IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHRISTINA GREEN,	:	
	:	
Claimant Below-Appellant,	:	**C.A. No: 04A-09-003 RBY**
	:	
v.	:	
	:	
CONAGRA POULTRY, Co.,	:	
	:	
Employer Below-Appellee.	:	

Submitted: April 18, 2007
Decided: July 11, 2007

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware, Attorney for Appellant.

J.R. Julian, Esq., Wilmington, Delaware, Attorney for Appellee**.**

Upon Consideration of Various Motions of the Parties
Following a Decision Remanding an IAB Determination
DENIED AND REMANDED

OPINION AND ORDER

YOUNG, Judge

Before the Court are various motions filed by the Employer-Below/Appellee ("Appellee"), ConAgra Poultry Co., and the Claimaint-Below/Appellant ("Appellant"), Christina Green. These motions were filed following this Court's decision reversing and remanding a determination of the Industrial Accident Board ("Board") limiting the award of attorney's fees to the Appellant to $1.00. For the following reasons, these motions are **DENIED** and the matter is **REMANDED** to the Board for action consistent with this Court's September 8, 2005 decision.

FACTUAL AND PROCEDURAL HISTORY

On March 22, 1994, the Appellant injured her right knee while working on the Appellee's production line.[1] This injury caused some scarring on the Appellant's right knee.[2] On May 4, 2004, the Appellant filed a Petition to Determine Disfigurement Benefits, seeking to recover for the scars on her right knee.[3]

The Board held a hearing on August 25, 2004.[4] At the hearing, the Appellant testified about her injury, which caused three scars on her right knee, and the Board examined the scars.[5] After the hearing, the Board awarded the Appellant one week of workers' compensation benefits for her disfigurement, totaling $189.33.[6] The

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[1] *Green v. ConAgra Poultry, Co.*, 2005 WL 2249521, at *1 (Del. Super.).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

Board also awarded attorney's fees of $1.00.[7]

On September 22, 2004, the Appellant filed an appeal with this Court. Her appeal was confined to the Board's award of limited attorney's fees.[8] Despite a Final Delinquent Brief Notice, the Appellee did not file an answering brief. The Court rendered its decision on the basis of the Appellant's opening brief and the Court's own review of the case law on this issue. For the reasons stated in the Court's decision, the matter was reversed and remanded to the Board.

Following the Court's decision, the Parties raised several issues. First, the Appellant filed an Application for Attorney's Fees in connection with the Court's decision to reverse and remand the matter. That application included a Request for Production of the Appellee's counsel's time records for the appeal.

Second, the Appellee filed a Motion for Reargument of the Court's September 8, 2005 decision. The Appellee also filed an Objection to the Appellant's Request for Production and a Request for Production of the fee agreement between the Appellant and her counsel.

Third, the Appellant responded to the Appellee's Motion for Reargument by filing a Motion to Strike the Appellee's Motion for Reargument and, in the alternative, a Response to the Appellee's Motion for Reargument. The Appellant also filed an Objection to the Appellee's Request for Production.

Fourth, the Court issued a letter to the Parties on September 26, 2005 indicating that the Appellant's Application for Attorney's Fee was premature. That same day

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[7] *Id.*

[8] *Id.*

the Appellant filed a Notice of Withdrawal of the Application. It appears the Appellant's intention was to withdraw the Application. However, when the Appellant received the Court's letter, she filed a Motion for Reargument on the letter in order to protect her right to reargue the point with the hope that she could then file another Application after the Appellee's Motion for Reargument was decided.

Finally, the Appellee filed a Motion to Strike the following documents filed by the Appellant: (1) the Appellant's Objection to Appellee's Request for Production, (2) the Appellant's Motion to Strike the Appellee's Motion for Reargument, (3) the Appellant's Response to the Appellee's Motion for Reargument and (4) the Appellant's Notice of Withdrawal of the Application for Attorney's Fees.

DISCUSSION

The Court's decision as to the numerous motions currently before it, set forth previously, is as follows:

1. The Appellee's Motion to Strike Certain Filings By the Appellant

Before the Court can address many of the substantive motions presented, it must first address the Appellee's Motion to Strike these motions for the Appellant's alleged failure to comply with certain procedural requirements regarding service set out in Superior Court Civil Rule 5. The Appellee maintains that while the Appellant's motions were filed with the Court on September 26, 2005, and the certifications attached to the motions were dated September 23, 2005, they were not actually mailed by her attorney until September 28, 2005. The Appellee asserts that federal case law requires the strictest and most exacting compliance with Rule 5(b), service by mail; and that, because the mailings did not correlate to the certification,

the service was void.

