

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

JIMMIE EVANS, :  
 : C.A. No. 09A-04-001 WLW  
 Claimant Below - :  
 Appellant, :  
 :  
 v. :  
 :  
 PLAYTEX PRODUCTS, INC., :  
 :  
 Employer Below - :  
 Appellee. :

Submitted: September 25, 2009  
Decided: December 4, 2009

**ORDER**

Upon an Appeal from a Decision of the  
Industrial Accident Board.  
*Affirmed.*

Walt F. Schmittinger, Esquire and Kristi Vitola, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Appellant.

Paul V. Tatlow, Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorneys for the Appellee.

WITHAM, R.J.

Jimmie Evans (“Evans”), the Claimant Below, filed an appeal from the March 27, 2009 decision of the Industrial Accident Board (“IAB” or “the Board”). The IAB considered Evans’s Petition to Determine Additional Compensation Due. The Board awarded Evans outstanding medical expenses in the amount of \$3,891.32. The Board also ordered Playtex Products, Inc. (“Playtex”), the Employer below, to pay for ongoing treatment with Dr. Balu. In addition, the Board awarded \$4,000 in attorney’s fees. Evans filed this appeal claiming that the Board erred as a matter of law when it awarded an attorney’s fee that was unreasonably low.

***Decision of the IAB***

On June 16, 1999, Evans was injured in a compensable work accident while employed by Playtex. On June 23, 2008, Evans filed a Petition to Determine Additional Compensation Due with the IAB seeking payment for medical bills and ongoing treatment with Dr. Ganesh Balu, a pain management specialist. The Board conducted a hearing on Evans’s petition on December 2, 2008.

The Board, after hearing all of the evidence, granted Evans’s request to have Playtex pay for his outstanding medical bills and ongoing treatment with Dr. Balu. The Board also concluded that Evans was entitled to a “reasonable attorney’s fee.”

The Board, citing 19 *Del. C.* § 2320, concluded that the attorney’s fees awarded must not “exceed thirty percent of the award or ten times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller.”<sup>1</sup> The maximum award based on Delaware’s average weekly

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<sup>1</sup> See 19 *Del. C.* § 2320.

wage was, at the time, \$9,077.30.<sup>2</sup> The Board then addressed the *Cox* factors<sup>3</sup> in determining an appropriate attorney's fee.

The Board noted that Evans received \$3,891.32 for medical bills and mileage. The Board also noted that it was uncertain how long Evans's treatment with Dr. Balu was going to continue. The Board acknowledged Evans's claim that his counsel spent 23.9 hours to prepare for the two-hour hearing, but noted that the case was "of less than average complexity involving no novel issues of fact or law."<sup>4</sup> The Board also acknowledged the relative experience, reputation, and ability of Evans's counsel, that Evans's counsel was apparently not precluded from other employment by accepting this case, and that Evans was represented by counsel or his firm for six years. In addition, the Board considered the fees customarily charged in the locality for such services. Finally, the Board noted that the fee was contingent, that Evans's counsel did not expect to receive compensation from any other source, and that

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<sup>2</sup> See *Evans v. Playtex Prods., Inc.*, IAB Hearing No. 1147310 (Mar. 27, 2009), at 12.

<sup>3</sup> See *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973). The Factors are as follows: (1) The time and labor required, the novelty and difficulty of the legal questions involved, and the skill required 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 the 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 or will be received from any other source.

<sup>4</sup> *Evans*, IAB Hearing No. 1147310, at 13.

Playtex was seemingly able to pay an award.

After considering the *Cox* factors, the Board concluded that an award of \$4,000 was reasonable. This amount did not exceed thirty-percent of the award or ten times the average weekly wage in Delaware. The Board noted that this award “adequately reflects the value of any non-monetary benefit arising from [its] decision.”<sup>5</sup>

### ***Standard of Review***

The review of an Industrial Accident Board’s decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board’s findings of fact and conclusions of law.<sup>6</sup> Substantial evidence equates to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>7</sup> This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>8</sup> Errors of law are reviewed *de novo*. Absent error of law, the standard of review for a Board’s decision is abuse of discretion.<sup>9</sup> The Board has abused its discretion only when its

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<sup>5</sup> *Id.* (citing *Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591-92 (Del. 2008)).

<sup>6</sup> *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>7</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966)).

