

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

KATHY M. MELVIN,)	
)	
Appellant,)	C. A. No. K10A-06-011 RBY
)	C. A. No. K10A-07-002 RBY
v.)	C. A. No. K10A-07-004 RBY
)	C. A. No. K10A-08-005 RBY
PLAYTEX APPAREL, INC.,)	Consolidated
)	
Appellee.)	

Submitted: April 4, 2014

Decided: May 29, 2014

ORDER

*Upon Consideration of Appellant's
Application of Attorneys' Fees*
GRANTED IN PART and DENIED IN PART

Walt F. Schmittinger, Esquire and Kristi N. Vitola, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware for Appellant.

J. R. Julian, Esquire of J.R. Julian, P.A., Wilmington, Delaware for Appellee.

Young, J.

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SUMMARY

Schmittinger and Rodriguez (herein “S&R”), the law firm representing Kathy M. Melvin (“Claimant”) in an appeal of the Industrial Accident Board (“the Board”), applied for attorneys’ fees and a one-third contingent multiplier on July 3, 2013. Including the contingent multiplier, S&R now requests a total of \$18,686.67 in attorneys’ fees. The Court must decide whether: 1) the fees requested by S&R are appropriate; and 2) whether the work S&R performed warrants the payment of a one-third multiplier contingency fee.

The Court finds that the requested sum of \$14,127.80 in attorneys’ fees is not reasonable according to the detailed Supplemental Response to Playtex’s Interrogatories filed by S&R. However, after deduction of \$560.00, which is for noncompensable time S&R spent reviewing time records, a grant of \$13,567.80 in attorneys’ fees will be awarded. The Court finds that an award of a one-third multiplier contingency fee is unreasonable, because S&R has not demonstrated how any of the issues involved in Claimant’s appeal were especially difficult, or presented a doubtful likelihood of success. The sum of \$13,567.80 in attorneys’ fees is **GRANTED**. The one-third contingency multiplier is **DENIED**.

FACTS AND PROCEDURAL POSTURE

_____ Claimant’s Motion for Attorneys Fees was originally filed on July 3, 2013. Claimant applied for attorneys’ fees pursuant to 19 *Del. Code* § 2350(f) for her representation by S&R before this Court on appeal from the Board. Cross-appeals were taken by the parties in this matter. The Court found against Claimant in her appeal, but found in favor of Claimant in her employer, Playtex’s worker’s

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compensation appeal. At the time of the first fee application filing, Walt F. Schmittinger, Esq. and Kristi N. Vitola, Esq., attorneys from S&R, claimed a total of 47.15 hours defending Employer's appeal. The fee previously applied for was \$12,861.10 based on 45.55 hours of work by an associate at S&R at an hourly rate of \$200.00 per hour, and 1.60 hours worked by Walt F. Schmittinger, Esq. at an hourly rate of \$350.00 per hour, plus an additional one-third for the contingent nature of the litigation.

On July 23, 2013, Playtex filed a Response and Opposition to Claimant's and S&R's Fee Application, and filed a Motion to Strike. On August 21, 2013, Claimant and S&R filed a Response to Playtex's Opposition. That same day, Claimant filed a Response to Playtex's Interrogatories. On September 9, 2013, the Court sent a letter to Claimant's attorneys, asking for a more detailed account of the requested attorneys' fees. In the Response sent on September 11, 2013, counsel explained that S&R ultimately procured a monetary award for Claimant that was over \$100,000, indicating that an attorneys' fee award for work done representing Claimant before the Board was \$9,160.00, which the Board awarded for the time spent in preparation for that hearing, including the results achieved for Claimant. On October 7, 2013, Playtex filed a Motion to Compel Claimant and S&R to provide complete and legally sufficient answers to the interrogatories. On October 11, 2013, Playtex filed a Supplemental Response and Opposition to S&R's Application for Attorneys' Fees on Appeal.

In the Board appeal to this Court, Playtex argued that the Board erred when it awarded Claimant the medical expenses associated with her 2008 surgery. According

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to Claimant's counsel, the benefit achieved by Claimant in defending Playtex's appeal is that her surgery remained compensable, and she kept the award of over \$100,000.00 in medical bills, her medical expert fee award, and her attorneys' fee award. The Court heard oral argument regarding the instant attorneys' fees application on April 4, 2014.

