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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Harold DANIELS,
Claimant Below-Appellant
v.
STATE of Delaware,
Employer Below-Appellee

C.A. No. N19A-09-002 VLM
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Date Submitted: January 20, 2020
|
Date Decided: June 22, 2020[1]

*Upon Consideration of Appellant's Appeal of the Decision of the Industrial Accident Board,* **REVERSED AND REMANDED.**

**Attorneys and Law Firms**

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**ORDER**

MEDINILLA, J.

**I. INTRODUCTION**

***1** Appellant, Harold Daniels ("Daniels") appeals a decision of the Industrial Accident Board ("Board") that denied his request for expert cancellation fees after he reached an agreement with his employer for workers' compensation benefits. Upon consideration of the arguments, submissions of the parties, and the record in this case, the Court hereby finds as follows:

1. On June 28, 2017, Daniels sustained a compensable work-related injury to his left finger and hand while operating a forklift at the Port of Wilmington for the State of Delaware ("Employer"). He required and underwent surgery in the fall of 2017. In 2018, Jeffrey S. Meyers, D.O. ("Dr. Meyers") provided his medical opinion that Daniels had suffered a 12% permanent impairment to his left upper extremity as a result of his work injury.

2. In September of 2018, Daniels filed a Petition to Determine Additional Compensation Due for the 12% permanent impairment under 19 *Del. C.* § 2326, and also sought reimbursement of his medical witness testimony fees/expenses for Dr. Meyers' opinion. In response, Employer obtained the opinion of William H. Spellman, M.D. who opined that Daniels had suffered only a 4% permanent impairment to his left upper extremity. The Board scheduled a hearing for April 22, 2019[2] to consider the competing medical opinions. Daniels noticed the deposition of Dr. Meyers for April 1, 2019.

3. On March 19, 2019, nine business days before Meyers' scheduled deposition, Employer faxed and mailed the following settlement offer to Daniels' counsel:

> Since the above offer is being tendered more than thirty (30) days prior to the scheduled Hearing, there is no offer of attorney fees. I understand your client has not yet incurred any expert witness testimony fees/expenses associated with this Petition. If reasonable and necessary expert witness testimony fees/expenses are incurred, they will be reimbursed by the Carrier.[3]

4. One week later, on March 26, 2019, Daniels' counsel emailed Employer's counsel to confirm that she had conferred with her client regarding the offer and asked if the expert cancellation fee, if incurred, would be covered.[4] Employer's counsel responded: "Is he accepting the offer? If so, how much is the cancellation fee? The carrier did offer to pay it."[5]

***2** 5. Daniels' counsel responded the next day on March 27: "Yes [to accepting offer]. We have canceled our doctor and will find out if/how much the cancellation fee is."[6] On the same day, Employer's counsel sent a letter memorializing the terms of the settlement agreement for the permanent impairment benefits. As to expert fees, he further confirmed he understood there may be a cancellation fee and requested both the fee invoice and the cancellation policy.[7]

  

6. Employer was thereafter provided with a fee invoice for $2,000 and the cancellation policy.[8] The policy provided that cancellation six to ten business days prior to Dr. Meyers' deposition would result in a 50% fee ($1,000) and cancellation five business days or less would require payment of the full deposition fee ($2,000).[9] Employer paid $1,000. Daniels sought a legal hearing before the Board to request that the Employer pay the full amount.

7. On August 1, 2019, the Board denied Daniels' request. The Board found that the settlement agreement was sufficiently ambiguous to find that Daniels agreed to accept reimbursement of a *reasonable and necessary* fee.[10] It expressly did not address the reasonableness of the fee but determined that any additional cancellation fee "may not have been necessary" where Daniels may have delayed his acceptance of Employer's offer and that the acceptance and cancellation policy "could have been made clear earlier ...."[11]

8. Daniels appealed to this Court and on December 6, 2019, filed his Opening Brief in Opposition of the Board's Decision. On January 6, 2020, Employer filed its Answering Brief, and Daniels filed his Reply on January 20, 2020. Due to the global pandemic, review of this matter was temporarily stayed. The matter is now ripe for review.

