

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RAYMOND POOLE)
) CIVIL ACTION NUMBER
 Plaintiff)
 v.) 11A-04-012-JOH
)
STATE OF DELAWARE)
)
 Defendant)
)

Submitted: February 14, 2013

Decided: March 7, 2013

MEMORANDUM OPINION

Upon Motion of Appellant for Attorneys' Fees - GRANTED

Appearances:

Gary S. Nitsche, Esquire, and Michael B. Galbraith, Esquire, of Weik Nitsche & Dougherty, Wilmington, Delaware, Attorneys for Appellant, Raymond Poole

Dennis J. Menton, Esquire, and Andrew M. Lukashunas, Esquire, of Tybout Redfearn & Pell, Wilmington, Delaware, Attorneys for the Appellee.

HERLIHY, Judge

Counsel for Raymond Poole has applied for fees in this worker's compensation case. This case was before this Court twice.

In the first appeal, Poole raised several challenges to the decision of the Industrial Accident Board. To more completely understand counsel's fee application, the Court starts its analysis with the Board's original decision. Poole had filed a petition to determine compensation due involving his work at the Delaware Psychiatric Center. The Board found Poole was injured at work and that his medical expenses were reasonable and necessary. It, nevertheless, referred those medical expenses to "utilization review," which is a process created in a substantial revision in 2007 to the Workers' Compensation laws.

The State moved for reargument asking that the phrase "reasonable and necessary" be removed from that initial decision. Over Poole's objection, the Board did so. Poole appealed. This Court remanded the case to the Board to answer two questions, one of which related to the removal of the "reasonable and necessary" finding from its original decision. On remand, the Board addressed both questions, and on the one, explained the phrase was removed to correct an issue of law.

Poole again appealed. On this second appeal, he raised several issues, among which were whether an employer is entitled to utilization review once it disputes a compensation filing, and whether the Board erred in removing "reasonable and necessary" from its initial opinion.

This Court held that an employer is not entitled to utilization review of medical expenses where, as here, it did not acknowledge that the injury was work-related. Further, this Court held that only the Board is empowered to determine if medical expenses are “reasonable and necessary” and could not delegate that decision to utilization review.¹ This case was again remanded to the Board.

Counsel now seeks \$28,700.00 in fees, representing 114.8 hours of work at \$250.00 per hour. His application is made under 19 *Del. C.* §2350(f).² When evaluating such a fee request, the Court utilizes these factors:

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; and 8) whether the fee is fixed or contingent.

Additionally, the Court must consider the employer’s ability to pay and whether the attorney will receive any fees and expenses from any other sources.³

¹ *Poole v. State of Delaware*, 2012 WL 6858946, Del. Super. Dec. 4, 2012.

² The Superior Court may at its discretion allow a reasonable fee to claimant’s attorney for services on an appeal from the Board to the Superior Court and from the Superior Court to the Supreme Court where the claimant’s position in the hearing before the Board is affirmed on appeal. Such fee shall be taxed in the costs and become a 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.

³ *Bruce v. Chrysler Group, LLC*, 2012 WL 2353538, (Del. Super. June 13, 2012)(citing (continued...))

The State opposes portions of counsel's application. It argues that some of the time for which counsel seeks reimbursement concerns his work before the Board. It says the Board has a mechanism for seeking and obtaining an award of attorneys' fees for work before the Board.⁴ Presumably, Poole's counsel did so. It is unclear why time spent before the Board is being sought here. The Court concurs that time for work before the Board is not within the purview of § 2350(f). Examination of counsel's affidavit indicates 17.6 hours of his 114.8 hours involved work before the Board and thus, cannot be part of his fee award in this case. Deducting that figure leaves 97.2 hours.

The State offers additional opposition, primarily to the time spent preparing and reviewing the briefs filed in the first and second appeals. All tolled, counsel spent 81.9 hours drafting opening and reply briefs, preparing appendices, conducting legal research, and reviewing the State's answering brief. While the Court is concerned that some of this time requested for the brief drafting and revising is perhaps more than necessary, it is not so much to warrant deduction of any time spent. Counsel's affidavit lists .3 hour spent

³(...continued)
Cox v. General Motors Corp., 304 A.2d 55, 57 (Del. 1973)).

⁴ Industrial Accident Board Rule No. 23 regarding attorney's fees provides:
The claimant's attorney shall file with the Board and serve upon the other party in the same manner and at the same time as filing with the Board, a completed affidavit regarding attorney's fees, with a copy of the attorney's fee agreement attached. Said affidavit and fee agreement shall be reviewed by the Board, so as to assist in awarding a reasonable attorney's fee in those cases when an attorney's fee may be awarded to the claimant. Objections, if any, to the contents of the affidavit shall be heard by the Board during closing arguments.

sending a copy of this Court's opinion to his client. That will be deducted from the 97.2 hours, leaving 96.9 hours to examine in light of the *Cox* factors.

Counsel indicated he has been practicing workers' compensation and personal injury work since admission to the Bar, just over six years ago. But this case and appeal differs significantly from the more routine, though important, cases he would handle before the Board and the usual appeals that this Court often considers. On appeal here, there was no challenge to the sufficiency of the evidence, etc. The issue presented was of first impression and involved interpretation of a substantive change, effective in 2007, to Workers' Compensation statutes. It appears counsel was the first to raise the issue, and this Court took a substantial amount of time parsing the applicable statutory provisions.

Further, the Court fully appreciated the import and consequences of its decision on a number of future cases. It has a significant effect on the processing of disputed workers' compensation claims. It would take a practitioner skilled in handling such cases to "spot" this issue and pursue it properly.

Counsel is candid when stating that undertaking this case did not preclude other employment. From this, the Court presumes, the client appreciated his case was not detracting from counsel's other work. Counsel seeks \$250.00 per hour in fees. The State does not challenge that amount, nor in the various opinions the State presented here on other issues, the \$250.00 figure is not out of line.

Poole came to counsel's office in June 2010. Counsel kept in touch with him. The Court sees no role of this factor in this analysis.

As to counsel's experience, this Court has already noted that not being a novice before the Board helped him "spot" the fundamental issues in this case. There is a contingent fee agreement, but no role is taken from it for this application.

The State of Delaware has a several billion dollar budget. Despite the tightness of that budget over the last four fiscal years, there is no reason to believe it cannot pay the award. No other source of payments has been identified.

Accordingly, the Court awards counsel fees in the amount of \$24,225.00.

IT IS SO ORDERED.

J.