IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HELEN A. KONKIEL,	)	
	)	
Plaintiff,	)	C. A. No. 03C-04-284 PLA
v.	)	
	)	
WILMINGTON COUNTRY CLUB,	)	
	)	
Defendant.	)	
	)	

Date Submitted: May 17, 2004
Date Decided: July 6, 2004

UPON DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT
DENIED.

UPON PLAINTIFF'S CROSS MOTION FOR
SUMMARY JUDGMENT
GRANTED.

ORDER

Michael P. Freebery, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

John J. Klusman, Jr., Esquire, Susan A. List, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware, Attorneys for Defendant.

ABLEMAN, JUDGE

Before the Court is a Motion for Summary Judgment filed by Wilmington Country Club ("Defendant") in a related workers' compensation cause of action commenced by Helen A. Konkiel ("Plaintiff"). Plaintiff's counsel filed a civil suit in this Court, pursuant to *Huffman v. C.C. Oliphant & Son, Inc.*, 432 A.2d 1207 (Del. 1981), and the Delaware Wage Collection Act, 19 *Del. C.* §§ 1103 and 1113, to compel the Defendant to make payment of an attorney's fee award granted by the Industrial Accident Board ("Board"). Upon the Board's decision becoming final, Defendant delayed making payment of the attorney's fee award for several months, after which time Defendant commenced making payment in weekly installments. In its motion, Defendant contends that Delaware law permits it to make weekly payments of the attorney's fee award. Plaintiff filed a cross motion for summary judgment arguing that, contrary to Defendant's contention, and pursuant to an award of attorney's fee issued by the Board, an attorney is entitled to receive payment of the maximum award in one payment.

For the reasons set forth below, the Court finds no support in either Delaware case law, or in the Delaware Wage Collection Act, to substantiate Defendant's contention. Because there exists no issue of material fact in dispute concerning this matter, Plaintiff is entitled to judgment as a matter of law, and to payment of the entire $7,373.50 in attorney's fees, as well as liquidated damages,

interest, and costs recoverable, pursuant to the remedies provided by Delaware Wage Collection Act and *Huffman*.

Statement of Facts

On April 1, 2004, the parties filed with the Court a stipulated statement of facts as set forth hereafter. Plaintiff suffered a compensable work accident, on or about, February 6, 2001 when she was working for Defendant. She suffered a closed head injury when she slipped and fell on ice in the course and scope of her employment. On March 9, 2001, the parties entered into an Agreement of Compensation, agreeing to pay the Plaintiff ongoing disability benefits at the rate of $240.01 per week, based on her average weekly wage of $360.00, at the time of the accident.

On August 16, 2002, the Defendant filed a Petition to Terminate benefits, alleging that the Plaintiff was physically capable of returning to work. Disability benefits had been paid to the Plaintiff by the Workers' Compensation Fund since the filing of the petition, pending a hearing and decision on the petition. In accordance with 19 *Del. C.* § 2301B(a)(4), the parties stipulated that the issue could be heard and decided by a workers' compensation hearing officer.[1] On January 6, 2003, a hearing was conducted by Christopher F. Baum, a workers' compensation hearing officer, to consider Defendant's petition.

[1] When hearing a case by stipulation, the hearing officer stands in the position of the Industrial Accident Board. *See* DEL. CODE ANN. tit. 19, § 2301B(a)(6) (1995 & Supp. 2002).

In a decision dated January 17, 2003, the Board denied Defendant's Petition to Terminate. Plaintiff was to continue to receive, and Defendant was to continue to pay to Plaintiff, total disability benefits. In the same decision, the Board granted an attorney's fee to Plaintiff's counsel in the maximum amount of $7,373.50, or thirty percent (30%) of the award, whichever is less. The Board's decision was mailed on January 17, 2003 and received by Plaintiff's counsel on January 20, 2003. Since neither party filed an appeal of the Board's decision to this Court, the Board's decision became final and conclusive thirty days after the notice of the decision had been mailed to the parties, i.e., February 16, 2003. Approximately, one month elapsed after the Board's decision had become final, and Plaintiff's counsel had not received payment of the awarded attorney's fee. On March 13, 2003, Plaintiff's counsel sent a demand letter for payment of the overdue benefits to Defendant's counsel. A second demand letter was sent to Defendant's counsel on March 21, 2003, requesting that the single attorney's fee in the amount of $7,373.50 be paid in full.

The Defendant's insurer continues to pay Plaintiff's award biweekly, and also pays to her counsel, on a biweekly basis, a fee of thirty percent of the award. Defendant's insurer has adopted this plan of payment with respect to the attorney's fee award, and will continue to do so, until either the Plaintiff's entitlement to the total disability ceases, or her attorney has received a total of $7,373.50 in fees.

Plaintiff's counsel received a hand delivered letter, dated April 28, 2003, in his office on April 29, 2003, along with a check in the amount of $2,584.00. This check was the earliest payment made by Defendant pursuant to the Board award.

The Plaintiff filed a complaint with this Court on April 28, 2003, seeking payment of the entire $7,373.50 in attorney's fees, as well as penalties, interest, and costs recoverable pursuant to the Delaware Wage Collection Act, and the accompanying relief available according to the principles first set forth by the Delaware Supreme Court in *Huffman*. Plaintiff asserted that the attorney's fee was overdue, while the Defendant asserted that Plaintiff's counsel's attorney fee award was being paid weekly, and continues to be paid weekly, in accordance with the decision of January 17, 2003.

