

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2
GEORGETOWN, DE 19947

July 25, 2017

David A. Boswell, Esquire
Ann P. Boswell, Esquire
Hudson, Jones, Jaywork & Fisher, LLC
18354 Coastal Highway
Lewes, DE 19958

Amy M. Taylor, Esquire
Heckler & Frabizzio
800 Delaware Avenue, Suite 200
P.O. Box 128
Wilmington, DE 19899

RE: *Milourde Decembre v. Perdue Farms, LLC*
C.A. No. S16A-05-003-ESB

Dear Counsel:

This is my decision on Milourde Decembre's appeal of the Industrial Accident Board's finding that her counsel was not entitled to an attorney's fee lien on monies that Decembre claimed were payable by her employer directly to her for certain of her medical bills pursuant to 19 *Del. C.* §2322(b). Decembre was an employee of Perdue Farms, LLC. Decembre injured her right hand at work on November 12, 2013. Decembre was treated at Milford Memorial Hospital. Perdue paid Decembre's lost wages and medical bills relating to her treatment at Milford Memorial Hospital in accordance with the Workers' Compensation Act. Decembre was then admitted and treated for chest pain and high blood pressure at Kent General Hospital on November 16, 2013. Decembre was released from Kent General Hospital on November 19,

2013. Kent General Hospital sent its bills to Decembre. Decembre was not able to pay them.

Decembre retained counsel on January 6, 2014. Decembre signed a Contingent Fee Agreement with her counsel providing that she would pay one-third of any recovery by her to her counsel. On March 7, 2014, Decembre's counsel sent a letter of representation to Perdue's workers' compensation claims adjuster. Decembre's counsel demanded temporary total disability benefits for a short period of time. Decembre's counsel also asserted an attorney's fee lien on any recovery by Decembre and directed that all disbursements be made out jointly to Decembre and her counsel.

On April 28, 2014, Decembre's counsel sent a demand letter to Perdue's adjuster with all of the related medical records and bills, seeking payment of \$17,827.92 in medical expenses for Decembre's in-patient stay at Kent General Hospital, and temporary total disability benefits for a few days. Decembre's counsel also told Perdue's adjuster that the cost of the medical expenses for services procured by Decembre were to be paid directly to her pursuant to 19 *Del. C.* §2322(b). Decembre's counsel once again asserted that he had an attorney's fee lien on any recovery by Decembre and directed that all disbursements be made out jointly to Decembre and her counsel.

Perdue then retained counsel. Perdue's counsel sent a letter to Decembre's

counsel on April 29, 2014. Perdue's counsel noted that Decembre's hospitalization at Kent General Hospital appeared to be unrelated to Decembre's injured hand and requested that Decembre's counsel identify Decembre's treating physicians for the two years preceding her accident at work. Decembre's counsel complied with that request on May 19, 2014. Decembre's counsel made several inquiries to Perdue but received no response to her demand letter of April 28, 2014.¹

Decembre's counsel then obtained a report from Dr. Irwin L. Lifrak linking Decembre's hand injury to her hospital stay at Kent General Hospital. Decembre's counsel provided Dr. Lifrak's report to Perdue's counsel on April 17, 2015, and informed Perdue's counsel by letter that if she did not receive a response within 60 days she would file a petition to determine compensation due. Decembre's counsel also reminded Perdue that all costs and medical bills were to be paid directly to Decembre and her counsel's law firm under 19 *Del.C.* § 2322(b) and that Decembre's counsel had an attorney's fee lien on all recoveries by Decembre.

On May 22, 2015, Perdue paid Decembre's medical providers directly and without notice to Decembre's counsel. On June 8, 2015, Decembre's counsel again

¹ Decembre states that she made documented attempts on September 22, 2014, October 1, 2014, October 13, 2014, October 16, 2014, and October 17, 2014, for a response to her demand letter but received no response from Perdue. Perdue admits that Decembre sent multiple demands for payment but due to its ongoing investigation, those payments were denied pending completion of the investigation.

sought an answer from Perdue's counsel on whether or not Perdue was accepting Decembre's claim. On June 11, 2015, Perdue's counsel told Decembre's counsel that he would review the matter with Perdue.

Decembre filed a Petition to Determine Compensation Due on October 13, 2015. Decembre filed an additional Petition for Compensation Due on October 28, 2015. Decembre's two petitions were consolidated for a single hearing scheduled for February 18, 2016. Decembre's combined petition sought (1) payment of the Kent General Hospital bills totaling \$17,827.92, (2) an acknowledgment by Perdue that Decembre's hand injury was compensable, (3) one week of temporary total disability benefits, and (4) payment of three other medical bills totaling \$1,901.06. Perdue and Decembre then began to prepare for the hearing before the Board.

