

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHERYL GARGANO,	§	
	§	No. 388, 2012
Appellant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware, in and for
v.	§	Sussex County
	§	
FOOD LION, INC.,	§	C.A. No. S10A-09-004
	§	
Appellee Below,	§	
Appellee.	§	

Submitted: October 24, 2012

Decided: October 31, 2012

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices.

ORDER

This 31st day of October 2012, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Cheryl Gargano, the appellant-below (“Gargano”), appeals from four orders: (1) an Industrial Accident Board (“Board”) order denying a Petition to terminate Gargano’s disability benefits, (2) a Board order denying Gargano’s Motion for Reargument, (3) a Superior Court order partially enlarging the record, and (4) a Superior Court order affirming the Board’s order denying the Petition. On appeal to this Court, Gargano argues that the Board should have increased its award of her attorney’s fees and awarded her vocational witness fees. We **AFFIRM** the Superior Court’s March 13, 2012 order partially enlarging the record,

and its June 19, 2012 order affirming the Board's order denying the Petition to Terminate Benefits. We DISMISS Gargano's appeals from the Board's two orders, because as a procedural matter those appeals are not properly before this Court.

2. In 2000, Gargano suffered a work-related injury and began receiving total disability benefits from her employer, Food Lion, Inc. In February 2009, Food Lion petitioned the Board to terminate Gargano's disability benefits. For the Board hearing, Gargano hired a vocational expert, who was not a medical expert, to rebut Food Lion's expert, who had testified that Gargano was physically able to return to work in certain jobs.

3. On May 4, 2010, the Board denied Food Lion's petition, and awarded Gargano partial attorney's fees of \$6,000.¹ Specifically, the Board concluded that the underlying issues in the case were not novel; that the 61 hours that Gargano's attorney devoted to the case were excessive, given the nature of the administrative proceeding; and that both 19 *Del. C.* § 2320² and the *General Motors Corporation v. Cox*³ factors for determining an appropriate attorney's fee dictated a \$6,000

¹ Order on Pet. to Terminate Benefits, at 25-27 (IAB May 4, 2010).

² 19 *Del. C.* § 2320(10) (providing that the maximum attorney's fee shall not exceed thirty percent of the award or ten times the average weekly wage in Delaware at the time of the award, whichever is smaller).

³ 304 A.2d 55, 57 (Del. 1973).

attorney's fee award.⁴ The Board did not address Gargano's request for vocational witness fees.⁵

4. Gargano moved for reargument, claiming for the first time that Food Lion had engaged in bad faith in prosecuting an earlier (2008) petition to terminate Gargano's disability benefits. Gargano asserted that under 19 *Del C.* § 2320(8),⁶ a determination of Food Lion's bad faith would justify an award of her vocational witness fees. Gargano also moved the Board to increase its attorney's fee award. On August 12, 2010, the Board denied Gargano's motion, holding that Food Lion's conduct in 2008 was irrelevant, and, moreover, that Food Lion had not engaged in egregious or bad faith conduct during the earlier (2008) proceeding.⁷

5. After Gargano appealed to the Superior Court, neither party submitted a complete record of the Board's proceedings to that court. Accordingly, on March 13, 2012, in ruling on Gargano's Motion to Enlarge the Record, the Superior Court

⁴ Order on Pet. to Terminate Benefits, at 27.

⁵ *Id.*

⁶ 19 *Del. C.* § 2320(8) states that “[w]itness fees and mileage shall be computed at the rate allowed to witnesses in the Superior Court. Costs legally incurred may be taxed against either party or apportioned between parties at the sound discretion of the Board, as the justice of the case may require.”

⁷ Order on Mot. for Reargument, at 2, 4 (IAB Aug. 12, 2010).

“assume[d], for the purposes of its decision, that [some] omitted documents [were] a part of the record.”⁸

6. By order dated June 19, 2012, the Superior Court held that Gargano’s arguments about Food Lion’s bad faith were irrelevant and had been abandoned.⁹ The Superior Court concluded that the Board had properly applied the *Cox* factors in awarding a \$6,000 attorney’s fee, because (a) the Board had based its award on earlier similar awards, and (b) Gargano had not distinguished the \$6,000 fee awarded from the fees awarded in those other cases.¹⁰

7. Regarding vocational witness fees, the Superior Court held that because there was no statutory authorization, Gargano was not entitled to an award for vocational witness fees as a matter of right.¹¹ The court acknowledged, however, that the Board had the power to award vocational witness fees either in its discretion under *Izquierdo v. City of Wilmington*,¹² or by statute “as justice of the case may require.”¹³ Such an award, however, requires the losing party to have

⁸ Order on Mot. to Enlarge Record, at 5-6 (Del. Super. Ct. Mar. 13, 2012).

⁹ Order on Appeal, at 2 (Del. Super. Ct. June 19, 2012).

¹⁰ *Id.* at 4, 15-17.

¹¹ *Id.* at 14.

¹² *Izquierdo v. City of Wilmington*, Hearing No. 1297701, at 2-4 (IAB Mar. 29, 2010).

¹³ Order on Appeal, at 13 & n.30, 14-15 (Del. Super. Ct. June 19, 2012) (citing 19 *Del. C.* § 2320(8)).

engaged in egregious fraud or to have acted in bad faith.¹⁴ Because Gargano had abandoned her bad faith argument, and because the Board found that Food Lion had not engaged in bad faith, the court concluded that an award for vocational witness fees would be inappropriate.¹⁵

8. Gargano appeals to this Court from all Board and Superior Court orders. The only issues are whether the Board erred in awarding to Gargano some (but not the statutory maximum) attorney's fees, and in declining to award any vocational witness fees. Gargano also asks this Court to award her the attorney's fees she incurred in prosecuting this appeal.

9. This Court reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by directly examining the decision of the agency.¹⁶ We review the agency's decision to determine if the decision is supported by substantial evidence and free from legal error.¹⁷ Absent an error of law or fact, we review an administrative agency's decision for abuse of discretion.¹⁸ We also review a Board decision to award attorney's fees for abuse of

¹⁴ *Id.* (citing *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 545 (Del. 1998)).

¹⁵ *Id.*

¹⁶ *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 380-81 (Del. 1999).

¹⁷ *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981); *UIAB v. Duncan*, 337 A.2d 308, 308-09 (Del. 1975).

¹⁸ *Person-Gaines v. Pepco Hldgs., Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

discretion.¹⁹ An agency abuses its discretion if its decision exceeds the bounds of reason in view of the circumstances.²⁰

10. We conclude that the Board did not err in applying the *Cox* factors, or abuse its discretion in awarding only a portion of the requested attorney's fee to Gargano. Nor did the Board and the Superior Court err in declining to award vocational witness fees to Gargano. In the absence of a formal motion before the appropriate court, we will not address Gargano's request for attorney's fees for pursuing this appeal.

NOW, THEREFORE, IT IS ORDERED that the orders of the Superior Court dated March 13, 2012 and June 19, 2012 are **AFFIRMED**. The appeals from the Board's two orders are **DISMISSED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

¹⁹ *Scheers v. Indep. Newspapers*, 832 A.2d 1244, 1248 (Del. 2003).

²⁰ *Person-Gaines*, 981 A.2d at 1161 (quotation omitted).