_____ On November 4, 2013, S&R filed a Supplemental Response to Playtex's Interrogatories detailing how much time was spent by each S&R attorney, with a description of the task performed. At the oral argument before this Court on April 4, 2014, Appellant requested a new attorneys' fees figure of \$14,000 for time spent on appellate work, since the award of \$9,160.00 from the Board. In S&R's Supplemental Application for Attorneys' Fees submitted on April 4, 2014, S&R asked for a total of \$18,686.67, which includes an additional one-third for the contingent nature of the litigation. According to Appellant, Walt F. Schmittinger, Esq. worked 2.604 hours defending Playtex's appeal, and after the appeal, for work regarding the instant fee application at a rate of \$350.00 per hour, amounting to a subtotal of \$911.40. Kristi N. Vitola, Esq. submitted 66.082 hours at a rate of \$200.00 per hour, amounting to a subtotal of \$13,216.40. The total number of hours worked by both Kristi N. Vitola, Esq. and Walt F. Schmittinger, Esq. during and after the appeal amounts to \$14,127.80, not including the one-third contingent multiplier or noncompensable hours spent reviewing time records.

DISCUSSION

At the oral argument before this Court on April 4, 2014, Playtex argued that the hours submitted by S&R were unreasonable, and the fee application was

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inaccessible. Further, Playtex contended that the work S&R completed would have to have involved something extraordinary in order to warrant an award of an additional one-third for the contingent nature of the litigation. Playtex asserts that, in this case, the work performed by S&R was not complicated. The Court must decide whether: 1) the fees requested by S&R are reasonable; and 2) whether the work S&R performed warrants the payment of a one-third multiplier.

Regarding the first issue, before S&R submitted a Supplemental Response to the Court in November, 2013, Playtex argued to strike S&R's fee application, because it was not clear how many hours the attorneys worked. This made the sum of \$12,861.10 at the time unreasonable. However, it is now apparent from S&R's Supplemental Response that the total number of hours the attorneys submitted as having done legal work after the first award of \$9,160.00 was granted, amounts to \$13,567.80, not including the one-third contingent multiplier or noncompensable hours worked. S&R's Supplemental Response provides an in-depth list of the work performed by S&R by the hour beginning in August, 2010, and ending in October, 2013.

This Court has previously awarded S&R attorneys' fees at a similar rate of \$200.00 per hour for associates, and \$350.00 per hour for Walt F. Schmittinger, Esq. for time spent filing and defending its fee application.¹ No specific basis for not accepting those rates was presented by Playtex. However, the Court will not award attorneys' fees for time S&R spent reviewing or figuring out the amount of

¹ *Vincent v. Gordy's Lumber Mill*, 2004 WL 2050427 (Del. Super. Sept. 9, 2004); *Waters v. Statewide Maintenance*, 2006 WL 2685585 (Del. Super. August 11, 2006).

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hours it billed in this matter. S&R's Supplemental Response to Playtex's Interrogatories states that S&R spent 2.6 hours drafting a response to Employer's Interrogatories and reviewing time records. S&R's review of the time records is not compensable.

Similarly, on October 23, 2013, S&R spent 3.0 hours drafting a response to Playtex's Interrogatories and reviewing time records. Both tasks are grouped together in the description. Therefore, the Court will only award half of the time listed in S&R's descriptions to account for hours reviewing time records, which is noncompensable. Thus, out of the 2.6 hours described above, the Court will deduct 1.3 hours from the bill, which amounts to \$260.00. Out of the 3.0 hours for tasks described above, the Court will deduct 1.5 hours from the bill, which amounts to \$300.00. With these subtractions, the requested sum of \$14,127.80 becomes \$13,567.80 in compensable attorneys' fees.