Somewhere along the way Perdue's counsel learned that Kent General Hospital's bills had been paid. Perdue's counsel told Decembre's counsel on July 12, 2016, that most of Decembre's medical bills had been paid, including Kent General Hospital's bills. On January 14, 2016, more than thirty days prior to the scheduled hearing, Perdue agreed to pay the three remaining medical bills totaling \$1901.06 directly to Decembre's counsel. Perdue also acknowledged that Decembre's hand injury was compensable and agreed to pay her temporary total disability for a week. Perdue paid the week of temporary total disability and \$1,901.06 in medical bills to

Decembre and her counsel on January 18, 2016. Decembre's counsel still sought payment of his attorney's fee lien from Perdue in the amount of \$4694.81, which represented one-third of Decembre's medical bills Perdue paid directly to the medical providers. Perdue rejected Decembre's counsel's demand for attorney's fees.

On January 26, 2016, Decembre asked the Board to cancel the scheduled hearing on her combined Petition to Determine Compensation Due. Instead, the parties requested a Legal Hearing in front of the Board on the issue of attorney's fees. Specifically, Decembre's counsel sought attorney's fees of \$4,694.81, representing one-third of the medical bills that Perdue had paid on May 22, 2015, five months before Decembre filed a petition seeking recovery of the same medical bills.

The Board held a Legal Hearing on March 16, 2016. During the hearing, Perdue conceded that Decembre's heart issues were not automatically deemed compensable. Perdue also admitted that it paid Kent General Hospital's bills on May 22, 2015, because it accepted Dr. Lifrak's report. In its Order dated April 25, 2016, the Board found that Decembre was not entitled to an award of attorney's fees because Perdue paid Decembre's medical bills prior to Decembre filing her Petition to Determine Compensation Due, thereby making her Petition moot at its inception. The Board denied Decembre's request to have it honor her counsel's attorney's fee lien because the Board felt that it only had jurisdiction to determine awards for

petitions pending before it. Moreover, the Board found that the medical service providers were the proper parties to be paid because there was no dispute as to the compensability of the medical services provided. Thus, according to the Board, there was no award for Decembre's counsel's attorney's fee lien to attach to. Lastly, the Board also criticized Decembre's counsel for a lack of diligence in determining if the bills had in fact been paid before he filed the petition. Decembre then filed this appeal.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.² Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.³ The appellate court does not weigh the evidence, determine questions

² *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

³ *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986)(TABLE).

of credibility, or make its own factual findings.⁴ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁵ We review errors of law *de novo*.⁶ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁷

DISCUSSION

Decembre argues that the Board erred when it 1) found that Decembre's counsel failed to exercise due diligence and caused the Board to hold unnecessary proceedings, 2) found that payment was due to the medical service providers and not Decembre, and 3) failed to enforce her express attorney's fee lien against the recovery made through the efforts of her counsel.⁸

Decembre's Counsel's Diligence

While the Board found that Decembre's counsel did not act diligently in this case because he filed the Petitions to Determine Compensation Due without realizing that the bills he was seeking compensation for had already been paid, it does not

⁴ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁵ 29 *Del. C.* § 10142(d).

⁶ *Person-Gaines v. Pepco Holdings Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

⁷ *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

⁸ Decembre does not challenge the Board's finding that she was not entitled to an award of attorney's fees pursuant to 19 *Del. C.* §2320(10).

matter because the Board did not rule against Decembre because of her attorney's lack of diligence. The Board concluded that the medical service providers were the proper parties to be paid and that it would not enforce Decembre's counsel's attorney's fee lien for reasons unrelated to Decembre's counsel's diligence. While the Board did say that it would not award attorney's fees to Decembre's counsel because he had not exercised due diligence, the underlying factor behind the Board's decision not to award attorney's fees was based on the fact that the case had not proceeded past the point of a valid initial filing. In such cases, the Board noted that no attorney's fees are awarded.⁹ I viewed that decision by the Board as separate from its decision not to enforce Decembre's counsel's attorney's fee lien.

Payment of the Medical Providers

Decembre argues that she should have been paid directly for Kent General Hospital's medical bills. Decembre's argument is based on 19 *Del. C.* §2322(b). This section states as follows:

If the employer, upon application made to the employer, refuses to furnish the services, medicines and supplies mentioned in subsection (a) of this section, the employee may procure the service and shall receive from the employer the reasonable cost thereof within the above limitations.

⁹ *Baughan v. Wal-Mart Stores, Inc.*, 947 A.2d 1120 (2008), *Pugh v. Wal-Mart Stores, Inc.*, 945 A.2d 58 (Del. 2008); *Lattis v. Blackwell & Son, Inc.*, 608 A.2d 728 (Del. 1992).

