SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

P.O. Box 746
COURTHOUSE
GEORGETOWN, DE 19947

May 13, 2004

Walter F. Schmittinger, Esquire
Schmittinger and Rodriguez, P.A.
414 South State Street
P.O. Box 497
Dover, DE 19903

John Klusman, Esquire
Tybout, Redfearn & Pell
300 Delaware Avenue, #1110
P.O. Box 2092
Wilmington, DE 19899

RE: Vincent v. Gordy's Lumber Mill
C.A. No. 03A-06-001 ESB

Date Submitted: April 8, 2004

Dear Counsel:

This is my decision on Gordy's Lumber Mill's ("Gordy's") Motion for Reargument of my Order dated March 17, 2004 that decided Jeffrey Vincent's ("Vincent") appeal of the Industrial Accident Board's (the "Board") approval of Gordy's application for a $2,000 credit for Vincent's two missed medical evaluations. Gordy's motion is denied for the reasons stated herein.

1. Vincent was involved in two compensable accidents while employed by Gordy's. Vincent filed a Petition to Determine Additional Compensation for both accidents where he sought permanent partial disability and disfigurement benefits. Gordy's scheduled a medical examination for Vincent with Dr. Robert Arm, a dentist and Department Chief at Wilmington Hospital, for May 6, 2003. Vincent failed to appear for the medical examination on May 6, 2003.

2. Gordy's asked the Board on May 7, 2003 to hold a hearing to address Vincent's failure to appear for the examination on May 6, 2003, to assess a $1,000 "no-show" charge against Vincent for failing to appear, and to compel Vincent to appear for an examination with Dr. Arm on May 20, 2003. Vincent failed to appear for the medical examination on May 20, 2003.

3. The Board held a hearing on May 21, 2003 to address Gordy's request for a credit representing the costs incurred as a result of Vincent's failure to appear for both medical examinations. The Board approved Gordy's application for a $2,000 credit and issued an order compelling Vincent to appear for a medical examination by Dr. Arm on June 17, 2003.

4. Vincent filed an appeal of the Board's decision, challenging Gordy's entitlement to a $2,000 credit for Vincent's failure to attend the two medical examinations. Vincent argued that (1) there was not substantial evidence in the record to justify the $2,000 credit, and (2) he was deprived of due process of law because his counsel had only 11 business hours to discover Vincent's reason for missing the second medical examination. In an Order dated March 17, 2004, I affirmed the Board's decision in part, reversed it in part, and remanded the case to the Board for further proceedings consistent with my Order.[1]

5. In my Order, I recognized the limited appellate review of an administrative agency's decision, but nevertheless found that there was not substantial evidence in the record to support the Board's approval of Gordy's application for the $2,000 credit. The record below reveals that the only evidence presented to the Board regarding the "no-show" charge was Gordy's counsel's statement as to the amount of the charge and the existence of a contract between his law firm and

[1] *Vincent v. Gordy's Lumber Mill*, Del. Super. Ct., C.A. No. 03A-06-001, Bradley, J. (Mar. 17, 2004).

Dr. Arm. I determined that this statement by Gordy's counsel was insufficient evidence to grant Gordy's request because it was unclear whether or not the amount is reasonable under the circumstances. I also found that there was no due process violation as to the first missed medical examination, but there was, however, a violation as to the second missed medical examination.

6. Gordy's has now filed a Motion for Reargument.

7. It is well established in Delaware that "reargument will usually be denied unless it is shown 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."[2]

8. In its motion for reargument, Gordy's claims that my instruction to the Board to consider possible guidelines upon remand to determine the reasonableness of the "no-show" charge, other than counsel's statement as to the amount of the missed examination fee, is misplaced. As an illustration only, I suggested that the Board consider guidelines, typically used to determine whether or not medical expenses are reasonable, to decide whether or not the "no-show" charge is reasonable. Gordy's compares a credit for a missed medical examination with expert testimony and concludes that there is no such requirement to recover fees for expert testimony. In an application to recover fees for expert testimony, Gordy's contends that the Board awards the claimant his medical expert fees, and whatever the claimant paid for those fees is the amount recovered from the employer. The only evidence presented, according to Gordy's, is the contract entered into by the parties, such as an invoice indicating the amount paid for the testimony. Gordy's further suggests that it would be more

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[2] *Citifinancial Mortgage Co. V. Edge*, 2004 WL 692728 (Del. Super. Ct.), at *1, *citing Monsanto Co. v. Aetna Cas. and Sur. Co.*, Del. Super. Ct., C.A. No. 88-JA-118, Mem. Op. at 2, Ridgely, P.J. (Jan. 14, 1994) (quoting *Wilshire Restaurant Group, Inc. v. Ramada, Inc.*, Del. Ch., C.A. No. 11506, Let. Op. at 2, Jacobs, V.C. (Dec. 1990)).

appropriate to compare missed medical examination fees to an application for expert witness fees sought pursuant to Superior Court Civil Rule 54 and 10 *Del. C.* § 8906, than to medical expenses.