## II. STANDARD OF REVIEW

9. On an appeal from a Board decision, the Superior Court does not "weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions."[12] Those functions are exclusively held by the Board.[13] In considering an appeal from the Board, this Court's review is restricted whereby it may only correct errors of law and determine whether substantial evidence in the record supports the Board's decision.[14] Substantial evidence constitutes relevant evidence which a reasonable person "might accept as adequate to support a conclusion."[15] Issues raised on appeal involving exclusively a question of law are reviewed *de novo.*[16]

***3** 10. Further, if the Court finds that the Board abused discretion by basing its decision on improper or inadequate grounds, it must reverse the decision where an abuse of discretion has occurred.[17] The Board commits abuse of discretion by ignoring rules of law or practice resulting in injustice.[18] In issuing a decision, the Board is required to include the reasoning for its decision[19] and provide the basis for its findings.[20] Upon review, when the Court finds that a Board decision was reached using facts outside the record and founded upon a mistaken understanding of the law, this Court must "correct that understanding, and is properly within its appellate role to do so."[21]

## III. DISCUSSION

### *Use of the Reasonableness and Necessary Standard*

11. An injured worker is entitled to compensation for reasonable and necessary treatment and/or services related to his compensable work injury.[22] The Workers' Compensation Act ("Act") often refers to the terms "reasonable and necessary" in the context of medical treatment or expenses and the resulting bills incurred by the injured employee.[23] The issue of whether medical services are reasonable is wholly factual and under the "exclusive fact-finding purview of the Board."[24] Here though, the issue before the Board was not whether medical treatment or services were reasonable and necessary. Rather, the issue was whether Employer was obligated to pay a cancellation fee per its settlement agreement.

***4** 12. Employer argued no further payment was warranted because it offered to pay only a "reasonable and necessary" fee. Arguing Daniels could have responded to the offer earlier, it maintained it was obligated to pay only the fee incurred at the time the offer was made, as reasonable and necessary. Daniels argued Employer was obligated to pay the fee assessed against him when they reached their settlement agreement and actually cancelled the deposition. Finding ambiguity in the agreement, the Board agreed with Employer. For the reasons that follow, this Court finds that the Board's findings are not supported by the record and the Board failed to set forth fully the reasons for its decision.

13. It is unclear on what basis the Board relied on the "reasonable and necessary" language in the context of the expert cancellation fee. Although it considered that the employer agreed to pay a reasonable and necessary fee, the Board made no findings as to whether the fee was reasonable or necessary[25] except that it expressly chose not to consider

the former and equivocated on the latter, finding only that an additional fee "may not have been necessary."

14. In making this decision, the IAB Order is silent upon what authority the Board relied for its determination that the cancellation expenses assessed against Daniels were required to be "reasonable and necessary." Although the Board does "retain[ ] the sole authority to determine reasonable and necessary medical expenses ... ,"[26] this authority is in the context of medical services rendered.[27] Since no authority is cited, the Court can presume only that the Board accepted Employer's argument echoed here on appeal as to the applicability of the "reasonable and necessary" language ordinarily found in the Act, and its reference to Workers' Compensation Regulation, 19 *Del. Admin.* § 1341, ¶ 4.16.1.2. Yet the regulation cited by Employer relates to the maximum fee an expert may charge for his/her testimony and is absent any "reasonable and necessary" language.[28] The regulation does not reference nor impose a structure for how that expert may decide to collect a fee for cancellation. Nor are expert cancellation fees referenced in any other provisions of the regulation that use the term "reasonable and necessary."[29] Nevertheless, although it referenced the term, the Board expressly chose not to make any findings as to the reasonableness of the fee.[30]

***5** 15.As to whether the fee was necessary, the Board also makes no finding. It equivocated, finding only that the fee *"may* not have been necessary." Also, the Board's determination that this fee *may* have been avoided under a "reasonable and necessary" standard not only misconstrues the use of the standard normally associated in the context of medical expenses and services, it is also not supported by the record for the following reasons:

16. The Board found, yet there is no evidence in the record, that "Employer urged Claimant's counsel for a quick response to avoid those fees."[31] Employer made its urgent offer to Daniels for purposes of avoiding paying *attorney fees,* not the witness expert fees at issue. The record reflects that Employer placed no time limit on Daniels to respond to the offer nor is there any evidence that Daniels was urged to respond within a certain timeframe to avoid the expert fee. Employer does not qualify that the fee would be limited to a certain amount or capped based on a timeframe under the cancellation policy when the original offer was presented.

17. It is undisputed that Employer offered to pay *the* fee on March 19, 26, and 27. That fee changed as the parties got closer to the deposition date. Although the amount was unknown, the forthcoming cancellation policy and invoice would dictate the Employer's obligation to pay the cancellation fee assessed when they cancelled the expert and settled their case. What may have contributed to the Board's belief that Daniels may have delayed is the Board's mistaken reference that the cancellation policy had a "ten day" versus "ten *business* day" provision. The distinction is important because, contrary to Employer's position that no fee was owed when it made its offer, the expert's cancellation fee of $1,000 had already been incurred by that time—six to ten *business* days before the April 1 deposition, and it increased to $2,000 four days after the offer was made (five *business* days prior to the deposition.) The Board's finding that Daniels may have unnecessarily delayed acceptance of the offer is therefore not supported by the record where Daniels' counsel contacted Employer's counsel within one week of the offer, emailed Employer's counsel to confirm the fee would be covered, and accepted the offer after Employer's counsel confirmed the carrier would pay it. The timeline appears to demonstrate a reasonable response by both Daniels' counsel and her client.

18. Finally, the parties settled on March 27 when Dr. Meyers' cancellation policy necessarily called for the payment of a 100% fee. The Board does not explain why it did not use the date of settlement/cancellation of expert as the appropriate date from which to calculate the cancellation fee. By not giving sufficient weight to the date of the agreement/ cancellation date, the Board equivocates as to its reasons for shifting the burden on Daniels to pay a fee that was contrary to the terms of their agreement.

19. The Court finds that the record does not present substantial evidence to support the Board's determination of an ambiguous agreement, nor the use of the "reasonable and necessary" standard in considering Daniels' appeal. The Board does not cite to what authority it relied upon to apply a "reasonable and necessary" standard related to cancellation fees. It expressly does not address the reasonableness of the fee and is ambivalent as to whether it was necessary. Regardless of the applicability of "reasonable and necessary" in the context of expert witness cancellation fees, the Board further fails to state its reasons for why, in the absence of any limitation placed on Employer's offer, the date of the offer versus the date of the agreement/cancellation date stands as the appropriate measure for the calculation of cancellation fees. The Board also does not state the reasons why and under

  

what authority the onus shifts to a claimant to pay for portions of a fee without the finding that there was an unnecessary delay associated with his consideration of a settlement offer. As such, the decision is based on inadequate grounds.

***6** 20. For the foregoing reasons, the Board's decision is **REVERSED AND REMANDED**, consistent with the opinions herein.

**IT IS SO ORDERED**.

**All Citations**

Not Reported in Atl. Rptr., 2020 WL 3971389

Footnotes

1 The United States of America and the State of Delaware declared states of emergency due to COVID-19. As a result, per Administrative Directives of the Supreme Court of the State of Delaware and the Delaware Superior Court, and the national and local states of emergency, "[e]xcept as set forth in 10 *Del. C.* § 2007(c), deadlines in court rules or state or local statutes and ordinances applicable to the judiciary that expire between March 23, 2020 and June 13, 2020 are extended through July 1, 2020." Administrative Order No. 6 Extension of Judicial Emergency (Del. May 14, 2020); *see also* Standing Order No. 6 Concerning COVID-19 Precautionary Measures (Del. Super. Ct. Apr. 15, 2020).