As to the remaining facts that the Court can glean from the record, it appears that, after Plaintiff filed the *Huffman* complaint, the matter proceeded through Rule 16 arbitration. On December 5, 2003, an arbitration hearing was held. On January 5, 2004, the arbitrator issued an order awarding $4,309.56, plus statutory interest pursuant to 19 *Del. C.* § 1103, to the Plaintiff. On January 15, 2003, Defendant filed a Demand for Trial *De Novo* appeal from the arbitrator's decision. On January 30, 2003, the arbitrator issued an amended order, awarding $8,619.12, plus statutory interest pursuant to 19 *Del. C.* § 1103, to the Plaintiff.

Following this series of events, and with the permission of the Court, the parties stipulated to the facts of the case, and entered into a briefing schedule. On April 1, 2004, Defendant filed its opening brief in support of its motion for summary judgment. Plaintiff's counsel filed his answering brief in support of his cross motion for summary judgment on April 23, 2004. Defendant filed its reply brief to Plaintiff's cross motion on May 14, 2004.

Contentions of the Parties

In its motion for summary judgment, Defendant does not dispute the Board's decision denying its Petition to Terminate Plaintiff's disability benefits. Nor is Defendant challenging the nature or amount of the final attorney's fee awarded to Plaintiff, pursuant to the Board's decision and the Delaware Workers' Compensation Act. According to 19 *Del. C.* § 2320(10)(a) of the Act, 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."[2] What Defendant asserts is that Plaintiff's *Huffman* suit for damages, resulting from Defendant's ongoing, extenuated, payments of the attorney's fee award, is without merit because Defendant is effectuating the method of payment in accordance with the Board's award.

[2] DEL. CODE ANN. tit. 19, § 2320 (10)(a) (1995 & Supp. 2002).

Defendant argues that it is entitled to summary judgment because the award to the Plaintiff was in the form of ongoing, temporary total disability benefits. Since the awarded benefits granted by the Board are ongoing, and not guaranteed, Defendant contends that there is no requirement that it pay the maximum attorney fee of $7,373.50, because thirty percent of the award may be less. Defendant claims that it is "merely following the Board's decision in paying an attorney's fee of thirty percent each time it issues a temporary total disability check."[3] According to the Defendant, "[s]ince Plaintiff is receiving benefits of $240.01 per week, Defendant has been paying an attorney's fee of thirty percent of that amount, and will continue to do so until it has paid an attorney's fee of the maximum allowed of $7,373.50, as directed by the Board's decision."[4] Defendant reasons that Plaintiff's right to ongoing temporary total disability benefits can cease through various means: 1) Defendant can file a Petition to Review pursuant to 19 *Del. C.* § 2347, and demonstrate that Plaintiff is no longer totally disabled; 2) the parties could enter into a settlement or commutation agreement, in which Plaintiff would stop receiving ongoing total disability benefits; and/or 3) pursuant to 19 *Del. C.* § 2333, total disability benefits would cease if the Plaintiff were to die from unrelated causes.[5]

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[3] Defendant's Motion for Summary Judgment, filed April 1, 2004, at 3, (hereinafter "Def.'s Mot. for Summ. J. at ___.").
[4] Def.'s Mot. for Summ. J. at 5.
[5] Def.'s Mot. for Summ. J. at 5.

Finally, Defendant argues that, since Plaintiff's counsel cannot demonstrate any entitlement to the maximum attorney's fee at this time, he is not entitled to any penalties under the Delaware Wage Collection Act or *Huffman*.[6] Therefore, Defendant concludes, it is entitled to summary judgment as a matter of law.[7]

In Plaintiff's cross claim for summary judgment, Plaintiff's counsel advances several arguments. First, Plaintiff's counsel notes that "nowhere in the Board's decision is there any express language authorizing the employer's actions."[8] Furthermore, not only does the Board's decision "not support the employer's claim, there is no statute, board rule or case law which permits the employer's unilateral action in this case."[9] Plaintiff's counsel asserts that, in determining an award for workers' compensation, the Board is required to conduct

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[6] Plaintiff's request for liquidated damages, interest, costs and attorney's fees is based upon the Delaware Supreme Court's holding in *Huffman*, in which the Court recognized, for the first time, that under 19 *Del. C.* § 2357, the remedies available for recovery of unpaid wages are also available for the recovery of wrongfully withheld workers' compensation benefits. Specifically, these remedies are found in Chapter 11 of Title 19, Wage Payment and Collection Act, and include recovery of liquidated damages under 19 *Del. C.* § 1103(b), and costs and attorney's fees under 19 *Del. C.* § 1113(c).

[7] Def.'s Mot. for Summ. J. at 3-5.

[8] Plaintiff's Cross Motion for Summary Judgment, filed April 23, 2004, at 5, (hereinafter "Pl.'s Cross Mot. for Summ. J. at ___.").

