

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

LIBERTY MUTUAL,)	
Appellant,)	
)	
v.)	C.A. No. N12A-03-003 CLS
)	
JESUS SILVA-GARCIA AND)	
CITY CLEANING OF DELAWARE)	
INC.,)	
Appellees.)	
)	

ORDER

AND NOW, TO WIT, this 13th day of June, 2012, **IT IS HEREBY**

ORDERED as follows:

Introduction

Before the Court is Appellees’ Motion to Dismiss. This Court is faced with the preliminary issue of whether an order of the Industrial Accident Board (“IAB” or “Board”) requiring Liberty Mutual (“Appellant” or “Liberty Mutual”) to pay insurance coverage to the employer constitutes an appealable final award or an unappealable interlocutory order. An order of the IAB directing Liberty Mutual to pay insurance coverage to the employee is not an award of the IAB, and is instead an interlocutory order. Accordingly, pursuant to Superior Court Civil Rule 72(i), Liberty Mutual’s appeal is **DISMISSED** as an interlocutory order and **REMANDED** to the Board to determine compensation due.

Facts

This case arises from an injury that occurred at Harrington Raceway and Casino in Harrington, Delaware, located in Kent County. On January 15, 2010, Appellee, Jesus Silva-Garcia (“Silva-Garcia”) fell while working in the course and scope of his employment with the employer, City Window Cleaning of Delaware, Inc. (“City Window” or “CWC”). Silva-Garcia sustained multiple injuries including amputation of his left leg.

On February 18, 2010, Silva-Garcia filed a Petition to Determine Compensation Due (“Petition”) with the IAB. In his Petition, Silva-Garcia requested workers’ compensation benefits for the injuries sustained in the accident at Harrington Raceway. On October 8, 2010, Liberty Mutual filed a declaratory action in this Court to determine whether coverage existed on the date of the accident. On October 15, 2010, the IAB held an evidentiary hearing to determine coverage. At the hearing, Liberty Mutual argued that the IAB lacked jurisdiction to determine the coverage issue because of the declaratory action filed in this Court.

On May 26, 2011, this Court dismissed Liberty Mutual’s Motion for Declaratory Judgment. In its Order, the Court held that the IAB is the administrative body charged with handling workers’ compensation issues and thus, the IAB is the entity to resolve the dispute about workers’ compensation insurance.

On June 16, 2011, CWC filed a Petition for a Rule to Show Cause why it was not covered by Liberty Mutual at the time of the injury. The IAB had an evidentiary hearing on August 17, 2011 to determine insurance coverage issues.

On August 31, 2011, the IAB issued a decision holding that CWC was covered by workers' compensation insurance from Liberty Mutual at the time of the injury at Harrington Casino. The IAB additionally ordered Liberty Mutual to reimburse CWC for payments made to Silva-Garcia pending resolution of the coverage question.

On September 12, 2011, Liberty Mutual filed a Motion to Strike the language directing it to reimburse CWC, which essentially was a Motion for Reargument. On January 31, 2012, the IAB denied Liberty Mutual's Motion for Reargument. In its decision, the Board noted that "[t]he intent of the Workers' Compensation Act is to quickly resolve issues surrounding the injury of a worker. The laws are not intended to provide avenue for unnecessary litigious exercises, unduly burdening the trier of facts and determiner of law and further delaying compensation to the injured worker."¹ The decision indicates that the order denying the motion to strike was mailed on February 2, 2012.

On March 5, 2012, Liberty Mutual filed a Notice of Appeal in the Superior Court of New Castle County, from the IAB's denial of its motion to strike. In its

¹ Silva-Garcia Mot. to Dismiss, Ex. D (K12A-03-003 RBY).

Notice of Appeal, Liberty Mutual claims that it did not receive the IAB's Order until February 15, 2012. Silva-Garcia's Petition is pending resolution of this appeal.

Parties' Contentions

Silva-Garcia filed a motion to dismiss for lack of jurisdiction on March 12, 2012. In support of its motion to dismiss, Silva-Garcia states that pursuant to 19 *Del. C.* § 2349, the Appellant filed its notice of appeal with the Court beyond the statutory appeal period permitted under this section. Further, Superior Court Civil Rule 72(i) mandates that the untimely filing of an appeal is grounds for dismissal since this Court lacks jurisdiction to hear untimely appeals. Moreover, Silva-Garcia argues that Appellant has failed to comply with the requirement of Section 2349 which states that the notice of appeal should have been filed with the Superior Court for the county in which the injury occurred, i.e., Kent County. Therefore, Silva-Garcia argues that Appellant's notice of appeal should be dismissed as untimely and non-compliant with the statutory guidelines imposed by Super. Ct. Civ. R. 72(i) and *Section 2349*.