None of the case law cited by the Appellee stands for the proposition advanced by the Appellee, to wit: that a variance between the date on the certification of service and the date of actual service by mail requires the Court to strike the filing. In fact, in two of the cases cited by the Appellee, *Rivera v. Fossarina*[9] and *Timmons v. United States,*[10] the issue was not whether service was valid because of a variance between when the document was actually mailed and when the certification stated the document was mailed, as in the case *sub judice*, but rather whether it was valid because of a lack of information in the certification as to where the document was mailed. Furthermore, the Delaware Superior Court, in a case regarding matters pre-dating the current Civil Rules, stated that the purpose of then Rule 33, which required that a party filing a pleading also file a copy to be mailed by the Prothonotary to the adverse party, "was to keep the parties informed as to the filing of pleadings so that they might not become in default."[11] *Ramirez* appears to be the only time a Delaware court mentions the service requirements as they might relate to this case. Because this statement pre-dated the current Civil Rules, the Court does not take it as case controlling, but does view it as instructive as to the underlying purpose of the current service by mail requirements. Here, the Appellee has not demonstrated, nor can this Court find, that the variance between the time of certification and the time of mailing has subjected the Appellee to any difficulty, let alone default.

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[9] 840 F.2d 152 (1st Cir. 1988).

[10] 194 F.2d 357 (4th Cir. 1952), *cert. denied*, 344 U.S. 844 (1952).

[11] *Ramirez v. Rackley*, 70 A.2d 18, 20 (Del. Super.1949).

Additionally, the Court notes that the Appellee's argument regarding the Appellant's compliance with Rule 5(b) also implicates Rule 5(d). Rule 5(d) requires that "all papers after the complaint required to be served upon a party shall be filed with this Court within a reasonable time thereafter." One interpretation of this language would require that documents be filed *before* they are served. At least one federal district court has adopted such an interpretation.[12] However, when another district court was presented with a similar situation in the context of an amended complaint, it held that the lack of prejudice coupled with the court's preference to determine matters on their merits instead of on procedural technicalities required it to deny the motion to dismiss the complaint.[13] The excessively limiting interpretation of Rule 5(d) is not adopted, especially given the fact that the Appellee has not shown, nor can this Court find, that the variance in the sequence of events, filing the documents before serving them by mail, has prejudiced the Appellee in any appreciable way. While the Appellee perhaps demonstrated that the Appellant's counsel has been lax in mailing certain filings, it has not provided the Court with controlling precedent removing this Court's jurisdiction to decide matters placed fairly before it. In the absence of such precedent, this Court's will address the merits of the motions before it. Therefore, the Appellee's Motion to Strike is **DENIED** *in toto*.

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[12] *Clark v. State Farm Mut. Auto. Ins. Co.*, 2005 WL 885007, at *1 (C.D. Cal.).

[13] *Ready v. Feeney*, 2005 WL 526886, at *2 (N.D. Ill.).

2. The Appellee's Motion for Reargument of the Court's September 8, 2005 Decision and the Appellant's Motion to Strike Said Motion

The Appellee seeks reargument of the Court's decision holding that remand was necessary because the Board must enunciate its basis for granting the Appellant attorney's fees of $1.00 in relation to the "*Cox* factors"[14] to allow appellate review of its decision. The Appellee argues that it was not necessary for the Board to list each of the *Cox* factors. Rather, the Appellee cites *DiGiacomo v. Board of Public Education in Wilmington*[15] and *Smith v. General Motors Corporation*[16] for the proposition that a finding of obstinance or misconduct by a party is enough to deny an application for attorney's fees, and that those cases do not require reference to the *Cox* factors.

The purpose of a motion for reargument is to request that the court reconsider its findings of fact, conclusions of law, or judgment in order to correct errors prior to appeal.[17] A motion for reargument should not rehash the arguments already decided by the court.[18] Moreover, a motion for reargument is not a device for raising

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[14] *See General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973).

[15] 507 A.2d 542 (Del. 1986).

[16] 1986 WL 217574 (Del.).

[17] *Kovach v. Brandywine Innkeepers Ltd. Partnership*, 2001 WL 1198944, at *1 (Del. Super.) (citing *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969)).

