SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

December 15, 2005

H. Garrett Baker, Esquire
Scott R. Mondell, Esquire
Elzufon, Austin, Reardon Tarlov & Mondell, P.A.
300 Delaware Avenue; 17th Floor
P.O. Box 1630
Wilmington, DE 19899

William D. Fletcher, Jr., Esquire
Craig T. Eliassen, Esquire
Schmittinger & Rodriguez, P.A.
414 S. State Street
P.O. Box 497
Dover, DE 19903

RE: William McDougall v. Air Products & Chemicals, Inc.
C.A. No. 02A-02-008-WCC

Submitted: September 16, 2005
Decided: December 15, 2005

On Air Products & Chemicals, Inc.'s Motion for Reargument. **DENIED**.

Dear Counsel:

Air Products & Chemicals, Inc. ("Air Products") has filed a motion pursuant to Superior Court Civil Rule 59 ("Rule 59") seeking reargument with respect to the opinion issued by this Court on August 31, 2005 (the "Motion"). A motion for reargument is the correct device to allow a court to correct any mistakes, prior to an

appeal, which may have been made.[1] To prevail on a motion for reargument, the proponent must show the Court has "overlooked a controlling precedent or legal principles, or [that] the Court has misapprehended the law or facts such as would affect the outcome of the decision."[2] In reviewing the parties' submissions to this Court and applying the above standard, the Motion is denied.

Background[3]

William McDougall ("Mr. McDougall") was involved in an accident, while he was an employee of Air Products on July 18, 1990 (the "Accident"), resulting in a number of personal injuries. Air Products initially compensated Mr. McDougall for these injuries with a disability amount of $297.21. In May 1994, an action filed by Mr. McDougall in Florida against his neurologist and the emergency room doctors was settled for the amount of $1,065,000.00 (the "Florida Action"). However, after cost and attorney fees were decided, Mr. McDougall received only $580,166.78. In 1995, the Industrial Accident Board (the "Board") determined that the stroke suffered by Mr. McDougall in 1991 was casually related to his Accident, and the Board awarded Mr. McDougall stroke-related medical expenses and lost wages to be paid by Air Products ("1995 Board Decision"). As a result of an additional suit brought by Mr. McDougall, in 2000 this Court found that Air Product's insurance company, National Union & Fire Insurance Company ("National Union"), did not act in bad faith with respect to payments from the 1995 Board Decision, but that National Union did still owe Mr. McDougall *Huffman* damages and attorney fees in the amount of $924,529.02 ("2000 Superior Court Decision").

As a result of the 2000 Superior Court Decision, Air Products petitioned the Board to determine what credit was owed to Air Products pursuant to 19 Del. C. § 2363 ("Section 2363"). On November 16, 2001, the Board determined Air Products was in fact entitled to a credit in the amount of $333,834.04 ("2001 Board Decision"). On January 30, 2002 the Board denied Mr. McDougall's motion for reargument of

---

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

[2] *Id.*; see also, *Murphy v. State Farm Ins. Co.*, 1997 WL 528252 (Del. Super. Ct.).

[3] In the interest of brevity, only pertinent details have been included. For a more inclusive background to this Motion, see the Opinion issued by this Court on August 31, 2005, of which this factual background has been extracted.

the 2001 Board Decision ("2002 Board Decision"). Mr. McDougall filed an appeal to the Superior Court of both the 2001 Board Decision and the 2002 Board Decision. This Court issued its opinion denying his appeal, but modifying the amount of the credit established (the "2005 Superior Court Opinion"). The Motion filed by Air Products, and currently before this Court, seeks reargument solely regarding the modification of the credit amount awarded to Air Products within the 2005 Superior Court Opinion.

Discussion

Air Products is arguing that this Court misapplied Section 2363 in determining the appropriate credit conveyed to Air Products in Section IV(F) of the 2005 Superior Court Opinion. However, Air Products has failed to convince this Court that Section 2363 was misapplied. In fact, this Court took great pains in developing and explaining the conclusion reached, and is confident the approach taken and the credit awarded was done so in the manner both intended under Section 2363 and based on the evidence presented by the parties.

Section 2363 was designed to ensure an injured party is not compensated twice for his injury.[4] The Court's opinion does exactly that. When requesting a credit, the employer has the burden of establishing that the employee has received a double recovery. The Court continues to find that beyond the medical expenses used to calculate the credit in the 2005 Superior Court Opinion, the employer provided no evidence to support such a contention. The simplistic mathematical calculation argued by the employer simply fails to recognize, appreciate or demonstrate the burden that logically flows from the undisputed intent of this statute. The potential damages available in the two litigation forums are simply not identical and to adopt the arguments made by the employer will cause an unsupported and unjustified windfall to that employer. The Court finds it has correctly calculated the Air Products credit.

---

[4]See *Harris v. New Castle County*, 513 A.2d 1307, 1308 (Del. 1986) (citing *Travelers Ins. Co. v. E.I. du Pont de Nemours and Co.*, 9 A.2d 88 (Del. Super. Ct. 1939)).

Conclusion

A motion for reargument is not a tool for parties to simply rehash arguments decided by the court,[5] nor is it a tool to create new avenues of argument.[6] A motion for reargument, pursuant to Rule 59, is only appropriate to allow the opportunity to correct any errors made prior to a costly appeal; absent this, the motion should be denied.[7] The Court is not convinced an error was made here, and as such, the Motion is denied. The Court again asks that counsel perform their responsibility to provide common sense advice as to the appropriateness of continuing this litigation. A decade of litigation in this matter is simply enough.

IT IS SO ORDERED this 15 day of December, 2005.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:

cc: Aimee Bowers, Case Manager

---

[5] *Kovach*, 2001 WL 1198944, at *1.

[6] *Beatty v. Smedley*, 2003 WL 23353491 (Del. Super. Ct.), at *2.

[7] *Id.*