[9] Pl.'s Cross Mot. for Summ. J. at 5.

an analysis under *Cox v. General Motors Corp.*,[10] and that the factors enumerated in *Cox*, support a prompt payment of the entire attorney's fee.[11]

In response to Defendant's contention that payment of the attorney's fee award is contingent on Plaintiff's continued entitlement to her ongoing total disability benefits, and that payments can "cease through various means," Plaintiff's counsel contends that Defendant's posited theory is illogical, and contrary to the intent manifest in Delaware's Workers' Compensation Act.[12] Plaintiff's counsel submits that, a claimant's attorney's fee is predicated on the facts as to the services in a compensation case at the time the services were rendered, and not subject to the disposition of collateral or later events.[13]

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[10] In *Cox*, the Delaware Supreme Court established a list of ten factors that the Board must consider in determining what amount of attorney's fees is reasonable. "Reasonable counsel fees should be evaluated upon the basis of the factors and formula set forth in the Delaware Lawyer's Code of Professional Responsibility, DR 2--106(B) as follows:

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(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.

(10) Whether counsel expects to receive any fee from another source." *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

It is essential that all of the factors be considered to facilitate the appropriate determination of attorney's fees and to provide the Court with sufficient information on appeal to formulate an informed decision. In the event the Board neglects to consider all the factors, or bases a decision on improper or inadequate grounds, it has committed an abuse of discretion. *Porter v. Insignia Mgmt. Group,* 2003 WL 22455316, at *3 (Del. Super. Ct.) (quoting *Willis v. Plastic Materials, Co*., 2003 WL 164292, at *1 (Del. Super. Ct.)).

[11] Pl.'s Cross Mot. for Summ. J. at 8.

[12] Pl.'s Cross Mot. for Summ. J. at 9-10.

[13] Pl.'s Cross Mot. for Summ. J. at 10-11.

Plaintiff's counsel also asks the Court to consider the local custom and practice of attorneys practicing before the Board. Specifically, the custom is, and has been, payment of a single attorney's fee payable in full, shortly after the conclusion of a Board decision.[14] Lastly, Plaintiff's counsel notes that Defendant's action of extending payments of the attorney's fee award contravenes public policy and the doctrine of judicial economy, and, "on a purely financial basis, it is more beneficial for a the carrier to pay a monetary award over time, than it is to pay the entire amount in a single lump sum."[15]

Standard of Review

Summary judgment may only be granted where the pleadings, depositions, answers to interrogatories, admissions on file and affidavits, if any, "show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law."[16] The Court must view the facts in a light most favorable to the non-moving party.[17] The moving party bears the initial burden of showing that a genuine material issue of fact does not exist.[18] If a motion is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[19] If, after viewing the record in the light most

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[14] Pl.'s Cross Mot. for Summ. J. at 12-13.
[15] Pl.'s Cross Mot. for Summ. J. at 13.
[16] DEL. SUPER. CT. CIV. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[17] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).
[18] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).
[19] *Id*.

favorable to the non-moving party, the Court finds no genuine issue of material fact, summary judgment is appropriate.[20] Summary judgment will be denied where the proffered evidence provides "a reasonable indication that a material fact is in dispute."[21]

Discussion

The issue presented by this case appears to be an issue of first impression in Delaware. While there exists ample, well-settled, case law controlling the question of the appropriate recourse that courts should adopt when an employer refuses to pay, or deliberately withholds payment of, compensation awards and/or attorney's fees from a claimant, there is scant, if any, precedent to shed light on the issue of the requisite method and/or manner of payment for awarded attorney's fees originating from a Board's decision.

That being said, the Court must focus its attention on the language of the controlling statute itself, in an attempt to garner the statute's true, intended, meaning and purpose, derived not only from the underlying legislative intent, but also from conventional wisdom and practice. It is well established that, in construing the language of a statute, Delaware courts attempt to ascertain and give effect to legislative intent,[22] i.e., the "objective of statutory construction is to

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[20] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. Super. Ct. 1990); *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. Ct. 1989).
[21] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[22] *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000); *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994).

'ascertain and give effect to the intent of the legislature.'"[23] In the construction of a statute, the Delaware Supreme Court has established as its standard the search for legislative intent.[24] Further, '[w]here the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.'[25] That is to say, if a statute contains unmistakable language, no interpretation is required and the plain meaning of the words control.[26]

Interpretation of legislative intent and statutory construction require that a court first examine the text of the statute in its context to determine if it is ambiguous.[27] By and large, a statute is ambiguous if it is "reasonably susceptible of two interpretations" or to evoking different conclusions.[28] A statute may also contain ambiguity, "[i]f a literal interpretation of the words of the statute would lead to a result so unreasonable or absurd that it could not have been intended by the legislature."[29] Therefore, in those instances where a statute's language lends itself to ambiguity, "[a] court must seek to resolve the ambiguity by ascertaining the legislative intent."[30] Concomitantly, in those instances when the language of a

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[23] *Dir. of Revenue v. CNA Holdings, Inc., f/k/a Hoechst Celanese Corp.*, 818 A.2d 953, 957 (Del. 2003) (quoting *Ingram*, 747 A.2d at 547).
[24] *Cephas*, 637 A.2d at 23; *Sandt v. Del. Solid Waste Auth.*, 640 A.2d 1030, 1032 (Del. 1994).
[25] *Sandt*, 640 A.2d at 1032 (quoting *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)); *see also Streett v. State*, 669 A.2d 9, 12 (Del. 1995); *Cephas*, 637 A.2d at 23.
[26] *Ingram*, 747 A.2d at 547; *accord Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999); *Cephas*, 637 A.2d at 23; *Spielberg*, 558 A.2d at 293.
[27] *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998); *State v. Reynolds*, 669 A.2d 90, 93 (Del. 1995).
[28] *CNA Holdings, Inc.*, 818 A.2d at 957; *accord Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.,*772 A.2d 172, 175 (Del. 2001); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985).
[29] *CNA Holdings, Inc.*, 818 A.2d at 957; *accord Newtowne Vill. Serv. Corp.*, 772 A.2d at 175; *Snyder*, 708 A.2d at 241; *DiStefano v. Watson*, 566 A.2d 1, 4 (Del. 1989).
[30] *Snyder*, 708 A.2d at 241; *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1088 (Del. 1995).