Appellant responded to Silva-Garcia's motion on March 13, 2012. In support of its response, Appellant submits that this appeal is not within the statutory mandates of 19 *Del. C.* §§ 2345, 2346 and 2347 because the Board decided an insurance coverage issue and not a Petition. Furthermore, the

Appellant argues that there is no injury because the issue was one of insurance coverage and therefore, the word “injury” in the statute is ambiguous. In the alternative, Appellant argues that should this Court find that the statutory guidelines apply, then this case should be transferred to Kent County pursuant to 10 *Del. C.* § 1902.

On March 15, 2012, the Appellant filed the same appeal in Kent County.² Silva-Garcia filed a motion to dismiss the appeal in Kent County on March 28, 2012, arguing that the appeal was untimely filed and should be dismissed pursuant to Super. Ct. Civ. R. 72(i).³ On that same day, CWC filed a motion to dismiss Appellant’s appeal in New Castle County based on lack of jurisdiction. CWC argues that this Court should dismiss for lack of subject matter jurisdiction and the appeal should not be transferred to Kent County. In the alternative, CWC argues that this Court should dismiss because it already held that these issues are best resolved before the IAB.

Appellant responded to City Window’s motion to dismiss on April 23, 2012. Appellant again attempts to distinguish appeals involving insurance coverage issues from appeals arising from petitions for workers’ compensation benefits. Appellant argues that the appeal was timely filed and therefore, the Court has subject matter jurisdiction over this appeal. Appellant requests that this the case be

² The case number of the appeal filed in Kent County is K12A-03-003 RBY.

³ Oral argument for the Motion to Dismiss is scheduled before Judge Young on June 22, 2012.

transferred to Kent County.⁴ Further, Appellant argues that collateral estoppel does not prevent this Court from determining whether the IAB had jurisdiction to consider the appeal because this Court did not make any factual determinations.

After oral argument on the Motion to Dismiss, the parties were instructed to provide supplemental briefing on the issue of whether or not this issue is interlocutory and any other issues they wanted to raise. Appellees, in their joint supplemental briefing, changed their position about the timeliness of the appeal. Contrary to the argument in their initial motion to dismiss, they now contend that the Appellant's appeal was timely filed pursuant to Super. Ct. Civ. R. 6(a), but the appeal should be dismissed because it was not filed in the county where the injury occurred. In addition, Appellees submit that the order of the Board is not interlocutory because its award was a final determination of the insurance coverage issue before the Board. Appellees claim that the pending Petition is separate from the issue subject to Liberty Mutual's appeal. Lastly, Appellees argue that this appeal should not be transferred to Kent County for public policy reasons.

Liberty Mutual agrees with the Appellees that its appeal was timely filed pursuant to IAB Rule 21. Also, Liberty Mutual argues that while the Order denying its motion for reargument indicated a mailed date of February 2, 2011, an e mail between Liberty Mutual and the Department of Labor shows that a copy

⁴ Appellant does not mention in her response to City Window Cleaning's motion to dismiss that it already filed the same appeal in Kent County on March 15, 2012.

was never mailed to Liberty Mutual. Therefore, Liberty Mutual requests this Court to transfer the appeal to Kent County pursuant to 10 *Del. C.* § 1902. Additionally, Liberty Mutual submits that this appeal is not interlocutory because the Board issued an award on this issue that is entirely separate from the pending Petition to Determine Compensation Due.

Discussion

The Board's Order Denying Liberty Mutual's Motion for Reargument is an Unappealable Interlocutory Order.

Liberty Mutual and Appellees both contend that the Board's decision denying Liberty Mutual's Motion for Reargument on the insurance coverage issue is not an interlocutory order and is thus appealable. In support of this contention, the parties submit that the issue of insurance coverage was separate from the pending Petition. However, contrary to the parties' assertions, this Court finds that the subject of this appeal is interlocutory because a final award has not yet been rendered on the issue of Silva-Garcia's Petition. Therefore, the Board's denial of Liberty Mutual's Motion for Reargument is interlocutory and unappealable.