9. Gordy's also contends that I failed to address the fact that Vincent has yet to provide a reason for missing the two medical examinations. My Order addressed the due process issue and remanded the case to the Board, where Vincent will have an opportunity to present an excuse as to the second missed examination only. Vincent certainly had no obligation, or an opportunity for that matter, to supplement the record on appeal. Vincent cannot provide any evidence to the Court for consideration that is not already in the record.[3] Any excuse should be presented to the Board upon remand and it is for the Board to decide whether or not Vincent has a satisfactory excuse, thereby relieving his responsibility for the "no-show" charge.

10. There are only a few cases in Delaware that address the issue of credits for "no-show" charges incurred by an employer.[4] 19 *Del. C.* § 2343 requires an employee claiming a compensable injury to submit to a medical examination upon the request of the employer or by order of the Board. If an employee refuses to submit to the medical examination, the employee shall be "deprived of the right to compensation . . . during the continuance of such refusal or obstruction and the period of such refusal or obstruction shall be deducted from the period during which compensation would

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[3]Superior Court Civil Rule 72(a) provides that an appeal sought pursuant to Rule 72 is to heard by the Superior Court "on the record made below." *See also Wilmington Vitamin & Cosmetic Corp. V. Tigue*, 183 A.2d 731 (Del. 1962).

[4]*See Townsends, Inc. v. Turner*, 1997 WL 358659 (Del. Super. Ct.); *Willey v. State*, 1985 WL 189319 (Del. Super. Ct.). These cases are discussed in this Court's earlier decision. *See Vincent v. Gordy's Lumber Mill*, Del. Super. Ct., C.A. No. 03A-06-001, Bradley, J. (Mar. 17, 2004).

otherwise be payable."[5] 19 *Del. C.* § 2320(7) allows the Board upon its own motion, or upon the request of either party, to appoint a disinterested physician to examine the employee. The physician performing the examination is entitled to receive a "*reasonable fee* subject to the approval of the Board, which fee shall be taxed as costs."[6] (Emphasis added). In order to determine the reasonableness of a fee, it is necessary for the Board to consider something more than a mere statement from Gordy's counsel as to the amount of the charge and the existence of a contract between his law firm and Dr. Arm. Further evidence is necessary before such a credit may be granted.

In *Slingwine v. Industrial Accident Board*, 560 A.2d 998 (Del. 1989), the Delaware Supreme Court considered the term "examination" within 19 *Del. C.* § 2343 and found the term to include "all proper medical techniques and tests reasonably necessary to facilitate an educated diagnosis of an injury, but which are not unreasonably invasive."[7] The claimant challenged the reasonableness of the medical tests which were part of the examination and claimed that she should have been afforded an opportunity to present and cross-examine witnesses on the issue of reasonableness.[8] The Court found that "a determination of 'reasonableness' of such medical procedures ordered pursuant to 19 *Del. C.* § 2343 involves a question of fact which should be determined in an evidentiary proceeding."[9] Although the situation in *Slingwine* addresses the reasonableness of the examination

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[5] 19 *Del. C.* § 2343(b).

[6] 19 *Del. C.* § 2320(7)

[7] *Slingwine*, 560 A.2d at 1000.

[8] *Id.*

[9] *Id.* at 1001.

itself and not the cost of the examination, it offers insight into the consideration of "reasonableness" within the Worker's Compensation Act. It emphasizes the need to consider evidence prior to making a determination of reasonableness. In the case at bar, no evidence, other than a statement made by Gordy's counsel, was presented on this issue. Therefore, it is impossible to find that there was substantial evidence in the record to support the Board's finding in this case.

In *Ames v. The Medical Center of Delaware, Inc.*, 1999 WL 458794 (Del. Super. Ct.), this Court considered the Board's determination that the employee's medical expenses were not reasonable. The Board heard testimony by the doctor charging the fee and considered evidence of the amount an insurance carrier would have paid as well as the doctor's invoice.[10] Based on this evidence, the Board found, and this Court agreed, that there was substantial evidence to support the Board's finding that the charges were unreasonable.[11] Once again, before making a determination of reasonableness, the Board considered evidence. No such evidence was presented in this case other than a statement by Gordy's counsel. The record reveals that neither Dr. Arm's invoice nor the contract between Gordy's counsel's law firm and Dr. Arm was submitted into evidence for consideration by the Board. In order to ascertain whether or not $1,000 is a reasonable fee for the missed medical examination, it is necessary to consider more than counsel's mere statement.

11. Whether the analysis of credits for missed medical examinations should parallel that of costs, expert witness fees or medical expenses is not clear. However, I recognized the uncertainty in this area and, as a result, outlined various factors that may be considered in determining the reasonableness of a "no-show" fee. These factors were set forth for illustration purposes only and

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[10] *Ames*, 1999 WL at *3.

[11] *Id.*

are not to be taken as a new legal standard that must be applied. They merely emphasize the Board's responsibility to consider some type of evidence before making such a determination.

12. I find that Gordy's has failed to meet the standard necessary to warrant reargument in this case.

CONCLUSION

Gordy's Motion for Reargument is denied for the reasons stated herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

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cc: Prothonotary's Office
Industrial Accident Board