IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PLAYTEX APPAREL, INC.,	:	
	:	C.A. No. 04A-11-002 WLW
Appellant,	:	
Defendant-Below,	:	
	:	
v.	:	
	:	
KATHY MELVIN,	:	
	:	
Appellee,	:	
Plaintiff-Below.	:	

Submitted: September 1,2005
Decided: December 29, 2005

ORDER

Upon Appeal of Two Decisions of the Court
of Common Pleas and a Cross-Appeal. Denied.

J. R. Julian, Esquire, of J. R. Julian, P.A., Wilmington, Delaware; attorneys for the Appellant, Defendant-Below.

Walt F. Schmittinger, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Appellee, Plaintiff-Below.

WITHAM, R.J.

Playtex Apparel, Inc. v. Kathy Melvin
C.A. No. 04A-11-002 WLW
December 29, 2005

Appellant, Playtex Apparel, Inc. ("Playtex"), Defendant-below, appealed two decisions of the Court of Common Pleas ("Court below"). Appellee, Kathy Melvin ("Melvin"), Plaintiff-below, filed a cross-appeal. Playtex's appeal is premised on four theories, namely: (1) the second injury fund[1] analysis used by the Court below was erroneous; (2) the Court below erred in holding that the Wage Collection Act applied and that Melvin had filed a valid *Huffman*[2] suit; (3) the Court below erred in its analysis of the medical witness fee issue; and (4) the Court below demonstrated bias against Playtex by its conduct of the case. Melvin's cross-appeal is based on her argument that the Court below erred by not awarding attorney's fees for the time Melvin's counsel spent defending the declaratory judgment action filed by Playtex in the Court of Chancery, which was then transferred to the Superior Court.

The underlying facts are as follows: Melvin suffered a work-related back injury in September of 1983. As a result of the injury, Melvin received total disability payments from Playtex in the amount of $228.53 per week. On January 26, 2001, Playtex, a self-insured company, filed a petition to terminate Melvin's total disability payments, but continued to pay Melvin's benefits as required by 19 *Del. C.* § 2347.[3] On September 7, 2001, after conducting a hearing on the matter, the Industrial

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[1] This fund is currently titled the Workers' Compensation Fund and will be referred to as the "Fund" throughout this opinion.

[2] *Huffman v. Oliphant*, 432 A.2d 1207 (Del. 1981).

[3] Section 2347 reads, in pertinent part, "Compensation payable to an employee, under this chapter, shall not terminate until and unless the Board enters an award ending the payment of compensation after a hearing upon review of an agreement or award."

Accident Board ("Board") granted Playtex's petition as of the date of filing, but awarded partial disability benefits to Melvin, as well as attorney's fees and medical witness fees. Subsequently, Playtex determined it was entitled to a credit for the amount it paid in total disability benefits during the pendency of the petition. However, Playtex never sought acknowledgment of this credit from the Board. Melvin sent several demand letters to Playtex and after full payment was not made, Melvin filed a *Huffman* claim in the Court below. Prior to Melvin's suit, Playtex filed a declaratory judgment action in the Court of Chancery, which was dismissed; however, the Court of Chancery allowed Playtex to transfer the matter to the Superior Court. The Superior Court subsequently dismissed the action based on Playtex's failure to prosecute. At the time of the Court below's decisions, Playtex was appealing the Superior Court's decision to the Supreme Court. The Court below issued two decisions - one concerning the failure of Playtex to pay Melvin's benefits, medical witness fees and attorney's fees on August 17, 2004, and one regarding whether Melvin was entitled to attorney's fees for the time spent defending the actions in the Court of Chancery, Superior Court and Supreme Court on October 26, 2004. Playtex appealed the initial decision of the Court below and Melvin filed a cross-appeal based on the Court below's second decision.

For the reasons set forth below, Playtex's appeal is *denied* and Melvin's cross-appeal is *denied*.

Standard of Review

"The function of this Court is to 'correct errors of law and to review the factual

findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process.'"[4] If an error of law exists, it is reviewed *de novo*.[5] However, "'if substantial evidence exists for a finding of fact, this Court must accept that ruling, as it must not make its own factual conclusions, weigh evidence, or make credibility determinations.'"[6]

Discussion

Both Playtex's and Melvin's contentions will be discussed individually below.