According to 19 *Del. C.* § 2349, "[a]n award of the Board . . . shall be final and conclusive between the parties . . . unless within 30 days of the day the notice of the award was mailed to the parties either party appeals to the Superior Court for the county in which the injury occurred" The Delaware Supreme Court held in *Eastman v. Newark Sch. Dist.* that, "[t]he word 'award' must be read as the final

determination of the Board in the case. The word itself requires that connotation; and the urgency of workmen's compensation cases, as well as the improvement of judicial administration, militates against a ruling permitting fragmentation of such litigation by interim appeals.”⁵

Consistent with the Court’s ruling in *Eastman*, this Court has held that an appeal from a Board order where there was “no award or denial of compensation, nor was there any ruling on the merits of the case” was considered interlocutory and unappealable.⁶ Thus, a Board order is “reviewable only at the point where it awards or denies compensation.”⁷ Accordingly, orders issued prior to the Board’s final determination of a case are considered interlocutory and unappealable. In other words, orders rendered prior to the Board’s final determination of a case are interlocutory.⁸ This Court has the authority, pursuant to Superior Court Civil Rule 72(i) to dismiss an appeal *sua sponte* or on motion by a party “for appealing an unappealable interlocutory order.”⁹

In *Clendaniel*, the claimant filed a Petition to Determine Compensation Due.¹⁰ Approximately three months later, the Board held a hearing to determine

⁵ 324 A.2d 775, 776 (Del. 1974).

⁶ *Standard Distributing, Inc. v. Hall*, 2007 WL 1748644, *2 (Del. Super. June 15, 2007).

⁷ *Kenol v. Johnny Janosik, Inc.*, 2011 WL 900588, *1 (Del. Super. Mar. 15, 2011) (holding that the Board’s order requiring an employee to sign a receipt for payments made by the employer constitutes an unappealable interlocutory order) (quoting *Hall*, 2007 WL 1748644, at *2).

⁸ *Clendaniel v. McDaniel Const. Inc.*, 787 A.2d 100, *1 (Del. 2001) (TABLE).

⁹ Super. Ct. Civ. R. 72(i).

¹⁰ 787 A.2d 100, at *1.

the threshold question of whether the claimant was an employee at the time of the work accident.¹¹ The Board rendered a decision and held that the claimant was an employee at the time of the injury; additionally, the Board declined to consider claimant's request for attorney's fees because the petition was still pending.¹² Claimant filed a motion for reargument based on the Board's denial of attorney's fees.¹³ Before the Board issued a final award on claimant's petition, claimant appealed to this Court.¹⁴ This Court dismissed claimant's appeal as interlocutory and claimant appealed to the Delaware Supreme Court.¹⁵ The Delaware Supreme Court affirmed the Superior Court's dismissal and held that, "[b]ecause [claimant's] appeal to the Superior Court was from orders issued prior to the IAB's final determination, the appeal was interlocutory and was properly dismissed."¹⁶

This case is analogous to *Clandaniel* and is also an unappealable interlocutory order. Before the Board was an insurance coverage issue, stemming from Silva-Garcia's Petition. Similar to the threshold issue presented to the Board in *Clandaniel*, the issue of insurance coverage was also a threshold question presented to the Board here before determining Silva-Garcia's Petition.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

The Board's order denying Liberty Mutual's motion for reargument concerning the insurance coverage issue is an unappealable interlocutory order because it is not the Board's final order. While the parties contend that the insurance coverage issue is separate from the Petition, this issue to determine insurance coverage is directly related to the Petition to Determine Compensation Due. Additionally, the Petition has not yet been decided by the Board and is pending review of this appeal. Therefore, even though the Board ruled that City Window is entitled to a certain amount of compensation on the insurance coverage issue, a final determination has not yet been decided pertaining to compensation. Thus, pursuant to Super. Ct. Civ. R. 72(i), this case is dismissed because the Court does not have jurisdiction to consider unappealable interlocutory orders of the Board.

After a final determination of the Board, should there be an appeal, pursuant to 19 *Del. C.* § 2349, the appeal is to be filed in the Superior Court in Kent County, as the injury occurred in Harrington, Delaware.

Conclusion

Based on the foregoing, Liberty Mutual's appeal from the Board's order denying a Motion for Reargument is **DISMISSED** pursuant to Super. Ct. Civ. R. 72(i) as an unappealable interlocutory order. Accordingly, this case is **REMANDED** to the Board to determine Silva-Garcia's Petition.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

Original: Prothonotary's Office
cc: Linda L. Wilson, Esq.
William E. Gamgort, Esq.
William X. Moore, Esq.