must demonstrate good cause and "extraordinary circumstances."²³ "Good cause" is defined as, among other things, "the unavailability of a previously scheduled witness."²⁴ "Extraordinary circumstances" includes situations where there are "unforeseen circumstance[s] beyond the control of the party seeking the continuance which would prevent the party from having a full and fair hearing."²⁵ In making a determination of whether to grant a continuance based on good cause shown, the Board must "set forth the facts in sufficient detail to support its decision."²⁶

Section 2348(h)(2)(a) states that the Board's order granting the continuance "shall be accompanied by . . . [a] specific finding stating that good cause for such an extension exists . . . and stating the reasons why a continuance, rather than the use of other case management measures . . . is necessary in the interests of justice."²⁷ Here, there is no record of the April 3, 2008, hearing where the Board presumably gave its reasons for granting the continuance. Moreover, while the Order issued by the Board appears to

look at the facts the Board considered in granting the continuance does not change the standard of review from arbitrary and capricious to substantial evidence.

²⁰ *Id.* (citing *Atwell v. The Delaware Violent Crimes Compensation Board*, 1994 WL 750326 (Del. Super. Dec. 1, 1994)).

²¹ 19 Del. C. § 2348.

²² 19 Del. C. § 2348(h).

²³ 19 Del. C. § 2348(h)(2).

²⁴ 19 Del. Admin. C. § 1331-12.2.1.1

²⁵ *Id.* at § 12.2.2.4.

²⁶ Industrial Accident Board Rule 12(B)(1); *see also* 19 Del. C. § 2348(h)(2)(a) (stating that the Board must state the reasons why a continuance as opposed to other case management measures is necessary in the interest of justice).

²⁷ 19 Del. C. § 2348(h)(2)(a).

state a finding of good cause and due diligence, it does not set forth a finding of extraordinary circumstances or why a continuance, rather than other case management measures, was necessary. Therefore, the Court is deprived of a record to review in determining whether the Board acted arbitrarily or capriciously when it granted a continuance of the April 23, 2008 hearing.

Where an administrative body has failed to develop a complete record sufficient for this Court's review, the Court "shall remand the case to the agency for further proceedings on the record."²⁸ Further, the Court may remand the case to the Board for the "limited purpose" of considering the parts of the record which are missing or incomplete.²⁹ This limited remand

[does] not require supplemental factual findings but merely direct[s] the Board to complete its determination of [the parties' claims] by explicitly stating all of its conclusions on the record. Once the Board complete[s] its supplemental function, the matter must of necessity, return to the Superior Court for the Court to complete its appellate review.³⁰

Thus, the Court remands this case to the Board so that it may explain on the record its reasons for granting the continuance in accordance with 19 Del. C. § 2348(h). The Board is requested to return the completed record to this Court by October 1, 2009. The Court does not reach the issue of attorney's fees at this time.

VI. CONCLUSION

For the aforementioned reasons, this appeal is **REMANDED** to the Industrial Accident Board.

Very truly yours,

Richard R. Cooch

oc: Prothonotary
cc: Industrial Accident Board

²⁸ 29 Del. C. § 10142(c).

²⁹ *Penchen, Inc. v. Heluck*, 391 A.2d 220, 224 (Del. Super. 1978).

³⁰ *Guy v. State*, 676 A.2d 903, 1996 WL 283591, at *1 (Del. 1996).