2 The hearing was rescheduled from March 14 to April 22 due to the unavailability of Dr. Spellman prior to the March hearing.

3 Employer's Answering Brief, Exhibit A.

4 Daniels' Opening Brief, Exhibit K.

5 Daniels' Opening Brief, Exhibit D.

6 Daniels' Opening Brief, Exhibit K.

7 Employer's Answering Brief, Exhibit D.

8 Employer's Answering Brief, Exhibit B; Employer's Answering Brief, Exhibit C.

9 Employer's Answering Brief, Exhibit B.

10 Daniels' Opening Brief, Exhibit A at 1 [hereinafter "IAB Order"]. ("The Board notes some ambiguity in the terms of the settlement agreement regarding the expert witness fees and the subsequent discussions.").

11 IAB Order at 2.

12 *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965); *see Christiana Care Health Servs. v. Davis,* 127 A.3d 391, 394 (Del. 2015).

13 *Noel-Liszkiewicz v. La-Z-Boy,* 68 A.3d 188, 191 (Del. 2013) (citing *Breeding v. Contractors-One-Inc.,* 549 A.2d 1102, 110 (Del. 1988)).

14 *Maracle v. Int'l Game Tech.,* No. CIV.A. 09A-11-002PLA, 2010 WL 541199, at *2 (Del. Super. Ct. Feb. 1, 2010) (citing *Histed v. E.I. Du Pont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965)). *See Lecompte v. Christiana Care Health Sys.,* 2002 WL 31186551, at *2 (Del. Super. Ct. Oct. 2, 2002) (citing 29 *Del. C.* § 10142(d)) (The Superior Court determines whether the record "is legally adequate to support the Board's findings.").

15 *Olney v. Cooch,* 425 A.2d 610, 614 (Del. 1981); *see Perdue Farms, Inc. v. Atkinson,* No. CV S19A-07-003 RFS, 2019 WL 7373397, at *2 (Del. Super. Ct. Dec. 30, 2019).

16 *See Vincent v. E. Shore Markets,* 970 A.2d 160,163 (Del. 2009) (quoting *Baughan v. Wal-Mart Stores,* 947 A.2d 1120, 2008 WL 1930576, at *2 (Del. 2008) (TABLE); citing *Duvall v. Charles Connell Roofing,* 564 A.2d 1132 (Del. 1989)).

17 *Maracle,* 2010 WL 541199, at *2.

18 *Feeney-Wathen v. Bayhealth Med. Ctr.,* No. CY K13A-10-007 WLW, 2014 WL 2120263, at *6 (Del. Super. Ct. May 9, 2014); *see Moore v. Corp. Kids Learning Ctr.,* No. CV K15A-03-002 JJC, 2015 WL 5968861, at *5 (Del. Super. Ct. Oct. 6, 2015).

19 *Moore,* 2015 WL 5968861, at *5 (citing *McCracken v. Wilson Beverage,* No. C.A. 91A-10-004, 1992 WL 301985, at *1 (Del. Super. Ct. Oct. 15, 1992)).

20 *Hughes v. Catalytic, Inc.,* No. CIV. A. 91A-04-1, 1992 WL 91145, at *3 (Del. Super. Ct. Apr. 23, 1992); *see McCracken v. Wilson Beverage,* No. C.A. 91A-10-004, 1992 WL 301985, at *1 (Del. Super. Ct. Oct. 15, 1992).

21 *McCracken,* 1992 WL 301985, at *2.

22 *See* 19 *Del. C.* § 2322.

