**SUPERIOR COURT**
**OF THE**
**STATE OF DELAWARE**

**T. HENLEY GRAVES**
***RESIDENT JUDGE***

**SUSSEX COUNTY COURTHOUSE**
**ONE THE CIRCLE, SUITE 2**
**GEORGETOWN, DE 19947**

October 13, 2009

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**RE:** ***Bryant v. Lifecare at Lofland***
**C.A. No. 09A-08-005 (THG)**

Date Submitted: September 3, 2009
Date Decided: October 13, 2009

On Board's Denial of Certain Mileage Expenses Pursuant to Claimant's Petition to Determine Additional Compensation Due: AFFIRMED

On Board's Denial of Attorney's Fees with Respect to Employer's Petition to Terminate Benefits: REVERSED

Dear Counsel:

This is the Court's decision on Nancy Bryant's appeal of the Industrial Accident Board's (hereinafter "the Board") decision dated October 9, 2008, regarding Employer's Petition for Termination of Benefits and Claimant's Petition to Determine Additional Compensation Due. The Board's decision is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion.

## STATEMENT OF FACTS

In February of 2002, Nancy Bryant (hereinafter "Claimant") was working for a long-term care facility, Lifecare at Lofland (hereinafter "Employer"), as a Certified Nurse Assistant when she suffered a compensable work injury to her right knee. Claimant has received significant treatment for the injury, including surgeries to her right knee in March of 2002, October of 2002, and October of 2003. Employer has paid partial disability benefits to Claimant since the accident.

In November of 2004, Claimant returned to work under light duty restrictions. Her new position required Claimant to respond to patient call bells three days per week. Claimant worked for Employer in this capacity until November of 2006 when she was transferred to an administrative assistant position. Her responsibilities as an administrative assistant included filing documents and working the telephone switchboard. Employer's Human Resources Manager, Heather Taylor (hereinafter "Taylor"), testified that Claimant's transfer to an administrative position was an effort, in part, to accommodate Claimant's work restrictions.

In August of 2007, Employer reassigned Claimant to yet another position known as an "activities job" where Claimant assisted patients with various tasks three days per week. According to Taylor, the "activities job" involved a substantial amount of sitting while working with patients on a one-on-one basis in their rooms. Nevertheless, Claimant requested that she be given the task of pushing patients in their wheelchairs. Employer agreed to do so only after Claimant had received permission from her treating physician.

Shortly thereafter, Claimant missed several months of work due to a stress fracture in her foot.[1] When Claimant returned to work in December of 2007, she continued her duties related to the

[1] Based on the record before the Court, the stress fracture was not a compensable work injury.

"activities job."

An Employer-ordered medical examination of Claimant took place in September of 2007. After the physician who conducted the examination concluded Claimant could work full-time in a sedentary capacity, Employer offered Claimant a full-time sedentary duty position. Claimant asked to speak with both her legal counsel and her treating doctor before responding to the offer. Employer granted this request. In an unfortunate twist of fate, Claimant suffered neck and shoulder injuries in a motor vehicle accident (unrelated to her work duties) on December 17, 2007, the same day as she received the full-time job offer. Claimant has been unable to work since that time due to the injuries sustained as a result of the motor vehicle accident.

On January 23, 2008, Employer filed a Petition for Termination of Benefits. On January 24, 2008, Claimant filed a Petition to Determine Additional Compensation Due stemming from outstanding medical and mileage expenses related to the compensable knee injury. Claimant also sought medical witness and attorney's fees. The Board held a hearing on both petitions on May 20, 2008.