[18] *Id.* (citing *McElroy v. Shell Petroleum, Inc.*, 1992 WL 397468 (Del.)).

arguments that could have been raised prior to the Court's decision[19] or for stringing out the length of time for making an argument.[20] Generally, reargument will be denied; unless the movant can demonstrate that the court "overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or the facts such as would affect the outcome of the decision."[21]

Before the Court can address the substance of the Appellee's motion, the Court must first dispense with the Appellant's Motion to Strike. The Appellant moves to strike the Appellee's motion because the Appellee did not file an answering brief. The Appellant contends that this failure precludes the Appellee from filing, and this Court from hearing, a motion for reargument. However, the case law cited by the Appellant does not preclude this Court from considering the Appellee's Motion. In fact, if the Court refused to consider the Motion, it would be undermining the purpose of these motions, correcting errors prior to appeal. Therefore, for the foregoing reasons, and in light of this Court's stated intent to address matters presented to it, rather than to dismiss them on mere technicalities, the Appellant's Motion to Strike is **DENIED**.

Turning to the merits of the Appellee's Motion, the Court finds that the cases cited by the Appellee do not demonstrate that the Court has overlooked precedent or misapprehended the law so as to affect the outcome of the decision. First, in *DiGiacomo v. Board of Public Education in Wilmington*, the Delaware Supreme

[19] *Plummer v. Sherman*, 2004 WL 63414, at *2 (Del. Super.).

[20] *Denison v. Redefer*, 2006 WL 1679580, at *2 (Del. Super.).

[21] *In re Murphy v. State Farm Ins. Co.*, 1997 WL 528252, at *1 (Del. Super.).

Court dealt with an appeal by a worker's compensation claimant who had successfully appealed a decision of the Board, but whose award of attorney's fees on appeal had been partially denied by the Superior Court.[22] The pertinent issue before the *DiGiacomo* Court was whether the Superior Court could award attorney's fees for time spent on an application for attorney's fees in successful appeals from the Board.[23] The *DiGiacomo* Court held that such an award was appropriate, but that the amount of the award was within the discretion of the Superior Court.[24] The *DiGiacomo* Court then addressed the employer's concern that allowing attorney's fees for time spent on the application for attorney's fees would "provide an incentive to a successful claimant's attorney to eschew compromise of the underlying fee application . . . ."[25] The *DiGiacomo* Court found this to be a legitimate concern and held:

> "In fixing an appropriate fee, the court should consider the scope of settlement negotiations, if any, with respect to the underlying attorney's fee and the reasonableness of the positions there asserted. The court should not reward obstinacy nor permit the fee application to become, itself, the focus of the appeal."[26]

Viewed in the larger context of the *DiGiacomo* decision, it becomes clear that the language cited by the Appellee does not grant to the Board or this Court the power

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[22] 507 A.2d at 544.

[23] *Id*. at 547. Such request is often referred to as fees on fees.

[24] *Id*.

[25] *Id*.

[26] *Id*.

to disregard the *Cox* factors. Rather, the *DiGiacomo* Court addressed a specific concern about attorney conduct during settlement negotiations on an application for attorney's fees for an appeal to the Superior Court.

The case *sub judice* does not fall into that area. This Court reviewed the Board's analysis regarding a claim for attorney's fees for work on the underlying worker's compensation claim that was before the Board, not a claim for fees on fees. Furthermore, the *DiGiacomo* Court did not hold that, in considering the attorney conduct in these types of settlement negotiations, the reviewing court was to disregard the *Cox* factors. Therefore, this Court views *DiGiacomo* as announcing an addition to the reasonableness inquiry to be made by a reviewing tribunal when presented with an application claiming fees on fees, not as abrogating the reasonableness inquiry established by the *Cox* Court.[27]

Second, in *Smith v. General Motors Corporation* the Delaware Supreme Court was presented with another appeal by a worker's compensation claimant who had successfully appealed a decision of the Board, but had been denied an award of attorney's fees for the appeal by the Superior Court.[28] The Superior Court had denied the petition in its entirety, citing misconduct by claimant's attorney.[29] Specifically, the Superior Court "pointed to the introduction of the [19 *Del. C.*] § 2313 issue by

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[27] *See State v. Pepper*, 1988 WL 90546 (Del. Super.) (In *Pepper*, Judge Steele assessed an application for attorney's fees by first undertaking an analysis of the *Cox* factors and then discussing the consideration raised by the *DiGiacomo* Court.).

[28] 1986 WL 217574, at *1.

