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Re: Valvetta Frazier v. Barrett Business Services, Inc.
C.A. No. 01A-07-010 HDR

Upon Appellee Barrett Business Services, Inc.'s Motion to Dismiss Appeal - GRANTED

Submitted: September 28, 2001
Decided: October 5, 2001

Counsel:

This is an appeal by Appellant Valvetta Frazier ("Claimant") from a decision of the Industrial Accident Board which directed Appellant to submit to certain medical testing prior to a hearing on a petition for worker's compensation benefits. Appellee Barrett Business Services, Inc. ("Employer") has moved to dismiss the appeal because it is interlocutory. For the reasons which follow, Employer's motion is granted.

I. BACKGROUND

On January 25, 2001, Claimant filed a petition with the Industrial Accident Board, (the "Board"), seeking compensation for permanent impairment to her bladder, allegedly resulting from her December 9, 1999 work-related accident. At Employer's request, Dr. Terrence R. Malloy, a urologist examined her. Dr. Malloy could find nothing wrong and recommended that she undergo a video urodynamics study to confirm whether or not there was any significant

nerve damage to her bladder.

Claimant refused to undergo the video urodynamics test. Employer then moved the Board to compel Frazier to submit to the test. The Board conducted an evidentiary hearing where Claimant contended the test was cumulative, hazardous, unnecessary, invasive and exposed her to unsafe levels of radiation. Her doctor testified that the risk of radiation exposure outweighed the medical benefits. However, Employer's doctor testified that the radiation exposure was minimal and the test was necessary. After the hearing the Board accepted the testimony of Employer's doctor and ordered Claimant to submit to the test.

On July 25, 2001, Frazier filed this appeal. The appeal has three grounds: (1) the Board's decision is contrary to law, (2) the Board's decision is contrary to the evidence presented at the hearing, and (3) the Board's decision is not supported by substantial evidence. Employer has moved to dismiss the appeal on the grounds that the Board's decision is an interlocutory order which is not appealable.

II. DISCUSSION

Appellate review of decisions of the Industrial Accident Board are governed by two statutes.[1] They are 19 *Del. C.* § 2349[2] and § 2350.[3] 19 *Del. C.* §

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[1] ***See Eastburn v. Newark School District*, Del. Supr., 324 A.2d 775, 775-76 (1974).**

[2] **19 *Del. C.* § 2349 Finality of awards; appeals; limitation period.**

2349 references the word "award" only and does not make any reference to the

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An award of the Board, in the absence of fraud, shall be final and conclusive between the parties, except as provided in § 2347 of this title, 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 or, if the injury occurred out of the State, to the Superior Court in and for the county in which the hearing was had. Whenever an award shall become final and conclusive pursuant to this section, the prevailing party, at any time after the running of all appeal periods, may, if a proper appeal has not been filed, file with the Prothonotary's office, for the county having jurisdiction over the matter, the amount of the award and the date of the award. From the time of such filing, the amount set forth in the award shall thereupon be and constitute a judgment of record in such court with like force and effect as any other judgment of the court, except that the renewal provisions of § 4711 of Title 10 shall not be applicable, and a judgment obtained under this section shall automatically continue for a period of 20 years from the date of the award. The Prothonotary shall enter all such certificates in the regular judgment docket and index them as soon as they are filed by the prevailing party.

[3] **19 *Del. C.* § 2350 Jurisdiction, procedure and decision on appeal; review by Board; costs and security. Provides in relevant part:**

(b) In case of every appeal to the Superior Court the cause shall be determined by the Court from the record, which shall include a typewritten copy of the evidence and the finding and award of the Board, without the aid of a jury, and the Court may reverse, affirm or modify the award of the Board or remand the cause to the Board for a rehearing. In case any cause shall be remanded to the Board for a rehearing, the procedure and the rights of all parties to such cause shall be the same as in the case of the original hearing before the Board.

* * * (e) If the decision of the Board is affirmed by an appellate court, the employee shall be entitled to all compensation plus interest at the legal rate from the time of the award by the Board.(f) The Superior Court may at its discretion allow a reasonable fee to 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 a part of the final judgment in the cause and may be recovered against the employer and the employer's insurance carrier as provided in this subchapter.

appealability of an interlocutory order of the Board.[4] The word "award" must be read as the final determination of the Board.[5] Therefore "interlocutory orders of the Industrial Accident Board are unappealable."[6] "Appellate review of an interlocutory order must await appellate review of the final determination of the Board."[7]

The Supreme Court case cited by Employer is on all fours with these facts. In *Eastburn v. Newark School District*, an employee refused the employer's request to submit to an examination by a physician.[8] After a hearing the Board denied the employer's request. The employer appealed to the Superior Court, which reversed the Board's decision. The Supreme Court reversed because the

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4 *See Eastburn,* 324 A.2d at 776.

5 *See id.*

6 *Id*.

7 *Id.*

8 *Id.*

statutes do not provide for interlocutory appeal 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."[9]

The facts of this case are almost identical to the facts in *Eastburn*. Appellate review of this type of order must await an appeal of the final determination of the Board.

III. CONCLUSION

I conclude that this Court does not have jurisdiction over this interlocutory appeal. Accordingly, Employer's Motion to Dismiss is *GRANTED*.

IT IS SO ORDERED.

Very truly yours,

/s/ Henry duPont Ridgely

cmh
oc: Prothonotary
xc: Order distribution

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9 *Id.*