In a decision dated October 9, 2008, the Board granted Employer's Petition for Termination of Benefits effective April 11, 2008. Although the Board found that Claimant was capable of working in a full-time, sedentary position as of September of 2007, the Board held Claimant was entitled to partial disability benefits until April 11, 1008, the date her treating physician was deposed and testified that Claimant was capable of performing full-time sedentary work. Until that time, the Board concluded Claimant was entitled to follow the recommendation of her treating physician; that is, the recommendation that Claimant be restricted to part-time sedentary work. The Board ordered Employer to reimburse the Workers' Compensation Fund for benefits paid from the time of the filing of the Petition for Termination of Benefits on January 23, 2008, through April 11, 2008. The Board also partially granted the Petition to Determine Additional Compensation Due, awarding Claimant medical

and mileage expenses. In addition, the Board awarded attorney's fees based upon Claimant's partial success on the Petition to Determine Additional Compensation Due. Finally, the Board granted Claimant's request for a witness fee relating to Claimant's medical testimony.

Claimant timely appealed the Board's decision to the Superior Court. Claimant argues (1) the Board improperly denied the reimbursement of certain mileage expenses and (2) the Board erred by failing to award Claimant attorney's fees with regard Claimant's partial success in defending against Employer's Petition for Termination of Benefits.

**STANDARD OF REVIEW**

The review of the Board's decision is confined to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's finding of fact. *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993). The Supreme Court and this Court have emphasized the limited appellate review of the agency findings of fact. The reviewing Court must determine whether the administrative decision is supported by substantial evidence. *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (citation and internal quotation marks omitted). Substantial evidence requires "more than a scintilla but less than a preponderance" to support a finding. *Id.* (citation and internal quotation marks omitted). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson*, 312 A.2d at 66.

Questions of law are reviewed *de novo*. *Delhaize America, Inc. v. Baker*, 2002 WL 31667611, at *2 (Del. Super. Sept. 18, 2002). Absent an error of law, the standard of review on appeal is abuse of discretion. *Willis v. Plastic Materials*, 2003 WL 164292, at *1 (Del. Super. Jan. 13, 2003). An award of attorney's fees pursuant to 19 *Del. C.* § 2320(10) is reviewed under the abuse of discretion standard.

*Blythe v. VPI Mirrex, LLC*, 2004 WL 1102438, at *6 (Del. Super. May 10, 2004). The Board has abused its discretion only when the decision has "exceeded the bounds of reason in view of the circumstances." *Willis*, 2003 WL 164292, at *1 (citation and internal quotation marks omitted).

## DISCUSSION

*A. The Board did not Improperly Deny Claimant Mileage Expenses.*

The Board awarded medical and mileage expenses to Claimant in the amount of $4,380.04. At the hearing below, Employer objected to some of the medical and mileage expenses submitted by Claimant because (1) some expenses had already been reimbursed and (2) other expenses were causally unrelated to Claimant's compensable work injury. At issue are the costs associated with treatment received by three physicians: Dr. Ganesh Balu, whom Claimant has seen for general pain management since 2004; Dr. Ray A. Moyer, Claimant's treating orthopedist since April of 2005; and Dr. David Stephens, an orthopedic surgeon who evaluated Claimant on Employer's behalf in September of 2007 and again in April of 2008. Due to Claimant's multiple injuries, she saw the physicians for a myriad of reasons, not all of which were related to her compensable knee injury.

The burden is on Claimant to show the medical and, therefore the mileage expenses, were reasonable, necessary and causally related to her work injuries. *See Turnbull v. Perdue Farms*, 1998 WL 281201, at *2 (Del. Super. May 18, 1998), *aff'd* 723 A.2d 398 (Del. 1998). In addition, whether medical services are reasonable, necessary, and causally related to a work accident are purely factual issues within the purview of the Board. *Bullock v. K-Mart Corp.*, 1995 WL 339025, at *3 (Del. Super. May 5, 1995). The Court will not disturb an award absent an abuse of discretion or error of law. *Willis*, 2003 WL 164292, at *1.