statute harbors no ambiguity and application of the literal meaning of its words would not be unreasonable, there is no basis for an interpretation of those words by the court.[31]

The Delaware Supreme Court has consistently recognized that the legislative purpose behind 19 *Del. C.* § 2320(10)(a) (formerly 19 *Del. C.* § 2127)[32] in mandating the availability of awarded attorney's fees to a claimant, was to relieve a successful claimant of the burden of legal fees and expenses, at least in part.[33] Further, the intent of this statute was to foster the ideal that an employee pursuing a meritorious claim for workers' compensation, not be required to pay counsel fees from the proceeds of the award.[34] According to 19 *Del. C.* § 2320 (10)(a), "[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 as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board

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[31] *Snyder*, 708 A.2d at 241; *DiStefano*, 566 A.2d at 4.

[32] DEL. CODE ANN. tit. 19, § 2127 was repealed by 71 Del. Laws, c. 84, § 1, eff. Dec. 24, 1997. Former § 2127 (a) provided that, "[a] reasonable attorney's fee in an amount not to exceed 30% of the award or $2,250, whichever is smaller, shall be allowed by the Board to an employee awarded compensation under this chapter and Chapter 23 of this title and taxed at costs against a party." Section 2127(a) was replaced by § 2320 (10)(a), which provides that, "[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 as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to an employee awarded compensation under Part II of this title and taxed at costs against a party." DEL. CODE ANN. tit. 19, § 2320 (10)(a) (1995 & Supp. 2002). 73 Del. Laws, c.121 (2001), substituted "10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award," for "$2,250" in (10)(a).

[33] *Ham v. Chrysler Corp*., 231 A.2d 258 (Del. 1967).

[34] *Digiacomo v. Bd. of Pub. Educ*., 507 A.2d 542, 546 (Del. 1986).

to an employee awarded compensation under Part II of this title and taxed at costs against a party."[35]

Examination of the statutory language reveals no hint of ambiguity or uncertainty as to the amount of reasonable attorney's fees a claimant is entitled to receive upon being awarded compensation. Although the statute clearly speaks to the prescribed amount of an awarded reasonable attorney's fee, it is silent as to the means or method of payment of this fee. Rules of statutory construction dictate that if a statute contains unmistakable language, no interpretation is required and the plain meaning of the words control. Similarly, if a statute is silent as to a related or conditional term, requirement, or proviso, and the legislative history reveals no delineated intent on the part of the General Assembly to consider or incorporate such a term, requirement, or proviso, this Court will not infer or presume the existence, intended or otherwise, of such a term, requirement, or proviso. As the Court has remarked on many occasions, it is the responsibility and duty of the Court to adjudicate the laws, while the General Assembly is empowered with the duty of creating and enacting them.

The workers' compensation hearing officer issued the decision, on behalf of the Board, in unison with the statutory language, decreeing that, "[c]laimant has successfully defended herself against WCC's termination petition, allowing her to

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[35] DEL. CODE ANN. tit. 19, § 2320 (10)(a) (1995 & Supp. 2002).

receive total disability compensation at the rate of $240.01 per week . . . . I find that an attorney's fee in the maximum amount of $7,373.50 or thirty percent of the award, whichever is less, is reasonable in this case."[36] Presently, Plaintiff is receiving compensation benefits of $240.01 per week and Defendant has been paying an attorney's fee of thirty percent of that amount on a weekly basis. Defendant plans to continue to make these payments until it has paid an attorney's fee of the maximum allowed of $7,373.50, pursuant to the Board's decision. At this rate, it will take the Defendant ninety-two weeks, or almost two years, to remit the awarded attorney's fee to Plaintiff's counsel.

The Court cannot discern anything in the statutory construction of 19 *Del. C.* § 2320 (10)(a) granting or conferring upon the Defendant the unilateral right to extend payment of the awarded attorney's fee by paying thirty percent of that amount, i.e., $79.99, on a weekly basis to the Plaintiff. Frankly, the Court is mystified by Defendant's presumption, and is unable to ascertain anywhere in the statutory language, or for that matter, in the Board's decision, the language or purposeful intent that confers upon Defendant the right to "merely follow[ing] the Board's decision in paying an attorney's fee of thirty percent each time it issues a temporary total disability check."[37]

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[36] Industrial Accident Board Decision, dated January 17, 2003, at 16-17 (hereinafter "Bd. Dec. at ___.").
[37] Def.'s Mot. for Summ. J. at 3.