  

23 *See* 19 *Del. C.* § 2322C(6) ("Services rendered by any health-care provider certified to provide treatment services for employees shall be presumed, in the absence of contrary evidence, to be reasonable and necessary .... Services provided by health-care providers that are not certified shall not be presumed reasonable and necessary unless such services are preauthorized by the employer or insurance carrier ...."); *see also* 19 *Del. C.* § 2322D(b) ("[A]ny health care provider may ... receive reimbursement for reasonable and necessary services directly related to the employee's injury or condition ...."); *see also* 19 *Del. C.* § 2346 ("The Board shall hear and determine the matter. No party to the proceedings shall have any liability for the payment of charges in excess of the amount deemed reasonable and necessary; provided, that the provider is subject to the jurisdiction of the Board and made a party to the proceedings."); *see also* 19 *Del. C.* § 2322F(j) ("An employer or insurance carrier may engage in utilization review to evaluate the quality, reasonableness and/or necessity of proposed or provided health-care services for acknowledged compensable claims."); *see also* 19 *Del. C.* § 2357 ("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."); *see also* 19 *Del. C.* § 2322 (referring to "reasonable" medical and other services, and supplies as furnished by employer).

24 *McCracken,* 1992 WL 301985, at *2; *see Moore,* 2015 WL 5968861, at *3.

25 This Court does not consider whether the reasonable and necessary standard applies in the context of a cancellation fee because the issue was not raised by the parties, nor was any authority cited in support or against its application. So for purposes of this appeal only, since the Board sought to employ a "reasonable and necessary" standard, and both sides reference the term in their pleadings, the Court analyzes how—even if applicable—the record did not present substantial evidence to support the Board's determination that denied Daniels' request.

26 *Poole v. State*, 77 A.3d 310, 312 (Del. Super. Ct. 2012).

27 *See Rawley v. J.J. White, Inc.,* 918 A.2d 316, 320 (Del. 2006), *as revised* (Dec. 18, 2006) ("The Workers' Compensation Act contemplates that an employer will have the opportunity to verify the reasonableness of charges related to medical services. The Act further provides that the resolution of a dispute on the reasonableness of a charge for medical services shall be before the Industrial Accident Board."); *see also Moore,* 2015 WL 5968861, at *3 (quoting *McCracken,* 1992 WL 301985, at *2) ("The issue of whether medical services are reasonable is wholly factual and under the 'exclusive fact-finding purview of the Board.' "); *see also see also Poole,* 77 A.3d at 311 ("Traditionally, if the Board found there was a work related injury, it would also determine what medical expenses were reasonable and necessary.").

28 *See* 19 *Del. Admin.* § 1341, ¶ 4.16.1.2. ("Testimony by a physician for non-video deposition shall not exceed $2,000.00; for video deposition: $500.00 additional[ ]").

29 *See* 19 *Del. Admin.* § 1342.1.0; *see also* 19 *Del. Admin.* § 1342F.1.0; *see also* 19 *Del. Admin.* § 1342C.1.0; *see also* 19 *Del. Admin.* § 1342A.1.0; *see also* 19 *Del. Admin.* § 1342B.1.0; *see also* 19 *Del. Admin.* § 1342D. 1.0; *see also* 19 *Del. Admin.* § 1342E. 1.0 (Each of these sections uses the terms "reasonable and necessary" as follows: "Services rendered by any health care provider ... to provide treatment or services for injured employees shall be presumed, in the absence of contrary evidence, to be *reasonable and necessary* .... Services rendered outside the Guidelines and/or variation in treatment recommendations from the Guidelines may represent acceptable medical care, be considered *reasonable and necessary* treatment and, therefore, determined to be compensable .... Services provided by any health care provider ... shall not be presumed *reasonable and necessary* unless such services are pre-authorized by the employer or insurance carrier ....") (emphasis added); *see also* 19 *Del. Admin.* § 1341.3.1.6 (referencing "reasonable and necessary" in relation to reimbursement of health care providers for "reasonable and necessary services" rendered that were "directly related to the employee's injury or condition"); *see also* 19 *Del. Admin.* § 1341.4.9.7.1.1 (referencing "reasonable and necessary" in relation to services used for patient diagnosis, evaluation, and treatment).

30 IAB Order at 2 ("The Board does not comment whether the actual fee is reasonable. The full $2000 may not have been necessary given the facts or it could have been made clear earlier so that by the terms Employer would have paid it pursuant to the agreement.").

31 IAB Order at 1.