[29] *Id*.

claimant's attorney at the Board hearing without prior notice to the employer, and to the issue's lack of support in the evidence, noting in addition that both constituted a violation of DR 7-106 (C)(1), (2), and (5) of the Delaware Lawyer's Code of Professional Responsibility."[30] The Superior Court relied on *Dann v. Chrysler Corp.*, 215 A.2d 709, 717-18 (Del. Ch. 1965), *aff'd*, 223 A.2d 384 (1966), for the proposition that unethical and unprofessional conduct can result in the denial of an application for attorney's fees.[31] The Supreme Court, approving the reasoning of the Superior Court, affirmed.[32]

Smith does not aid the Appellee in its Motion. First, in *Smith*, the Supreme Court did not indicate that this analysis was to preempt the reasonableness inquiry traditionally conducted by the Board and this Court, including reference to the *Cox* factors. Second, in the case *sub judice*, the Board never specifically found that the Appellant's counsel had engaged in unethical or unprofessional conduct, and never cited any provisions of the Delaware Lawyer's Rules of Professional Conduct. Without a finding of such by the Board, the Appellee's contention that *Smith* controls, thereby allowing this Court to affirm without remand, is unavailing. As noted by this Court in its September 8, 2005 decision, the Board's decision must be reversed and remanded, because it failed to "identify the factors on which it relied, and to 'set forth

[30] *Id.*

[31] *Id.*

[32] *Id.*

explicitly the *ratio decidendi* for the amount it decided to award.'"[33] The Board, not this Court, needs to make a determination as to the amount of the fee to be paid to the Appellant's counsel.

Finally, the Court notes that neither of the cases cited by the Appellee are factually similar to the case at hand. Here, the Board limited the attorney's fees for the Appellant's counsel because of counsel's failure to cooperate by providing certain photographs. This case is factually similar to *DeShields v. Harris*[34], *Allens Foods v. Nesmith*[35] and *Martin v. Rent-A-Center*,[36] the cases cited in this Court's September 8, 2005 decision. The Court is convinced that these cases, rather than those cited by the Appellee, control.

Accordingly, the Court finds, based on its reading of the cases cited, that it has not overlooked a precedent or legal principle that would have controlling effect, or that it has misapprehended the law or the facts such as would affect the outcome of the decision. Therefore, the Appellee's Motion for Reargument is **DENIED**.

3. The Appellant's Motion for Reargument of the Court's September 26, 2005 Letter

The Court issued a letter to the Parties on September 26, 2005 indicating that

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[33] *Green v. ConAgra Poultry, Co.*, 2005 WL 2249521, at *3 (quoting *Ohrt v. Kentmere Home*, 1996 WL 527213, *3 (Del.Super.) (quoting *Simmons v. Delaware State Hospital*, 660 A.2d 384, 392 (Del. 1995)).

[34] 1997 WL 819123, at *1 (Del. Super.).

[35] 1997 WL 33442117, at *1 (Del. Super.).

[36] 1997 WL 716894, at *1 (Del. Super.).

the Appellant's Application for Attorney's Fee was premature, since the Court did not find in favor of the Appellant. While the Appellant was no longer seeking attorney's fees on appeal, she nevertheless filed a Motion for Reargument on the letter in order to protect her right to reargue the point with the hope that she could file another Application after the Appellee's Motion for Reargument was decided.

Pursuant to 19 *Del. C.* § 2350(f), "The Superior Court may at its discretion allow a reasonable fee to the 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 part of the final judgment in the cause." This provision gives the Superior Court the discretion to award an attorney's fees in an appeal from the Board to the Superior Court.[37] However, for the Court to exercise its discretion, it must first determine whether the action taken on the appeal before it "constitute[s] an affirmance on appeal of the claimant's position before the Board."[38]

In *Murtha v. Continental Opticians, Inc.,*[39] the Superior Court addressed, for the first time, what constitutes an affirmance of the claimant's position before the Board.[40] Before undertaking a detailed analysis of the statutory language in effect after the General Assembly amended the provision in 1994, the Court stated that prior to the amendment "the touchstone for an award of counsel fees evolved into

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[37] *Murtha v. Continental Opticians, Inc.*, 729 A.2d 312, 315 (Del. Super. 1997).

[38] *Id*.

[39] 729 A.2d 312.

[40] *Id*. at 317.

determining whether the claimant was successful in defending the award."[41] Based on its in-depth statutory interpretation, the *Murtha* Court held that, following the amendment, "the clear legislative intent of the amendment is to create a right for a claimant to seek an attorney's fee for the time expended at the appellate level when a claimant appeals an unfavorable or erroneous Board decision and the claimant's position before the Board is affirmed on appeal."[42] The Court added that under the new statutory language the General Assembly did not intend that success be the only requirement for a claimant to receive an attorney's fee.[43] Instead, the General Assembly specifically included a requirement that the claimant's position before the Board be affirmed. The *Murtha* Court viewed this as requiring that "where the claimant was the appellant, the claimant must have pursued the specific position they were arguing on appeal at the Board proceeding."[44] After inquiring into the specific position of the claimant before the Board, and referring to the Court's decision on the appeal, the Court concluded that the claimant's position before the Board was not affirmed on appeal.[45] Rather, the Court found that it had affirmed the employer's position.[46] Therefore, the Court denied the claimant's request for attorney's fees on

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[41] *Id*.

