

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

P.O. Box 746  
COURTHOUSE  
GEORGETOWN, DE 19947

September 9, 2004

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RE: Vincent v. Gordy's Lumber Mill  
C.A. No. 03A-06-001 ESB

Date Submitted: July 6, 2004

Dear Counsel:

This is my decision on Jeffrey Vincent's ("Vincent") Application for Attorneys' Fees pursuant to 19 *Del. C.* § 2350(f) against his employer, Gordy's Lumber Mill ("Gordy's"). Vincent's application is granted, in part, and denied, in part, for the reasons stated herein.

**BACKGROUND**

In an Order dated March 17, 2004, I found that there was no evidence to support the reasonableness of two \$1,000 cancellation fees for missed defense medical evaluations, and that Vincent was denied due process when the Board awarded a cancellation fee for a missed medical evaluation scheduled for just 11 business hours prior to the hearing. Accordingly, I affirmed, in part, and reversed, in part, the decision of the Industrial Accident Board (the "Board"), and remanded for

further proceedings consistent with my Order.<sup>1</sup> Gordy's then filed a Motion for Reargument which I denied in an Order dated May 13, 2004.<sup>2</sup>

## DISCUSSION

### A. Attorneys' Fees Based On an Hourly Rate

Vincent has now filed an Application for Attorneys' Fees pursuant to 19 *Del. C.* § 2350(f). As a result of work performed on appeal, Vincent seeks a fee of \$3,985.00, plus an additional one-third for the contingent nature of the litigation, totaling \$5,313.33. Since I remanded the case to the Board for proceedings consistent with my Order, Gordy's argues that Vincent's application for attorneys' fees is premature because it was filed before a final judgment establishing an increase in Vincent's award, or a decrease in the penalties assessed to Vincent. 19 *Del. C.* § 2350(f) governs the award of counsel fees in this situation, and provides the following:

The Superior Court may at its discretion allow a reasonable fee to claimant's attorney for his services on an appeal from the Board to the Superior Court and from the Superior Court to the Supreme Court where the claimant has prevailed in his hearing before the Board and is affirmed on appeal. Such fee shall be taxed in the costs and become part of the final judgment in the cause and may be recovered against the employer and the employer's insurance carrier as provided in this subchapter.<sup>3</sup>

Despite Gordy's contention that Vincent must have prevailed before the Board and be affirmed on appeal, that is not the case. It is only necessary that Vincent's position before the Board be

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<sup>1</sup>*Vincent v. Gordy's Lumber Mill*, Del. Super. Ct., C.A. No. 03A-06-001, Bradley, J. (March 17, 2004).

<sup>2</sup>*Vincent v. Gordy's Lumber Mill*, Del. Super. Ct., C.A. No. 03A-06-001, Bradley, J. (May 13, 2004).

<sup>3</sup>19 *Del. C.* §2350(f).

affirmed.<sup>4</sup> Therefore, Vincent need not be successful before the Board in order to obtain an award of attorneys' fees.

Gordy's argues that Vincent's success on appeal is dependent upon the Board's subsequent ruling on remand. However, this is incorrect. The relevant inquiry is whether Vincent was successful on appeal, regardless of the result on remand. In determining whether or not Vincent was successful on appeal, the Court looks at its own appellate ruling because "the outcome at the appellate level is all that matters."<sup>5</sup> Vincent's success on remand is therefore irrelevant.<sup>6</sup> Moreover, Delaware case law provides that "where an appellate court reverses the Board's decision due to legal error and where the reversal is in claimant's favor, then an application for attorneys' fees may be filed after the determination of the legal error occurs."<sup>7</sup> Therefore, it is not necessary for Vincent to wait until the outcome of the case prior to seeking attorneys' fees.<sup>8</sup>

In this case, I determined that there was no evidence to support the reasonableness of the Board's award of two \$1,000 fees for missed medical evaluations, and that Vincent was denied due process when the Board awarded a cancellation fee for a missed medical evaluation scheduled just 11 business hours prior to the hearing. My decision affirmed Vincent's position below. I reversed

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<sup>4</sup>*Murtha v. Continental Opticians, Inc.*, 729 A.2d 312, 315 (Del. Super. Ct. 1997).

<sup>5</sup>*Resource Technologies Services v. Hedden*, 1999 WL 41793 (Del. Super. Ct.).

<sup>6</sup>*Hedden*, 1999 WL at \*3 (citations omitted).

<sup>7</sup>*Bythway v. Super Fresh Food Markets, Inc.*, 1999 WL 1568615, at \*3 (Del. Super. Ct.) (citations omitted); *See also Thomason v. Temp Control*, 2002 WL 1587856 (Del. Super. Ct.).

<sup>8</sup>*Bythway*, 1999 WL at \*3.

and remanded the matter as a result of the Board's error. Thus, the Board's decision on remand is irrelevant. Vincent's position before the Board was affirmed by the Court.