Additionally, in its motion, Defendant places undue emphasis on the phrase "whichever is less" found in the Board's decision, seeming to conclude that these words somehow confer on Defendant the privilege, guaranteed by an implicit right, to sustain its unilateral decision of making incremental, weekly, payments of the awarded attorney's fee to Plaintiff's counsel, over an extended period of ninety-two weeks. In actuality, the phrase "whichever is less" derived from the text of the Board's decision, and its counterpart of "whichever is smaller," found in the statutory language, have the same, indigenous meaning, separate and distinct from that which Defendant is attempting to assign to them. The fundamental rule of statutory construction is that all statutes must be read as a whole and all words must be given effect.[38] Any interpretation of a statute must give full effect to all of the pertinent statutory language and produce the most consistent, harmonious result.[39]

The requirements of "not to exceed 30 percent of the award" "or 10 times the average weekly wage in Delaware" are followed, respectively, by the phrase "whichever is smaller/less" in the statute, and in the Board's decision. Webster's Dictionary assigns one meaning to the pronoun "whichever," defining it as "any one (of two or more)."[40] Taken as a whole, within the context of the statute, these

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[38] *Indus. Rentals, Inc. v. New Castle County Bd. of Adjustments*, 776 A.2d 528, 530 (Del. 2001).
[39] *Nationwide Ins. Co. v. Graham*, 451 A.2d 832, 834 (Del. 1982).
[40] WEBSTER'S NEW WORLD DICTIONARY 1139 (2nd ed. 1990).

two phrases, followed by the pronoun "whichever," denote that the statute simply requires the total award of reasonable attorney's fee be equal to no more than thirty percent of the award or, in the alternative, no higher than ten times the average weekly wage in Delaware, depending on which one of the two is smaller. There is no trick language here inferring anything more than a mathematical comparison of ratios of varying proportions. Simply stated, Defendant's "slippery-slope" assertion that the Board's decision, and statutory law, permits it to ration the attorney's fee payments to the Plaintiff is unfounded. There is no support to be found for this contention within the constructs of § 2320(10)(a), in the decision mirrored by the Board, or in Delaware case law.

Defendant suggests that Plaintiff had the opportunity to appeal the Board's decision on the attorney's fee issue and, having failed to do so, the Board's award became final. The record indicates that it was not until April 22, 2003, a full three months after issuance of the Board's decision, and two months after the decision became final, that the Defendant, for the first time, informed Plaintiff's counsel that it intended to initiate periodic payments of the awarded attorney's fee. Defendant's argument fails because it belies the fact that, until the Defendant made its intentions regarding its chosen method of making payment of the attorney's fee known to Plaintiff's counsel, the Plaintiff had no reason to appeal the decision.

Additionally, Defendant's contention that, not only do § 2320(10)(a), and the Board's decision, authorize payment of the attorney's fee on a weekly basis, but the fees are contingent on Plaintiff's continued entitlement to her ongoing total disability benefits, is not only misguided, but unrelated to the issue before the Court. It is undisputed that Plaintiff's right to ongoing, temporary total disability benefits can terminate for various reasons including, but not limited to, Defendant filing a Petition to Review pursuant to 19 *Del. C.* § 2347, and demonstrating that Plaintiff is no longer totally disabled, the parties entering into a settlement or commutation agreement, and/or, pursuant to 19 *Del. C.* § 2333, Plaintiff dying from unrelated causes. But, the occurrence of such a potential happenstance is unrelated, distinctly disassociated from, and not contingent on, Plaintiff's counsel's entitlement to the attorney's fee awarded to him for providing representation to his client in the matter before the Board. By Defendant contemporaneously associating the weekly payment of Plaintiff's disability benefit of $240.01, with the attorney's fee of $79.99, it has mistakenly equated the two as co-existing, and thus, co-dependent. Basically, whether Plaintiff continues to remain eligible for disability benefits, has no bearing on the attorney's fee award already earned by Plaintiff's counsel. The rationale of awarding an attorney's fee is to afford remuneration for legal work already performed or provided, which has been earned

at the juncture when compensation benefits are awarded to a claimant, not when a claimant actually begins to receive payment of the benefits down the road.

Taking into consideration the *Cox* factors, as well as the Board's adapted analysis, the Court finds further support for the prompt payment of the attorney's fee award. It is a requirement that the Board consider the factors specified in *Cox* in making a determination of an attorney's fee award.[41] Independent of the Board's decision, in reviewing the *Cox* factors, the Court finds that they provide an instructive guideline, or roadmap of sorts, reflecting a general intent to assist the neutral observer in compiling various fee-related elements affected by an attorney's representation of a client. After formulating the elements as a whole, the process culminates in a final determination of a reasonable fee award. In this instance, some of the pertinent elements to be considered are the amount of time and labor the attorney devoted to preparation and representation, the nature and length of the client relationship, and whether the attorney expects to receive any fee from any other source. In the final analysis, the factors are compiled together to aid the Board, and this Court, in generating the quantity of attorney work performed, so that the attorney can be compensated. Once that amount has been quantified, it stands to reason that the attorney should receive payment, and that payment should be received within a reasonable period of time.

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[41] *See supra* note 10.

In considering the *Cox* factors relevant to the fee to be awarded to Plaintiff's counsel,[42] the Board concluded in its decision:

> 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, I find that an attorney's fee in the maximum amount of $7,373.50 or thirty percent of the award, whichever is less, is reasonable in this case. At most, this equates to only slightly over $175.00 per hour for counsel's services. I do not find this excessive in light of the factors set forth above.[43]

The Board's finding of an overall attorney's fee of $7,373.50 was supported by the amount of work Plaintiff's counsel performed at the time of the hearing. In reaching a determination of the applicable hourly rate, the Court presumes that the Board's allocation of time and effort in arriving at this number, is indicative of its expectation that Plaintiff's counsel could then receive payment of the appropriate amount in a timely fashion.