It is clear from the record that the Board did not have enough evidence before it to determine the purpose of each and every doctor's visit. For example, the Board explained that, because there was

no medical testimony regarding Claimant's November 6, 2007, visit to Dr. Balu, it could not ascertain whether or not this appointment was related to Claimant's knee injury. In other instances, the Board did have sufficient information to conclude that a visit was either related to or not related to the compensable knee injury.[2]

Although Claimant does not dispute the Board's findings with respect to the medical expenses awarded, she argues that the Board erred when it denied certain mileage expenses. At the hearing on May 20, 2008, Claimant introduced a medical bill exhibit to show that mileage expenses had not been paid as far back as 2002. On appeal, Employer asserts that it was unaware that mileage expenses were in dispute prior to the Board hearing and notes that mileage claims were not set forth in the discovery process. Employer further contends that mileage expenses had, in fact, been reimbursed to Claimant in May of 2004.

The Board permitted the parties to supplement the record on the mileage issue at the hearing in the following fashion:

> BOARD MEMBER: Do you have any questions in regard to anything that was said?
>
> HEARING OFFICER: Yeah a little bit. I'm not clear are the parties going to submit another exhibit with the medical expenses agreeing on what is related?
>
> BOARD MEMBER: That's what I'm asking for.
>
> [COUNSEL FOR CLAIMANT]: Well, I guess, maybe the, it sounds like if there's a dispute it's with respect to A3 and I guess maybe the simplest thing to do is if the board accepts this with the understanding we'll either get a letter saying there's a further problem with A3 or you'll assume not hearing from us it's good as…
>
> BOARD MEMBER: We can live with that.

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[2] The Board denied expenses related to Dr. Moyer's evaluation of Claimant on February 25, 2008, because it found this visit was for treatment for neck and shoulder injuries unrelated to the work accident. However, the Board awarded expenses for Dr. Moyer's treatment of Claimant in January of 2008 as Dr. Moyer testified that this evaluation concerned her compensable knee injury in addition to those injuries suffered in the unrelated motor vehicle accident.

[COUNSEL FOR CLAIMANT]: Are we okay with that?

[COUNSEL FOR EMPLOYER]: And mileage to the extent I need to present you a payment ledger for mileage because as I said the mileage is dating back to 2004 and I was never supplied with that.

BOARD MEMBER: How long do you think it's going to take to get that information?

[COUNSEL FOR EMPLOYER]: I can get the payment ledger I can request it from the carrier upon my return to the office.

BOARD MEMBER: So let's say within two weeks?

[COUNSEL FOR EMPLOYER]: Two weeks is more than enough.

BOARD MEMBER: Send it to Ms. Palladino at her Department of Labor fax.

HEARING OFFICER: I am going to mark the medical expense exhibit as claimant's exhibit one. And we'll leave the record open for two weeks for any further solution about the medical bill. And then I'm going to mark Dr. Moyer's deposition as claimant's exhibit two.

BOARD MEMBER: And that's without objection?

[COUNSEL FOR EMPLOYER]: That is without objection.

[COUNSEL FOR CLAIMANT]: I don't want to beat a dead horse. Do you want to hear from us either way about the exhibit or if you don't hear from us we're going to roll with what we've got?

BOARD MEMBER: Well to the extent, if we don't hear from you we'll assume that you're well satisfied. We hear from you we have an issue.

IAB Hearing Transcript dated May 20, 2009, p. 86-87. After the hearing, Employer submitted a letter from counsel stating that the mileage expenses had been paid. *See* Letter from Susan List Hauske, dated June 2, 2008, and attached to Claimant's Opening Brief. While indicating that Employer did not contest mileage for medical defense examinations in the amount of $344.16, the letter reiterated Employer's position that Claimant had been reimbursed for the remainder of the mileage expenses in May of 2004. Claimant did not respond to Employer's letter to the Board regarding the outstanding mileage expenses

or otherwise supplement the record.

Claimant notes that Employer never sent a payment ledger to the Board as was requested. She also argues that her failure to respond to Employer's supplementation of the record does not mean that Claimant agreed with Employer's assertions. Because she argues that a letter from employer's counsel is not evidence, Claimant suggests that the Board improperly limited the award of mileage expenses.