However, Gordy's contends that the Court, as permitted within its discretion, should deny the application for attorneys' fees because the Court allegedly imposed new requirements on Gordy's which were never required in the usual practice before the Board when an employer requested a credit for a missed examination fee. Gordy's argues that an award of attorneys' fees in this situation would essentially reward Vincent for his failure to attend the medical examinations, and thereby penalize Gordy's. However, there is no basis in case law or statute to deny attorneys' fees to a claimant who is successful on appeal because the Court imposed new requirements. The purpose of the statute would not be served by a denial in such a situation. The purpose of the statute is to preserve Vincent's worker's compensation benefits "by taxing the cost of services at the appellate level against the unsuccessful employer."<sup>9</sup> Furthermore, although I set forth factors to be considered in the determination of the reasonableness of a missed medical evaluation fee, the requirement that there be substantial evidence to support the Board's decision is not a new requirement. Based on the foregoing, I find that the application for attorneys' fees is not premature.

Vincent has submitted a Certificate of Attorney in support of his request for attorneys' fees. The fee applied for is \$3,985.00 based on 9.3 hours work by associates of Schmittinger and Rodriguez, P.A. at an hourly rate of \$150.00 per hour, 8.2 hours work by Walt F. Schmittinger, Esquire, at an hourly rate of \$250.00 per hour, and 1.8 hours work by John J. Schmittinger, Esquire, ("Mr. Schmittinger"), at an hourly rate of \$300.00 per hour. Although Gordy's opposes both Vincent's request for attorneys' fees, and an additional award of one-third, Gordy's has not

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<sup>9</sup>*Digiacombo v. Board of Public Education in Wilmington*, 507 A.2d 542 (Del 1986).

specifically opposed counsel's hourly rates or number of hours billed as being excessive or unreasonable under the circumstances. After a careful consideration of the application for attorneys' fees, and the factors set forth in *General Motors v. Cox*,<sup>10</sup> I have concluded that the fees sought should be allowed and are reasonably calculated given the issues and nature of the appeal.<sup>11</sup> Moreover, given Mr. Schmittinger's experience, reputation, ability, and the fee customarily charged in the locality for similar services, I find that Mr. Schmittinger's hourly rate of \$300.00 per hour is also reasonable.<sup>12</sup> Therefore, the Court awards Vincent \$3,985.00 in attorneys' fees which represents 9.3 hours at \$150.00 per hour, 8.2 hours at \$250.00 per hour, and 1.8 hours at \$300.00.

#### **B. Additional One-third Contingency Multiplier**

In addition to the \$3,985.00 sought in attorneys' fees based on an hourly rate, Vincent also seeks an additional one-third for the contingent nature of the litigation. A one-third contingency

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<sup>10</sup>304 A.2d 55 (Del. 1973). The factors to be considered are: (a) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (b) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (c) the fees customarily charged in the locality for similar legal services (d) the amount involved and the results obtained; (e) the time limitations imposed by the client or by the circumstances; (f) the nature and length of the professional relationship with the client; (g) the experience, reputation and ability of the lawyer or lawyers performing the services; (h) whether the fee is fixed or contingent. Additionally, two other factors to consider are the employer's ability to pay, and whether the Board's award is the exclusive source of the attorney's fees.

<sup>11</sup>See *Playtex Products, Inc. v. Lewis*, 2002 WL 1343883 (Del. Super. Ct.) (finding attorneys' fees at \$200 per hour to be reasonable). See also, *Bedwell v. Brandywine Carpet Cleaners*, 1996 WL 658839 (Del. Super. Ct.); *State v. Cornish*, 1995 WL 862127 (Del. Super. Ct.).

<sup>12</sup>See *Kelley v. ILC of Dover, Inc.*, 1998 WL 960704 (Del. Super. Ct.) (finding Mr. Schmittinger's hourly rate of \$300.00 per hour to be reasonable); See also, *Goshkey v. Exxon Shop of Rehoboth*, Del. Super. Ct., C.A. No. 96A-12-003, Lee, R.J. (May 26, 1998); *Deshields v. Harris Mfg. Co., Inc.*, Del. Super. Ct., C.A. No. 97A-06-003, Ridgely, P.J. (Jan. 20, 1998).

multiplier “is not to be granted routinely, it is justified where the fee was contingent on success, the outcome was doubtful, and the issues were novel and difficult. Where only the first factor (contingency of the result) exists, an award of one-third additional is not justified.”<sup>13</sup> Gordy’s argues that the issue on appeal is not novel or complex, and therefore, the request for the one-third multiplier is not warranted.<sup>14</sup> I agree with Gordy’s. The issues on appeal were not particularly novel or complex. Therefore, the request for the one-third multiplier is denied.

### CONCLUSION

Vincent’s application for attorneys’ fees is granted, in part, and denied, in part, for the reasons stated herein.

**IT IS SO ORDERED.**

Very truly yours,

E. Scott Bradley

ESB:tl

cc: Prothonotary’s Office

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<sup>13</sup>*Thomason*, 2002 WL at \*1, quoting *Meadows v. Linton*, 2000 WL 33114379, at \*1 (Del. Super. Ct.).

<sup>14</sup>*Meadows*, 2000 WL at \*7; *Quality Car Wash v. Cox*, 1983 WL 476625 (Del. Super. Ct.).