Of course, if Decembre had paid Kent General Hospital's bills, then her claim would have made some sense. That was not the case here. Decembre did not pay Kent General Hospital's bills. To pay her instead of the medical service providers who provided medical care to her would be inconsistent with the medical payment provisions under the Workers' Compensation Act and the Board's decision in *Sanitate*.¹⁰ In *Sanitate*, the Board ruled that where there is no dispute as to the compensability of the medical services, then it is the medical provider that should be paid directly by the employer or insurance carrier. The Board's rationale for this is that 19 Del. C. §2322F(h) provides that a medical provider "shall not hold an employee liable for costs related to nondisputed services for a compensable injury and shall not bill or attempt to recover from the employee the difference between the provider's charge and the amount paid by the employer or insurance carrier on a compensable injury." The Board reasoned that where there is no dispute as to the compensability of the services provided by the medical provider, it is the medical provider who should receive the payment because the medical provider can not look to the employee for payment. While the Kent General Hospital's bills were initially disputed by Perdue, Perdue ultimately agreed that they were compensable and paid them months before Decembre filed her Petitions to Determine Compensation Due.

¹⁰ *Sanitate v. Target Corporation*, Del. IAB., Hr'g No. 1259830 (Aug. 30, 2010).

I agree with the Board that the medical services providers should have been paid instead of Decembre.

Decembre's Attorney's fee Lien

In order to evaluate this issue, it is helpful to review the law regarding an attorney's fee lien.¹¹

As explained in *Royal Ins. Co. v. Simon*:

A charging lien is defined as “the right of an attorney at law to recover compensation for his services from a fund recovered by his aid, and also the right to be protected by the court to the end that such recovery might be effected.” [Citation omitted.]¹²

As further defined in *Katten Muchin Rosenman LLP v. Sutherland*:

[A] charging lien is “an equitable right to have costs advanced and attorney's fees secured by the judgment entered in the suit wherein the costs were advanced and the fees earned.”¹³

In Delaware, while there is no statutory right to a charging lien, common law recognizes the right to such and the charging lien is enforceable at law or in equity.¹⁴

¹¹ It is also called a “charging lien.”

¹² 174 A. 444, 446 (Del. Ch. 1934).

¹³ 153 A.3d 722, 726 (Del. 2017), quoting *Zutrau v. Jansing and ICE Systems, Inc.*, 2014 WL 7013578, *1 (Del. Ch. Dec. 8, 2014), *aff'd*, 123 A.3d 938 (Del. 2015), *rearg. den.* (Sept. 17, 2015), *cert. den.*, 136 S.Ct. 1198 (2016).

¹⁴ *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hosp., Inc.*, 36 A.3d 336, 340 (Del. 2012) (“*Doroshow*”); *Polin v. Delmarva Poultry Corp.*, 188 A.2d 364, 366 (Del. Super. 1963); *Royal Ins. Co. v. Simon*, *supra*.

As explained in *Doroshow*, “[t]he lien’s existence rests on the ‘theory that one should not be permitted to profit by the result of litigation without satisfying the demand of his attorney.’ [Footnote and citation omitted.]”¹⁵

Also of significance is the definition of a lien: A lien is “[a] charge or security or encumbrance upon property.”¹⁶

In each of the above-cited cases, some monies were due each attorney’s client and there were funds (or property) upon which the lien could attach.

An attorney’s charging lien never arose in this case for a number of reasons.

1) There never were any monies due Decembre. Perdue did not owe any money to Decembre. Instead, Perdue owed money to the medical service providers. Decembre’s counsel was, in effect, acting as a collection agent, seeking payment for creditors of Decembre. He was making sure judgments were not entered against her for medical services rendered to her. However, he never had, nor never would have, obtained funds for his client to which she was entitled to keep.

2) There was no “property” or fund upon which a lien could attach. The monies bypassed Decembre completely.

3) The charging lien is dealt with in the courts, not by statutorily-created

¹⁵*Doroshow, supra. Accord Zutrau v. Jansing and ICE Systems, Inc., supra* at *1.

¹⁶ Black’s Law Dictionary 832 (5th Ed. 1979).

boards. In fact, the Workers' Compensation Act has, in effect, created an attorney's charging lien by statutorily providing for attorney's fees under specific circumstances. The Workers' Compensation Act does not authorize attorney's fees for situations such as the one at hand.

4) The party with standing to pursue an attorney's charging lien is the attorney. Decembre owes her attorney money because her attorney did work for her. The fund achieved by her attorney otherwise would go to the client. However, the charging lien exists to prevent Decembre from profiting by the result of litigation without satisfying the demand of her attorney. Decembre has no standing to seek payment of the monies she owes.

The attorney's charging lien is not available to Decembre's counsel in this situation. The lien never arose. Decembre's counsel's mere statements that he has an attorney's charging lien does not establish the lien. The lien is created/defined by common law and Decembre's counsel did not have an attorney's charging lien under the facts of this case.

Conclusion

I have affirmed the Industrial Accident Board's decision in this case because it is in accordance with the applicable law and supported by substantial evidence in the record.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

ESB/sal

cc: Prothonotary