Workers' Compensation Fund Analysis:

Playtex argues that the Court below's decision incorrectly applied the Fund analysis because Playtex is self-insured; therefore, Playtex is responsible for paying its own disability benefits, even during the pendency of a petition to terminate benefits. However, Playtex's argument is flawed. In its decision, the Court below begins with a review of the legislative history behind the Fund. The Court below correctly observes that the point of the Fund is to ensure that employees continue to receive their full benefits until the Board issues a final decision. The Court below also accurately determined that simply because an employer is self-insured, such status does not negate the requirement that an employee is still entitled to full disability benefits during the pendency of a petition. In fact, to allow a self-insured employer to unilaterally issue itself a credit for benefits paid during the pendency of a petition would create a

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[4] *Snyder v. Jehovah's Witnesses, Inc.*, 2005 Del. Super. LEXIS 364.

[5] *Id.*

[6] *Id.*

disparity between self-insured employers and those who are insured through the Fund, and would favor self-insured employers. Consequently, the Court below did not commit an error of law in applying the Fund analysis, so this portion of Playtex's appeal fails.

Wage Collection Act and the Validity of the *Huffman* Suit:

Playtex contends that the Court below's reliance on *Hopkins*,[7] *Dobrzynski*[8] and *McDougall*[9] are all misplaced. Instead, Playtex asserts that *State v. Brown*[10] controls this case. However, Playtex's argument is erroneous for several reasons. First, *Brown* is inapposite to this case. In *Brown*, this Court held that the Board has a duty to grant a set-off when the employee has not experienced any loss of wages, such as when the employee receives "an award from the Board, but had previously obtained employer-provided benefits for the same injury."[11] Here, Melvin did not receive any benefits in addition to the benefits Playtex was already obligated to pay her. Moreover, if Playtex received a credit, Melvin would suffer wage loss. Therefore, no set-off is necessary and *Brown* is inapplicable.

Further, *Hopkins* is applicable because it was only cited for the proposition that

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[7] *Hopkins v. Evans*, 575 A.2d 1172 (Del. 1990).

[8] *Dobrzynski v. City of Wilmington*, IAB Hearing No. 928839 (August 5, 1998).

[9] *Nat. Union Fire Ins. v. McDougall*, 773 A.2d 388 (Del. 2001).

[10] 2000 Del. Super. LEXIS 491.

[11] *Id.* at *17.

"[t]he legislative policy behind the Contingency Fund is to provide compensation to an injured employee until such time as the employee is found not to be entitled to receive the compensation,"[12] which is accurate and pertinent to this case. *Dobrzynski* is also relevant because as a Board opinion, it clearly demonstrates that Playtex was not entitled to a credit, contrary to its assertion. In *Dobrzynski*, the Board opined, "[t]he Board agrees with Claimant that the Act does not provide the Board with the authority to order claimants to reimburse employers for payments made during the pendency of a Petition for Termination of Benefits. Nor does the Act allow employers to offset future benefits in the amount 'overpaid' to Claimant."[13] Lastly, the Court below's use of *McDougall* is on point. While Playtex attempts to argue that the Court below was incorrect in its application of *McDougall* because it used the "good faith" language instead of focusing on Playtex's "reasonable grounds for dispute," the Court below did not erroneously apply *McDougall*. As the Court in *McDougall* mentions, "'the alleged 'good faith' belief of an employer or insurer that the employee is no longer entitled to compensation is irrelevant under this statute."[14] The Supreme Court also observed that an employer's obligation to pay attaches when the Board's decision becomes final and "the decision not to pay the award was 'wrongful' because it contravened a final order of the Board."[15] Here, Playtex's decision to issue itself a

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[12] *Hopkins*, 575 A.2d at 1174.

[13] *Dobrzynski*, IAB Hearing No. 928839, at 2.

[14] *McDougall*, 773 A.2d at 393 (citing *Huffman*, 432 A.2d at 1209).

[15] *Id.*

credit and not pay Melvin's benefits as per the Board's decision was "wrongful." Therefore, the Court below was correct in stating:

> [t]hus, the employer's alleged belief that it is entitled to a credit is an insufficient basis to justify the unilateral withholding of benefits properly awarded by the Board. If the employer desires a credit, it must petition the Board to have the credit recognized and enforced against the claimant. Playtex has not obtained an order from the Board recognizing the alleged credit. The employer therefore may not simply withhold other benefits awarded by the Board in order to collect its alleged credit.