The Board awarded Claimant the $344.16 for mileage expenses as set forth in Employer's letter to the Board. The Board found that there was no medical testimony regarding the mileage expenses claimed by Claimant. Thus, the Board reasoned, "even if the other mileage expenses remain outstanding, i.e., they were not reimbursed on May 10, 2004 as Employer asserts, Claimant has not met its burden of proving the causal relationship of those expenses." IAB Decision dated October 9, 2008, p. 14. Moreover, the Board concluded, "Although it is likely that the remainder of the mileage expenses sought were for travel to medical appointments and physical therapy appointments related to Claimant's knee injury, the Board simply cannot make that assumption." *Id.*

The Court deems irrelevant the suggestion that the Board improperly considered the letter offered by counsel for Employer when the record was left open for supplementation. The Board specifically gave Claimant the opportunity to augment the record on the mileage dispute. That Claimant chose not to respond to the letter offered by Employer or to otherwise supplement the record does not mean that the Board erred in relying upon the evidence that was submitted. To paraphrase counsel for Claimant, the Board members "rolled with what they've got" when the Board awarded mileage in this case. A review of the record reveals that Claimant failed to establish, as she is required to do, that her mileage expenses were related to the compensable work accident. Accordingly, the Board's decision on this issue should not be disturbed.

*B. The Board Erred in Not Awarding Attorney's Fees to Claimant for Her Partial Success in Defending Employer's Petition for Termination of Benefits.*

Claimant's second issue on appeal concerns the Board's award of attorney's fees. The Board held Claimant was entitled to a reasonable attorney's fee with respect to Claimant's Petition to Determine Additional Compensation Due and awarded Claimant $1,350.00 in attorney's fees. However, the Board did not award attorney's fees for Claimant's defense of Employer's Petition for Termination of Benefits. Claimant argues she is entitled to additional attorney's fees because she was partially successful in defending against Employer's Petition for Termination of Benefits.

A claimant who is awarded compensation is entitled to payment of a reasonable attorney's fee "in an amount not to 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." 19 *Del. C.* § 2320(10)(a). The factors that must be considered by the Board in assessing a fee are set forth in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973)[3]. The Board is permitted to award less than the maximum fee, and the consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case, so long as some fee is awarded. *Heil v. Nationwide Mut. Ins. Co.*, 371 A.2d 1077, 1078 (Del. 1977).

Moreover, Delaware law requires the Board to allow an attorney's fee for each separate award of compensation. *Scheers v. Independent Newspapers*, 832 A.2d 1244, 1248 (Del. 2003). When the Board awards attorney's fees in a case where there are multiple awards of compensation, the Board's decision must "clearly and unambiguously disclose how the attorney's fee award was determined." *Tucker v. State*, 2006 WL 1680028, at *2 (Del. Super. May 4, 2006) (*citing Scheers*, 832 A.2d at 1248).

[3] Because the reasonableness of the attorney's fee awarded is not at issue here, a discussion of the *Cox* factors is unneccessary.

On appeal, Claimant does not dispute the award of attorney's fees for her partially successful Petition to Determine Additional Compensation Due. Instead, Claimant argues that the Board erred by failing to award an attorney's fee with respect to Employer's Petition for Termination of Benefits. Claimant notes that Employer's Petition for Termination of Benefits was filed on January 23, 2008, thereby indicating Employer's request to terminate benefits as of that date. Yet, Employer's Petition for Termination of Benefits was granted as of April 11, 2008. Since Claimant received an award of partial disability benefits from January 23, 2008, when Employer filed for termination of benefits, until April 11, 2008,[4] Claimant argues she is entitled to attorney's fees because she was partially successful in her challenge to Employer's Petition for Termination of Benefits.

In making this argument, Claimant relies heavily on *Blythe v. VPI Mirrex, LLC*, *supra*. The *Blythe* case involved a claimant who had received temporary total disability benefits. The employer there filed a Petition for Termination of Benefits effective January 10, 2003. The Board in *Blythe* granted the employer's Petition for Termination of Benefits effective after the date the petition for termination was filed and did not award attorney's fees.