[42] *Id*.

[43] *Id*. at 318.

[44] *Veid v. Besalem Steel Erectors*, 2000 WL 33113801, at *2 (Del. Super.) (citing *Murtha*, 729 A.2d at 318).

[45] *Murtha*, 729 A.2d at 319.

[46] *Id*. at 320.

appeal as premature, and directed the claimant to refile following remand if she "could claim some additional benefit arising from the remand."[47]

This brief overview of *Murtha* demonstrates that the touchstone for awarding attorney's fees is not, as the Appellant suggests, simply whether the claimant is successful on appeal or what action the Court took on the appeal (i.e., remanding for clarification or reversing due to an error of law or abuse of discretion). Rather, what the Court must look to is whether the claimant's position before the Board was affirmed on appeal. In order to reach that decision, "each case must be examined on its own facts ."[48]

Turning to the facts of the case *sub judice*, the Court concludes that the Motion for Reargument of its September 26 letter is **DENIED.** The Appellant has not met the requirements of the statute, as interpreted by Superior Court case law, to receive an award of attorney's fees at this time because this Court did not affirm the Appellant's position before the Board. Furthermore, unlike the Superior Court in *Woodall v. Playtex Products, Inc.,*[49] this Court's review of the facts of this case do not demonstrate that its decision was "a clear rejection of the Board's decision on attorney's fees because of the Board's failure to give adequate consideration to the *Cox* factors," or that its remand was not ordered to obtain a clarification of the basis

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[47] *Id.*

[48] *Woodall v. Playtex Products, Inc.,* 2002 WL 32067548, at * 3 (Del. Super.) (quoting *Veid*, 2000 WL 33113801, at * 2).

[49] *Id.* at *1.

for the Board's award.[50] Here, the Court did not reject the Board's decision, but rather simply remanded in order to obtain clarification on the basis of the Board's award.

Therefore, this Motion is **DENIED.** However, per the Court's September 26 letter, the denial is **WITHOUT PREJUDICE,** and the request may be renewed pending an altered position by the Board.

4. The Motions for Production and Objections to Production

As part of its Application for Attorney's Fees for the appeal, the Appellant has requested that the Appellee produce a copy of the time records of counsel for the Appellee for work performed on appeal. The Appellee objects to the request as immaterial and irrelevant to the Appellant's Application, and raises the Attorney-Client Privilege and the Privilege related to Proprietary Information. As the Appellant has withdrawn its Application, the Court has held that the Appellant's Application for Attorney's Fees is premature, and the Court has upheld its decision following the Appellant's Motion for Reargument, discussed above. Appellant's request is premature at this time and is, therefore, **DENIED**. Again, per the Court's September 26 letter, the denial is without prejudice, and the request may be renewed in the event of an altered position by the Board.

The Appellee has requested the Appellant produce copies of all fee agreements between herself and her counsel. The Appellant objects to the request, contending that these material are subject to the Attorney-Client Privilege. That is not correct.

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[50] *Id*. at *3.

While no Delaware precedent exists on the topic, according to Third Circuit case law, "[a]bsent unusual circumstances, the attorney-client privilege 'does not shield the fact of retention, the identity of clients, and fee arrangements.'"[51] However, as the Appellee has not shown the purpose or relevancy of the request for production in the proceedings immediately before this Court,[52] the Motion is considered to be not at issue.

CONCLUSION

Accordingly, the outstanding motions discussed above are **DENIED**. As there is nothing left for this Court to decide, the matter is now ripe for remand to the Board for proceedings consistent with this Court's September 8, 2005 decision.

SO ORDERED.

/s/ Robert B. Young
J.

RBY/sal
oc: Prothonotary
cc: Opinion Distribution

[51] *Prousi v. Cruisers Division of KCS Intern., Inc.*, 1997 WL 135692, *1 (E.D.Pa.) (quoting *In re Grand Jury Investigation*, 631 F.2d 17, 19 (3d Cir. 1980)).

[52] *See Id*. (In which the district court granted the motion to compel production of the fee agreement because the requesting party had shown how it would be relevant.).