<sup>8</sup> *Collins v. Giant Food, Inc.*, 1999 Del. Super. LEXIS 590 (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

<sup>9</sup> *Digiacombo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

decision has “exceeded the bounds of reason in view of the circumstances.”<sup>10</sup>

The appropriate standard of review concerning attorney’s fees is whether, in awarding an Appellant attorney’s fees under 19 *Del. C.* § 2320(10), the Board abused its discretion.<sup>11</sup>

### ***Discussion***

The issue before the Court is whether the Board abused its discretion when it awarded an attorney’s fee of \$4,000.00. The IAB has authority to award attorney’s fees pursuant to 19 *Del. C.* § 2320(10).<sup>12</sup>

Section 2320(10) provides, in pertinent part:

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 . . . at the time of the award, whichever is smaller, shall be allowed by the Board . . .<sup>13</sup>

An employee is entitled to attorney’s fees under Section 2320(10) where the employee experiences “any favorable change of position or benefit, as a result of a Board decision.”<sup>14</sup>

In the case *sub judice*, Evans claims that the attorney’s fees award was

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<sup>10</sup>*Willis v. Plastic Materials*, 2003 Del. Super. LEXIS 9 at \*2-3.

<sup>11</sup>*Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1248 (Del. 2003).

<sup>12</sup> *See Mitchell v. Purdue, Inc.*, 2009 WL 1418127 (Del. Supr.).

<sup>13</sup> 19 *Del. C.* § 2320(10).

<sup>14</sup> *Mitchell*, 2009 WL 1418127, at \*2 (quoting *Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 588, 591 (Del. 2008)).

unreasonably low. Evans cites *Cravens v. Wal-Mart Distribution Center*<sup>15</sup> for the proposition that added explanation is required when the Board awards an “unreasonably low attorneys’ fee.” In *Cravens*, this Court concluded that “added explanation is required” where the Board awards an amount lower than that customarily awarded by the Board.<sup>16</sup>

In *Mitchell v. Purdue, Inc.*, however, the Delaware Supreme Court concluded that an award is reasonable where “the Board thoroughly and adequately address[es] the Cox factors.”<sup>17</sup> In *Mitchell*, the Court found an award of attorney’s fees reasonable, noting that “[t]he Board expressly found such an award [to be] reasonable, given Mitchell’s counsel’s level of experience and the nature of the legal task, and noted that the award would be an offset against fees that would otherwise be charged by counsel to Mitchell under their fee agreement.”<sup>18</sup>

Similarly, here, the Board expressly found the award to be reasonable.<sup>19</sup> The Board noted:

Claimant has achieved an award of payment of his medical bills and mileage totaling \$3,891.32. It is known that Claimant’s treatment with

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<sup>15</sup> Del. Super., C.A. No. 07A-06-005, Witham, R.J. (Sept. 22, 2008) (ORDER).

<sup>16</sup> *Id.* at 5 (the Board awarded Appellant’s attorney \$162.79 per hour when the Board customarily awarded between \$260 and \$325 per hour).

<sup>17</sup> 2009 WL 1418127, at \*3.

<sup>18</sup> *Id.*

<sup>19</sup> *Evans*, IAB Hearing No. 1147310, at 13.

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Dr. Balu [sic] ongoing in nature, however the length of time that his treatment will continue is uncertain. Therefore, the exact amount of this award is unknown. Claimant's counsel submitted an affidavit representing that he spent approximately 23.9 hours preparing for this hearing, which itself lasted for approximately two hours. Claimant's counsel was admitted to the Delaware Bar in 1966, and is experienced in the area of workers' compensation litigation, a specialized area of the law. His first contact with Claimant was in December of 2002. Thus, Claimant has been represented by counsel or his firm for six years. This case was of less than average complexity involving no novel issues of fact or law. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, although he naturally could not work on other cases at the same time that he was working on this litigation. There is no evidence that accepting Claimant's case precluded counsel from other employment. Counsel's fee arrangement with Claimant is on a contingency basis. There is no evidence that counsel expects a fee from any other source. There is no evidence that the employer lacks the ability to pay a fee.

Taking into consideration the fees customarily charged in this locality for such services as were rendered by Claimant's counsel and the factors set forth above, the Board finds that an attorney's fee in the amount of \$4,000.00 is reasonable in this case and does not exceed thirty percent of the award or ten times the average weekly wage in Delaware.<sup>20</sup>

The Board also specifically noted that "this fee adequately reflects the value of any non-monetary benefit arising from [its] decision."<sup>21</sup> The Court is satisfied that the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

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Board has thoroughly and adequately addressed the *Cox* factors.<sup>22</sup> Following this review of the *Cox* factors, the Board then found that an attorney's fee in the amount of \$4,000 was reasonable. The Court finds that the Board did not abuse its discretion.

***Conclusion***

For the foregoing reasons, the decision of the Industrial Accident Board must be AFFIRMED. IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Hon. William L. Witham, Jr.

WLW/dmh

oc: Prothonotary

xc: Counsel

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<sup>22</sup> It should be noted that, in review of the record, I do not find that the Board's award is out of proportion to the benefit that the claimant received in light of the relatively average complexity of the case.