In holding that the employer was responsible for the claimant's attorney's fees for that portion of the Petition for Termination of Benefits that was unsuccessful, the *Blythe* Court observed that neither statute nor case law mandate that a "claimant receive immediate financial gain as a prerequisite to an award of attorney's fees." 2004 WL 1102438, at *7. The Court reasoned that it was "apparent that an award of compensation under the statute is intended to refer to any favorable change of position or benefit, as the result of a Board decision, rather than just being limited to contemporaneous financial

[4] April 11, 2008, is the date of Dr. Moyer's deposition in this case and the date Dr. Moyer renounced his prior medical opinion that a part-time sedentary work restriction was appropriate in light of Claimant's knee injury. At the deposition, Dr. Moyer opined that Claimant was able to work in a sedentary capacity on a full-time basis.

gain." *Id.* The Court further noted that when an employer "initiates fresh proceedings before the Board through a petition to terminate and requires the employee to retain counsel in order to sustain an existing award, 'the employer must bear the costs of such efforts proving unsuccessful.'" *Id.* (citation omitted). Consequently, the *Blythe* Court found that a complete denial of attorney's fees was inappropriate: "*Employer's petition was unsuccessful in that the Board did not terminate Appellant's temporary total disability as of the date ... requested by Employer.* As such... Employer is responsible for Appellant's attorney's fees relative to the portion of their [sic] petition that proved unsuccessful." *Id.* (emphasis supplied).

Employer argues that the holding of *Blythe* is limited to the facts of that case. According to Employer, if *Blythe* is not so confined, an award of attorney's fees would be required in all situations in which the Board does not terminate a claimant's benefits as of the date of the filing. This outcome, Employer argues, would circumvent the General Assembly's intention to promote settlement offers in IAB cases as reflected in our Worker's Compensation Statute. Moreover, Employer argues that the Petition for Termination of Benefits was successful on the merits. According to Employer, the Board agreed that Claimant was capable of working in a full-time, sedentary position as of September of 2007. Thus, it is claimed that the Board rejected Claimant's position that Employer was requiring her to work outside of her restrictions.

In the first instance, it cannot be said that Employer's Petition was entirely successful when the Board awarded benefits to Claimant through a later date than that requested by Employer. Pursuant to *Blythe*, if the Board chooses to extend the date of termination of benefits past the date of an employer's filing for termination of said benefits, this outcome is "successful", to some extent, for the claimant and the Board must award a reasonable attorney's fee to the claimant for its defense of the petition for termination. Simply put, if the Board determines a benefit terminates on a date later than the date of the employer's Petition for Termination is filed, the Board's determination also triggers the

attorney's fee award. Therefore, the Court holds Claimant is entitled to reasonable attorney's fees for the award of benefits from January 23, 2008, until April 11, 2008.

Second, the Board properly permitted Claimant to rely upon her treating doctor's medical opinion, i.e., that Claimant was subject to part-time sedentary work restrictions, until Dr. Moyer opined otherwise, as he did on April 11, 2008. A claimant has the right to rely upon a treating doctor's opinion as to disability status under *Gilliard-Belfast v. Wendy's Inc.*, 754 A.2d 251 (Del. 2000). Employer asserts the purpose of the *Gillard-Belfast* holding is to permit a claimant to rely upon a doctor's opinion as to disability status until the Board makes a decision so as to not unfairly prejudice the claimant. Because only the Board can render a final decision as to disability status, Employer argues that an award of attorney's fees here would reflect a sweeping construction of the *Gillard-Belfast* holding and unfairly benefit Claimant as a result of her doctor's mistaken impression of the facts in this case. Nevertheless, the Court is convinced that the reasoning in *Blythe* applies here unless the Supreme Court mandates otherwise.

**CONCLUSION**

Based on the foregoing, the Board's decision is *affirmed* in part and *denied* in part. The matter is remanded to the Board for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

oc: Prothonotory
cc: Industrial Accident Board