With respect to local custom and accepted practice in the realm of workers' compensation law, the generally accepted practice in the State of Delaware is for payment of an award of attorney's fees to be made to the applicable parties, soon

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[42] "Claimant's counsel submitted an affidavit stating that he spent forty hours preparing for the hearing, which itself lasted over two hours. Claimant's counsel was admitted to the Delaware Bar in 1989 and he has experience in the field of workers' compensation law. His first contact with Claimant was in July 2002, so he has been representing Claimant for slightly over half a year. There is no evidence that counsel has represented Claimant in anything other than a workers' compensation context. A cognitive injury is not a usual subject matter for a workers' compensation case and, in my opinion, this made it slightly more difficult to try then the traditional type of injury. Counsel does not appear to have been subject to any unusual time limitations imposed by either Claimant or the circumstances, and there is no evidence that taking Claimant's case precluded him from accepting other clients. Counsel took the case on a contingency basis, but no details of the fee arrangement were provided." Bd. Dec. at 16.

[43] Bd. Dec. at 16-17.

after the Board's decision becomes final, if no appeal is taken.[44] Additionally, in looking at the acceptable practices in other service-providing industries outside the legal community, it is customary for other professionals generally to require payment within an appropriate and reasonable period of time. Would the surgeon who removes a gall bladder, or the dentist who extracts a wisdom tooth, or the plumber who unclogs a drain, all expect to receive payments pursuant to an extended, installment payment plan, parsed out over ninety-two weeks? The Court does not believe this to be the case. Generally, merchandise can be purchased "on time," but not an individual's personal services. The Court questions whether counsel for Defendant would be equally amenable to an extended fee payment agreement between itself and its client for representation of the Defendant in this matter. Standard law firm accounting practices dictate that attorneys record their billable hours on a daily basis, and that the client is billed on a periodic basis (generally monthly) for services rendered, with receipt of payment usually due within thirty to sixty days. If counsel for Defendant anticipates prompt payment from his client for representation in connection with the Petition to Terminate, it seems incongruous that he would then expect counsel for Plaintiff to contemplate receipt of full payment for his representation of the Plaintiff in the same matter, stretched out over a period just shy of two years.

[44] DEL. CODE ANN. tit. 19, § 2349 (1995 & Supp. 2002).

In the *Huffman* complaint filed by Plaintiff, Plaintiff's counsel is seeking payment of the entire $7,373.50 in attorney's fees, as well as penalties, interest, and costs recoverable pursuant to the Delaware Wage Collection Act. In *Huffman*, the Delaware Supreme Court allowed amounts due under an Industrial Accident Board award to be collected pursuant to the Wage Payment and Collection Act, 19 *Del. C*. Ch. 11, thereby broadening the remedies available to a claimant whose payments are wrongfully withheld.[45] The Court held that:

> The Legislature has expressly provided, in 19 *Del. C*. § 2357, that, "If default is made by the employer for 30 days after demand in the payment of any amount due under this chapter, the amount may be recovered in the same manner as claims for wages are collectible." Wage claims are covered by Title 19, Chapter 11 of the Delaware Code. Thus, pursuant to § 2357, an employee with a claim based on the employer's alleged failure to pay compensation due after proper demand has been made may elect to pursue an action under Chapter 11.[46]

Title 19, Section 1103(b) of the Delaware Code states that an employer, who, without any reasonable grounds for dispute, fails to pay an employee wages is "liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller."[47] Under 19 *Del. C*. § 1113(a),

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[45] *Huffman*, 432 A.2d at 1210-11.
[46] *Id*. at 1210.
[47] DEL. CODE ANN. tit. 19, § 1103(b) (1995 & Supp. 2002).

"[a] civil action to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction."[48] Moreover, under 19 *Del. C.* § 1113(c), "[a]ny judgment entered for a plaintiff in an action brought under this section shall include an award for the costs of the action, the necessary costs of prosecution and reasonable attorneys' fees, all to be paid by the defendant."[49]

Thus, to recover liquidated damages in a *Huffman* suit for an employer's failure to pay a workers' compensation award, Title 19, Chapter 11 remedies are made available by application of 19 *Del. C.* § 2357. A claimant is entitled to liquidated damages under 19 *Del. C.* § 2357 for failure of an employer to pay a workers' compensation award only after the claimant/employee can prove the following elements: (1) the award has becomes "due," i.e., the Board has held that the employee is entitled to workers' compensation benefits; 2) the employee has made a proper demand for payment to the employer; and 3) the employer has failed to pay the amount due within thirty days after the demand.[50]

As to the first element, pursuant to the Board's January 17, 2003 decision, Plaintiff is to continue to receive total disability compensation, and, as such, the compensation award has clearly become "due" in the fullest sense of the word, as it was not terminated and is continuing. Further, this Court has interpreted this

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[48] DEL. CODE ANN. tit. 19, § 1113(a) (1995 & Supp. 2002).
[49] DEL. CODE ANN. tit. 19, § 1113(c) (1995 & Supp. 2002); *Huffman*, 432 A.2d at 1211.
[50] *Blue Hen Lines, Inc. v. Turbitt*, 787 A.2d 74, 78 (Del. 2001).

provision to mean that an award is "due" once the Board's decision becomes final.[51] The decision was received by the parties on January 20, 2003. As stated earlier, pursuant to 19 *Del. C.* § 2349, the Board's decision became final on February 16, 2003. Under 19 *Del. C.* §2362(d), the first payment of compensation shall be paid by the employer/carrier no later than fourteen days after the award becomes final and binding pursuant to 19 *Del. C.* § 2349. Therefore, all benefits would have been due as of March 3, 2003.