This argument by Playtex fails.

Medical Witness Fee Issue

Playtex argues that the Court below erred in awarding Melvin her medical witness fees, as granted by the Board, as well as liquidated damages since Playtex did not pay the fees in a timely manner after notice. However, the Court below's decision was correct. In support of its award, the Court below cited to 19 *Del. C.* § 2322(e), which states, "[t]he fees of medical witnesses testifying at hearings before the Industrial Accident Board in behalf of an injured employee shall be taxed as a cost to the employer or his insurance carrier in the event the injured employee receives an award." Additionally, the Court below cited to *Brandywine School District v. Hoskins*,[16] which held that if a claimant is successful and obtains an award, then that claimant is entitled to medical witness fees for any medical witness that claimant called. *Hoskins* also notes that the only exception to this rule is if "an unreasonable

[16] 492 A.2d 1247, 1252 (Del. 1985).

number of medical witnesses are called and their testimony is unreasonably cumulative or redundant because of the testimony of other medical witnesses."[17]

In the case *sub judice*, there was never a factual finding that the number of Melvin's medical witnesses was unreasonable, nor was there a finding that their testimony was unreasonably cumulative. Playtex's contention that Melvin should not be awarded medical witness fees because she did not receive an award from the Board regarding her psychiatric problems fails because as mentioned above, an injured employee is entitled to medical witness fees whenever he or she receives an award. Further, Playtex's reliance on *Knott-Ellis v. State*[18] is misplaced. *Knott-Ellis* is distinguishable because it was a direct appeal of a Board decision, wherein the Board denied medical witness fees. Here, the Board granted medical witness fees and Playtex did not appeal the Board's decision. Therefore, 19 *Del. C.* § 2322(e) and *Hoskins* control, so the Court below did not commit an error of law. Consequently, Playtex's argument that the Court below should not have awarded medical witness fees and liquidated damages fails.

Bias Against Playtex

Playtex contends that the Court below demonstrated bias because the August 17, 2004 decision was issued just five days after Playtex submitted its response to Melvin's Motion for Summary Judgment. However, as indicated above, the Court below's decision was well-reasoned and clearly supported by case law and the

[17] *Id.*

[18] 2000 Del. Super. LEXIS 409.

applicable statutes. Therefore, this Court finds no bias and rejects Playtex's request to reverse the decision of the Court below on this ground.

Attorney's Fees

Melvin's sole cross-appeal concerns the Court below's decision to only award attorney's fees for the work Melvin's counsel did in presenting the claim to the Court below. As the Court below noted, attorney's fees can only be awarded when provided for by statute or in a contract.[19] Here, the pertinent statute is 19 *Del. C.* § 1113(c), which reads, "[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 attorney's fees, all to be paid by the defendant." Melvin also cited to two additional Workers' Compensation Act statutes that permit an award of attorney's fees in support of his argument that there are multiple justifications for a comprehensive attorney's fee award. The first, 19 *Del. C.* § 2320(10) states, in relevant 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 as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under Part II of this title and taxed as costs against a party.

The second statute cited by Melvin was 19 *Del. C.* § 2350(f), which allows the Superior Court to award attorney's fees to a claimant's attorney when the claimant's award is affirmed on an appeal from the Board's decision. Both of these statutes

[19] *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 370 (Del. Super. 1982).

support the Court below's determination that attorney's fees are provided for in statutes. The first statute allows the Board to award attorney's fees to a successful claimant. The second statute permits the Superior Court to award attorney's fees when a claimant successfully defends his/her award on appeal. Likewise, Section 1113(c) provides authority to the Court below to award attorney's fees for a successful *Huffman* claim, as was the case here. However, Section 1113(c) does not require the Court below to award attorney's fees for the successful defense of a declaratory judgment action in either the Court of Chancery, the Superior Court or the Supreme Court.

The Court below concluded that it lacked the authority to impose attorney's fees for the declaratory judgment action in the Court of Chancery, Superior Court and the Supreme Court. This Court agrees. Consequently, Melvin's argument on cross-appeal is unsuccessful.

Based on the foregoing, Playtex's appeal is *denied* and Melvin's cross-appeal is *denied*. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution