

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RONALD BAUGHAN,	§	
	§	No. 662, 2007
Claimant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	Kent County
	§	
WAL-MART STORES, INC.,	§	C. A. No. 06A-05-003
	§	
Employer Below,	§	
Appellee.	§	

Submitted: April 16, 2008

Decided: May 2, 2008

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 2nd day of May 2008, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Ronald Baughan (“Baughan”), the claimant-below appellant, appeals from a Superior Court judgment affirming a decision of the Industrial Accident Board (the “Board”) denying Baughan’s request for an award of attorneys’ fees after a workers’ compensation dispute between the employee and the employer was settled the day before the scheduled Board hearing. On appeal, Baughan claims that the Board and the Superior Court erred as a matter of law by not awarding Baughan attorneys’ fees. We agree and, therefore, reverse and remand.

2. Baughan, an employee of Wal-Mart Stores, Inc. (“Employer”), was injured on August 23, 2005 while in the course and scope of his employment. On October 20, 2005, Baughan filed a Petition to Determine Compensation Due with the Board, seeking to establish compensability of the work-related injury, related benefits, and medical expenses. The hearing was scheduled for March 10, 2006. On March 9, 2006, the day before the hearing, the parties reached a settlement whereby the Employer acknowledged the August 23, 2005 injury as compensable, agreed to pay total disability benefits, as well as reasonable, necessary and related medical expenses. The settlement offer also addressed the issue of attorney’s fees, the Employer offering to pay a fee of 30% of the amount paid for the total disability (*i.e.* 30% of approximately \$1,000). Baughan’s counsel declined to accept that part of the offer, and the parties agreed to submit the attorneys’ fees issue to the Board at a separate legal hearing, pursuant to *General Motors v. Alcaraz*.¹

3. After the legal fee hearing, the Board concluded that it “is not required to, nor will it award any attorney’s fees to [Baughan] based on the voluntary agreement recently entered into between [Baughan] and Employer.” The Board reasoned that:

¹ 1998 WL 729631 (Del. Super.) (holding that, where the parties had settled the case less than 30 days before the scheduled trial date but had failed to agree on the amount of attorney’s fees, the Board did not err in awarding attorney’s fees).

The Board notes that 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." However, it is well settled Delaware law that when a settlement agreement is reached before a formal hearing, no attorney's fees will be awarded because a voluntary agreement between the claimant and the employer does not constitute an "award" as contemplated by the Workers' Compensation statute. Thus, Claimant's argument that he is entitled to reasonable attorney's fees because Employer did not make a settlement offer until within 30 days of the hearing is simply misplaced. Analysis of attorney's fees pursuant to the 30-Day-Rule is only warranted when an offer has been made prior to the hearing regarding a particular issue and the Board ultimately makes an award at the hearing regarding that same issue. In this case, no "award" was made by the Board regarding the compensability of Claimant's August 2005 accident, the closed period of total disability or Claimant's medical expenses, following Employer's March 9, 2006 settlement offer. [...]

Further, even if an "award" had been made by the Board in this case, potentially triggering the requirement of an award of attorney's fees, the Board would be reluctant to award anything more than a minimal fee because Claimant clearly violated Industrial Accident Board Rule 9 and 11, by failing to provide requested medical evidence in a timely manner. Further, Claimant offered no reasonable justification or explanation for the approximately five month delay in producing the requested medical evidence after filing of his Petition. [...] The Board agrees with Employer's argument that it is unfair for Claimant to ignore the requirements of IAB Rules 9 and 11, thereby making it impossible for Employer to make a timely settlement offer, then seek to obtain the benefit of the 30-Day-Rule at the same time. [...] For all the foregoing reasons, Claimant's request for attorney's fees is DENIED.²

² *Ronald E. Baughan v. Wal-Mart*, IAB Hearing No. 1273092, April 28, 2006, at 3-4 (citing 10 Del. C. § 2320(10)(a) and (b); *Anderson v. Wheeler Construction*, 267 A.2d 616 (Del. Super. 1970); *Kelly v. J & J Corp.*, 447 A.2d 427, 428 (Del. 1982) (citing *Huff v. Industrial Accident Board*, 430 A.2d 796, 798 (Del. Super. 1981)); *Hope's Suburban Garage v. Hope*, 348 A.2d 336, 338 (Del. Super. 1975)).

4. The Superior Court affirmed the Board's decision, holding that "[r]easonable attorneys' fees are awarded to a claimant when the [Board] makes *an award after a formal hearing*." Thus, "no attorneys' fees will be paid when the parties reach a voluntary settlement."³ This appeal followed.

5. Baughan's sole contention on appeal is that the Board and the Superior Court erred as a matter of law, because their decisions and holdings are contrary to this Court's recent opinion in *Pugh v. Wal-Mart*,⁴ decided three days after the filing of the opening brief on this appeal.

6. In reviewing a Board decision, this Court applies the same standard as the Superior Court. Where the issue raised on appeal from a Board decision involves exclusively a question of the proper application of the law, our review is *de novo*.⁵ Absent any errors of law, the standard of review is abuse of discretion.⁶

³ *Baughan v. Wal-Mart Stores, Inc.*, C.A. No. 06A-05-003, at 4-5 (Del. Super. Dec. 12, 2007) (citing 19 Del. C. § 2320(10)(b); Industrial Accident Board Rule 23; *Anderson v. Wheeler Construction*, 267 A.2d 616 (Del. Super. 1970); *Kelly v. J & J Corp.*, 447 A.2d 427, 428 (Del. 1982)). IAB Rule 23 relevantly provides: "The claimant's attorney shall file with the Board and serve upon the other party at the time of hearing a completed Affidavit Regarding Attorney's Fees, said forms being provided by the Department. Said affidavit shall be reviewed by the Board so as to assist it in awarding a reasonable attorney's fee in those cases where an attorney's fee may be awarded to the claimant."

⁴ *Pugh v. Wal-Mart Stores, Inc.*, 2008 WL 424049 (Del. Supr.).

⁵ *Porter v. Insignia Mgmt. Group*, 2003 WL 22455316, at *3 (Del. Super.).

⁶ *Digiaco v. Bd. of Pub. Educ. in Wilmington*, 507 A.2d 542, 546 (Del. 1986); *Histed v. E.I. DuPont DeNemours & Co.*, 621 A.2d 340, 342 (Del. 1993) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

7. In *Pugh*, the parties reached a settlement as to compensability, disability benefits, and certain medical expenses the day before the scheduled Board hearing. The employer agreed that the employee was entitled to an attorneys' fee, but the parties could not agree on the amount and presented their arguments to the Board. The Board made the required determination. On appeal, this Court held that 19 *Del. C.* § 2320(10)(a)⁷ “authorizes the Board to award attorneys’ fees to a claimant who prevails through a settlement rather than a Board determination.”⁸ Although both the Board and the Superior Court rendered their decisions before this Court issued its *Pugh* decision, *Pugh* controls here, because it is a restatement of our earlier holding in *Lattis v. Blackwell*,⁹ which implicitly overruled the cases on which the Board and the Superior Court relied. We hereby

⁷ 19 *Del. C.* § 2320(10) relevantly provides:

(10) Attorneys’ fee.--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 to any employee awarded compensation under Part II of this title and taxed as costs against a party. [...] Any fee awarded to an employee under this subsection shall be applied to offset the fees that would otherwise be charged to the employee by his attorney under the fee agreement.

b. In the event an offer to settle an issue pending before the Industrial Accident Board is communicated to the claimant or the claimant’s attorney, in writing, at least 30 days prior to the trial date established by the Board on such issue and the offer thus communicated is equal to or greater than the amount ultimately awarded by the Board at the trial on that issue, the provisions of paragraph a. of this subdivision shall have no application. [...]

⁸ *Pugh v. Wal-Mart Stores, Inc.*, 2008 WL 424049, at *1-2 (Del. Supr.).

⁹ *Lattis v. Blackwell and Son, Inc.*, 1992 WL 53435 (Del. Supr.).

expressly overrule those cases¹⁰ and approve the Superior Court's holding in *Alcaraz*, which currently articulates the proper legal standard applicable to hearings before the Board on attorney's fees applications following a settlement between the parties.

8. In light of our holding in *Pugh*, it is manifest, and the Employer admits, that both the Board and the Superior Court erred as a matter of law.

NOW, THEREFORE, IT IS ORDERED, that the judgment of the Superior Court is reversed and this case is remanded to the Board for a determination of a reasonable attorneys' fee, in light of the applicable factors that the Board must

¹⁰ Those cases are: *Anderson v. Wheeler Construction*, 267 A.2d 616 (Del. Super. 1970); *Hope's Suburban Garage v. Hope*, 348 A.2d 336, 338 (Del. Super. 1975); *Huff v. Industrial Accident Board*, 430 A.2d 796, 798 (Del. Super. 1981); and *Kelly v. J & J Corp.*, 447 A.2d 427, 428 (Del. 1982).

consider, and subject to the limitations contained in 19 *Del. C.* § 2320(10)(a).¹¹

Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹¹ The Board may award less than the maximum fee allowed under 19 *Del. C.* § 2320(a), but must properly consider the factors described in *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973) and Rule 1.5(4) of the Delaware Lawyers' Rules of Professional Conduct and must "set forth explicitly the *ratio decidendi* for the amount it decide[s] to award." *Simmons v. Del. State Hosp.*, 660 A.2d 384, 392 (Del. 1995). Moreover, "consideration of the *Cox* factors does not prevent the Board from granting a nominal or minimal fee in an appropriate case," for example, where claimant's actions prevented the employer from making a settlement offer before the 30-day deadline stated in 19 *Del. C.* § 2320(b). See *Green v. Conagra Poultry, Co.*, 2005 WL 2249521 (Del. Super.) (citing *Heil v. Nationwide Mutual Ins. Co.*, 371 A.2d 1077, 1078 (Del. 1977)).