With regard to the second element, Plaintiff's counsel made proper demand for payment of the attorney's fee portion of the award in two letters, dated March 13, 2003, and March 21, 2003, respectively. The content of these two letters lends great weight to this Court's decision and warrants further exploration. In the first letter, drafted by Plaintiff's counsel and sent to Defendant's counsel on March 13, 2003, the relevant passages are as follows:

> This letter will confirm our telephone conversation today . . . . Lastly, the Board awarded an attorney's fee on the petition to terminate. Would you please advise the carrier of its responsibility to initiate payment for all of the above items. The Board decision was dated 1/17/03. It is now approaching two months from the date of the decision. Therefore, please accept this letter as the claimant's demand for payment pursuant to the Delaware Wage Collection Act and the Huffman decision.[52]

[51] *Hamilton v. Trivits*, 340 A.2d 178, 180 (Del. Super. Ct. 1975).
[52] Pl.'s Cross Mot. for Summ. J., Ex. 3.

In the second letter, drafted by Plaintiff's counsel and sent to Defendant's counsel on March 21, 2003, the relevant passage is as follows:

> Lastly, you asked me to provide you with the specific attorney's fee to which I am entitled pursuant to the Board decision. The Board granted a single attorney fee in the statutory amount of the lesser of 30% of the award or 10 times the average weekly wage in effect as of the date of the decision. I am therefore entitled to a single fee in the amount of $7,373.50.[53]

In response to the above, on April 29, 2003, Plaintiff's counsel received a letter, dated April 28, 2003, from Defendant's counsel via hand delivery, which stated the following:

> Enclosed herein is a draft in the amount of $2,584.00 to cover the attorney's fees in connection with the above-referenced case. This check covers the attorney's fees for the period August 16, 2002 through April 18, 2003. You will continue to receive a check in the amount of $79.99 each week pursuant to the Industrial Accident Board Decision.[54]

Having established that the Board's award became due, and that the employee made proper demand for payment from the employer, not once, but twice, the remaining element of failure to pay within thirty days must be examined. Technically, the employer failed to pay the amount due within thirty days after the first demand. Pursuant to § 2362(d) and § 2349, all benefits were due as of

[53] Pl.'s Cross Mot. for Summ. J., Ex. 4.
[54] Pl.'s Cross Mot. for Summ. J., Ex. 5.

March 3, 2003. Since the initial demand letter was dated March 13, 2003, default occurred as of April 12, 2003, thirty days hence. Also, it is undisputed from the record, and from the stipulated facts that: 1) forty-six days elapsed between the date of the first demand letter and receipt of partial payment of the attorney's fee award, in the amount of $2,584.00, by Plaintiff's counsel on April 29, 2003; and 2) thirty-eight days elapsed between the date of the second demand letter and receipt of partial payment of the attorney's fee award, in the amount of $2,584.00, by Plaintiff's counsel on April 29, 2003. Thus, despite Defendant's untimely, half-hearted, attempt of making a partial payment of the attorney's fee award on April 29, 2003, and its unilateral decision to continue making a series of weekly, protracted payments in the future, Plaintiff is entitled to liquidated damages under 19 *Del. C.* § 2357 for Defendant's failure to pay timely the maximum attorney's fee award of $7,373.50.

Defendant submits that, should the Court determine that the Plaintiff is entitled to the maximum attorney's fee award, "it is not subject to penalties under Huffman or the Delaware Wage and Collection Act as its refusal to pay the maximum fee was not wrongful."[55] Relying upon its contention that the wording of the Board's decision somehow empowered it to extend payment of the attorney's fee award as a weekly stipend, and that it did not "fail" to pay the

[55] Def.'s Mot. for Summ. J. at 6.

Board's award, Defendant maintains that its refusal to pay the maximum fee was not "wrongful" as enumerated in *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. McDougall*.[56]

The Court disagrees. In *McDougall*, the employer's insurer made a similar argument that liability is based on "wrongful" non-payment, by relying on the provision of § 1103(b), which predicates liability on non-payment "without any reasonable grounds for dispute."[57] As the Delaware Supreme Court held in *McDougall*, this argument must fail.[58] First, Defendant cannot argue that there existed a bona fide dispute concerning the maximum amount of award due, thereby absolving it from any liability under § 1103(b), because nonpayment would then not have been "wrongful" or unreasonable. As further support, in *Blue Hen Lines, Inc. v. Turbitt*, the Delaware Supreme Court held that the "without any reasonable grounds for dispute" exception contained in § 1103(b), only applies in those instances "where a decision is not final and binding and the employer properly contests the employee's entitlement to benefits, the employer may not be held liable for liquidated damages during the pendency of the proceedings to resolve the dispute."[59] The Board's decision was final and no disputed grounds or issues existed. Moreover, the Delaware Supreme Court has repeatedly relied upon, and

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[56] *Nat'l Union Fire Ins. Co. v. McDougall*, 773 A.2d 388 (Del. 2001).
[57] *McDougall*, 773 A.2d at 392-93.
[58] *Id*. at 393.
[59] *Blue Hen Lines, Inc.,* 787 A.2d at 79.

reaffirmed its statement, first set forth in *Huffman*, that, "[a]s this Court stated in *Huffman*, 'the alleged "good faith" belief of an employer or an insurer that the employee is no longer entitled to compensation is irrelevant' under this statute [19 *Del. C.* § 2357]."[60]

Second, as the Court in *McDougall* recognized, "[f]ailure to pay an amount due can be 'wrongful' in a sense that does not necessarily imply bad faith."[61] In light of the same slippery-slope contention proposed by Defendant, Defendant cannot assert that "absent a showing that the benefits were due and owing, Plaintiff's claim must fail as a matter of law, and Plaintiff has no standing in this Court to request that this Court determine that the award should be modified by awarding the maximum attorney fee."[62] Plaintiff's counsel is entitled to payment of the maximum award of fees according to the Board's decision, and Defendant's failure to pay the amount due, according to statute, constitutes "wrongful" conduct.

Moreover, it is salient to point out that the Defendant could have sought some type of clarification from the Board as to its proposed method of an extended payment plan of the attorney's fee award, within the thirty-day statutory period, before the Board's decision became final. Defendant cannot assuage its "wrongful" behavior by suggesting that the Plaintiff could have appealed the

[60] *McDougall*, 773 A.2d at 393 (quoting *Huffman*, 432 A.2d at 1209); *Blue Hen Lines, Inc.,* 787 A.2d at 79.
[61] *McDougall*, 773 A.2d at 393.
[62] Def.'s Mot. for Summ. J. at 6.

Board's decision on the attorney's fee issue. It was not until April 22, 2003, a full three months after the Board issued its decision, that Defendant's counsel first contacted Plaintiff's counsel and informed him of Defendant's intention to make periodic payments of the attorney's fee. Until Defendant had announced its intended mode of payment, Plaintiff had no cause to appeal the Board's decision. In actuality, it was Defendant who procrastinated, waiting until the appeal time ran before it belatedly declared its intentions, unilaterally deciding to construct its own method of attenuated payments of the attorney's fee award.

The attorney's fee award, pursuant to the Board's decision, is an "amount due" under § 2357. Further, the Delaware Supreme Court in *McDougall*, determined that an unappealed award is an "amount due" under the statute, regardless of "good faith objections."[63] Notwithstanding Defendant's protestations and claims of propriety, non-wrongful behavior, and compliance with statutory law and the Board's decision, Defendant's attempt to circumvent the Board's decision as to the attorney's fee award, by making an initial default payment, followed by a series of weekly payments to coordinate with the Plaintiff's disability payments, until the time the maximum amount is exhausted, is incompatible with the statutory remedy outlined in *Huffman*. Following issuance of the Board's decision, and upon it becoming final thirty days later, several demands for payment were made

[63] *McDougall*,, 773 A.2d at 393.

by Plaintiff's counsel without any response from Defendant within the statutory period. Defendant's belief that it could initiate a single, partial payment after this default period had commenced, accompanied by an intention to pursue an extended payment plan with a projected termination date two years in the future, was "wrongful" in the statutory sense, even if based on a misguided, but unprecedented belief, that it could effectuate such a practice under statutory law.

In contravention to Defendant's claims, the Delaware Supreme Court in *Acro Extrusion Corp. v. Cunningham*, affirmed its holding in *Blue Hen Lines*, that a workers' compensation claimant entitled to payments of benefits on an unappealed award, may make a *Huffman* demand for payment of the amount due under the Board's decision. If the employer fails to make payment within thirty days of the demand, the employer may be liable for liquidated damages as provided by statute.[64] The Court went on to state, "[i]n the final analysis, however, the focus of the *Huffman* award must be on the employer's failure to pay once the thirty[-]day default period has expired after proper demand."[65]

The factual circumstances and events underlying Defendant's motion are distinguishable from *Acro.* In *Acro*, the employer was deemed to have received the thirty-day demand notice requirement of § 2357 upon to receipt of claimant's second demand letter, because there existed partially disputed amounts stemming

[64] *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347-48 (Del. 2002).
[65] *Id*. at 348.

from the appeal in claimant's first demand letter.[66] The claimant in *Acro* was not entitled to payment of damages for failure of the employer to have paid the award, because the employer had paid the undisputed portion of the award within thirty days of the date of the first letter. The second letter was only necessary because the claimant's notice of appeal of the Board's decision did not specify that the claimant had accepted certain portions of the award.[67] In the case at bar, Plaintiff's first demand letter sufficed for purposes of the demand notice requirement of § 2357, and Defendant's failure to timely respond by paying the maximum attorney fee award pursuant to the Board's decision, culminated in "wrongful" conduct, subjecting it to penalties and damages under *Huffman* and the Delaware Wage and Collection Act.

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[66] *Id*.
[67] *Id*.

Conclusion

For all of the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED**. The denial of the Defendant's Motion for Summary Judgment results in the Plaintiff's Cross Motion for Summary Judgment being **GRANTED**. Hence, pursuant to this Order, Plaintiff is entitled to payment of the entire $7,373.50 in attorney's fees, as well as liquidated damages, interest, and costs recoverable pursuant to the Delaware Wage Collection Act. If the parties are unable to agree upon the amount of damages, the Court will schedule a hearing upon request.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

cc: Michael P. Freebery, Esquire
John J. Klusman, Jr., Esquire
Susan A. List, Esquire
Prothonotary