The second issue requires the Court to decide whether an additional sum of attorneys' fees should be granted due to the alleged contingent nature of the case at hand. Playtex argues that this Court should not award the one-third multiplier. Appellee sites three cases in which the Court found that the one-third multiplier was not reasonable. In *Williams v. Kraft Foods*, 2005 WL 3007809 (Del. Super. September 7, 2005), the Court deemed the 14.1 hours worked by an attorney at \$250.00 an hour to be reasonable, and granted the \$3,525.00 fee requested. However, the Court denied an attorney's request for a one-third multiplier, because the issue on appeal was not novel or complex. In that case, there was only one issue on appeal, which was whether the Board properly denied medical

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witness fees for one of the claimant's medical experts.

In *Falconi v. Coombs & Coombs, Inc.*, 2006 WL 3393489 (Del. Super. November 21, 2006), the Court also granted the attorney's fees, but denied the attorney's request for a multiplier. The issue on appeal before the Board was whether the claimant was an employee of a certain company as contemplated by the worker's compensation statute. The Court denied the attorney's request for a multiplier, because the issue involved was not factually or legally complex.

Again, in *Sussex Pines Country Club v. Conaway*, 2011 WL 5966733 (Del. Super. November 29, 2011), the Court found that the time claimed was reasonable, but denied the claim for the contingency multiplier. In this case, S&R also relied upon the contingency fee arrangement to support its claim for the multiplier, but the Court stated that none of the additional factors warranting a contingency multiplier were present in this appeal from the Board.

In response, S&R argues that, in *In the Matter of Ronald Cox*, 1984 WL 21201 (Del. Ch. 1984) (herein "*Cox*"), and *Quality Car Wash v. Ronald Cox*, 1983 WL 476625 (Del. Super. Feb. 23, 1983) (herein "*Quality Car Wash*"), the Court of Chancery granted a contingency multiplier, and therefore, the Court should grant one in the instant case. *Cox* involved the representation of a physically incapacitated claimant against a worker's compensation carrier before the Board, in an appeal to this Court, and finally in an appeal to the Delaware Supreme Court, which reinstated the Board's holding for the claimant.

Unlike the case at hand, the attorneys in *Cox* were faced with the task of achieving a permanency benefits settlement between the carrier and the claimant,

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which was interrelated with the work the attorneys had done on a prior worker's compensation suit for the claimant.² This circumstance made the issues involved more novel and difficult, such that the Court of Chancery granted the contingent multiplier. Furthermore, the attorneys in the *Cox* decisions represented the claimant in an appeal to the Delaware Supreme Court after this Court found for the carrier. On that basis, the attorneys' representation of the claimant was deemed to have only a slim chance of success.³

In *Quality Car Wash*, this Court also makes clear that contingent fees in addition to fees already charged for time expended are not routinely granted.⁴ The Court found that a contingent multiplier was warranted for a case in which the attorneys operated on a contingency fee basis, the questions involved were novel and difficult, the likelihood of success was doubtful, and the size of the recovery was significant.⁵

These circumstances are not present in the instant matter. In the case at hand, S&R defended Claimant against Playtex's appeal, where Playtex argued that the Board erred when it awarded Claimant the medical expenses associated with her 2008 surgery. Claimant did receive benefit as a result of the time S&R spent devoted to her defense. In particular, Claimant's surgery remains compensable,

² *Cox*, 1984 WL 21201 at *5.

³ *Id.* at *2.

⁴ *Quality Car Wash*, 1983 WL 476625 at *1.

⁵ *Id.*

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and she will keep the award of over \$100,000.00 in medical bills, her medical expert fee award, and her attorneys' fee award. However, S&R has not demonstrated how any of the issues involved in this appeal were unusually difficult, or how counsel overcame a doubtful likelihood of success.

S&R counters that Playtex did not cite one case in which the Court found that a contingency multiplier was never reasonable. *Quality Car Wash* has already established that contingent multipliers are not typically granted. S&R has not established that the instant case satisfies any of the factors above that might warrant the grant of a contingent multiplier. While the sum of \$13,567.80 for attorneys' fees *is* compensable, the grant of a contingent multiplier in this matter is not.

CONCLUSION

For the foregoing reasons, the sum of \$13,567.80 in reasonable attorneys' fees is **GRANTED**, but the one-third contingency multiplier is **DENIED**.

J.

RBY/dsc

oc: Prothonotary

cc: Counsel

Opinion distribution