IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JUDITH D'ORAZIO	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: N13C-07-075 WCC
	)	
HOME DEPOT, INC., a Domestic CORPORATION, and SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., a Foreign Corporation	)	ARBITRATION MATTER TRIAL BY JURY OF TWELVE DEMANDED
	)	
Defendants.	)	

Submitted: February 19, 2014
Decided: June 4, 2014

On Defendants' Motion for Summary Judgment
GRANTED IN PART - DENIED IN PART

OPINION

Michael R. Ippoliti, Esquire. Law Office of Michael R. Ippoliti. 1225 King Street, Suite 900, Wilmington, DE 19801. Attorney for Plaintiff.

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CARPENTER, J.

Before this Court is Defendants' joint Motion for Summary Judgment. Defendants' Motion argues that, even accepting as true all allegations set forth in the Complaint, Plaintiff has failed to set forth facts from which this Court may rule in Plaintiff's favor. The Court finds that the undisputed material facts do not support Plaintiff's claim for liability pursuant to *Huffman v. C.C. Oliphant & Son, Inc.*[1] for the payments Defendants made on September 8, 2008, for permanent impairment and attorney's fees. However, the Court finds that there is a sufficient factual predicate to prevent the Court from granting summary judgment on Plaintiff's claim arising out of the payment made on November 19, 2008, for Plaintiff's expert witness fees. Accordingly, the Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART**.

BACKGROUND

On November 20, 2002, Plaintiff sustained an industrial injury while in the employ of Defendant, Home Depot, Inc., who was insured by Defendant, Sedgwick Claims Management Services, Inc. The claim and injury were voluntarily accepted as compensable and Plaintiff began receiving disability benefits and payment for medical expenses from Defendants. On or about August 7, 2007, Plaintiff filed a Petition to Determine Additional Compensation

[1] 432 A.2d 1207 (Del. 1981).

Due (the "Petition") with the Delaware Industrial Accident Board (the "Board"). In the Petition, Plaintiff alleged that she suffered from 24% permanent impairment to her cervical spine and 5% permanent impairment to her upper left extremity. With her Petition, Plaintiff also sought reimbursement for attorney's fees and expert witness fees, should the Petition proceed to a hearing.

Defendants opposed the Petition and a hearing was held before the Board on March 11, 2008. Thereafter, on July 3, 2008, the Board issued its decision on Plaintiff's Petition awarding Plaintiff $20,959.80 for 20% permanent impairment to her cervical spine and attorney's fees, in the amount of $6,287.94. The Board also ordered reimbursement of Plaintiff's expert witness fees, once such amounts were submitted to Defendants for payment. Defendants did not appeal the Board's decision.

On July 15, 2008, Plaintiff demanded payment of the permanent impairment and attorney's fees awarded by the Board pursuant to *Huffman v. C.C. Oliphant & Son, Inc.*[2] (referred to throughout as a "*Huffman* demand"). Hearing nothing from Defendants, Plaintiff issued a second *Huffman* demand on August 29, 2008. Thereafter, on September 8, 2008, Plaintiff received payment from Defendants for the permanent impairment and attorney's fee awards.

[2] *Id.*

In compliance with the Board decision, Plaintiff submitted to Defendants documents evidencing the amount of Plaintiff's expert witness fees, along with a *Huffman* demand for payment of such, on September 24, 2008. Hearing nothing from Defendants, Plaintiff submitted a second *Huffman* demand for payment of the expert witness fees on November 12, 2008. Thereafter, on November 19, 2008, Defendants tendered to Plaintiff the requested expert witness fees.

Believing that the above referenced tenders by Defendants on September 8, 2008 and November 19, 2008, were untimely under the law, Plaintiff brought this *Huffman* action on July 8, 2013. After answering the Complaint, Defendants filed the current Motion and a hearing was held before this Court on February 19, 2014. This is the Court's decision on Defendants' Motion for Summary Judgment.

STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.[3] Specifically, the moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.[4] Further, the Court must view all factual inferences in a light most favorable to the non-moving

[3] Super. Ct. Civ. R. 56(c); *Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[4] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

party.[5] Therefore, summary judgment will not be granted if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.[6]

DISCUSSION

The Complaint requests *Huffman* liability arising out of two allegedly untimely payments made by Defendants: (I) payments for permanent impairment and attorney's fees tendered on September 8, 2008 and (II) payment for expert witness fees tendered on November 19, 2008. Since the payments are subject to two different timelines and Defendants are pursuing summary judgment under two distinct legal theories, the payments will be addressed separately.

I. Permanent Impairment and Attorney's Fees

Defendants argue that they are entitled to judgment as a matter of law, contending that a "grace period" granted to liable employers extended Defendant's due date for payments and, under such extension, the payment was timely. Plaintiff counters that the "grace period" runs concurrently, not consecutively, with the time for payment and, thus, the payment was untimely.

[5] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[6] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

In *Huffman,* the Delaware Supreme Court allowed amounts due under a Board award to be collected pursuant to the Wage Payment and Collection Act[7] "thereby broadening the remedies available to a claimant whose payments are wrongfully withheld."[8] The Court, in *Huffman*, held that:

> The Legislature has expressly provided, in 19 *Del. C.* § 2357, that, "If default is made by the employer for 30 days after demand in the payment of any amount due under this chapter, the amount may be recovered in the same manner as claims for wages are collectible." Wage claims are covered by Title 19, Chapter 11 of the Delaware Code. Thus, pursuant to § 2357, an employee with a claim based on the employer's alleged failure to pay compensation due after proper demand has been made may elect to pursue an action under Chapter 11.[9]

19 *Del. C.* § 1103(b) states that an employer without any reasonable grounds for dispute, who fails to pay an employee wages is "liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller."[10] Under 19 *Del. C.* § 1113(a), "[a] civil action to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction."[11] Moreover, under 19 *Del. C.* § 1113(c), "[a]ny judgment

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[7] 19 *Del. C.* § 1101 *et seq.*
[8] *Konkiel v. Wilm. Country Club*, 2004 WL 1543250, at *8 (Del. Super. July 6, 2004).
[9] *Huffman*, 432 A.2d at 1210.
[10] 19 *Del. C.* § 1103 (b).
[11] 19 *Del. C.* § 1113(a).

entered for a plaintiff in an action brought under this section shall include an award for the costs of the action, the necessary costs of prosecution and reasonable attorneys' fees, all to be paid by the defendant."[12]

Accordingly, a claimant in a *Huffman* action

> is entitled to liquidated damages under 19 *Del. C.* § 2357 for failure of an employer to pay a workers' compensation award only after the claimant/employee can prove the following elements: (1) the award has becomes "due," i.e., the Board has held that the employee is entitled to workers' compensation benefits; 2) the employee has made a proper demand for payment to the employer; and 3) the employer has failed to pay the amount due within thirty days after the demand.[13]

As to the first element, the Court must determine when the award became "due." 19 *Del. C.* § 2349 provides: "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 . . . ."[14] However, the statute, in Section 2362 also states: "Following an award by the Board, the first payment of compensation shall be paid by the employer or its insurance carrier no later than 14 days after the award becomes final and binding."[15] The Court is tasked with determining whether the 14-day "grace period" runs concurrently, or

[12] 19 *Del. C.* § 1113(c).
[13] *Konkiel v. Wilm. Country Club*, 2004 WL 1543250, at *9 (internal citations omitted).
[14] 19 *Del. C.* § 2349.
[15] 19 *Del. C.* § 2362.

consecutively, with the appeal period. Stated another way the Court must determine whether payment is "due" once the Board decision is final or 14 days later.

In *Yoder v. Delmarva Warehouse, Inc.*,[16] this Court, when faced with the then-seven-day "grace period" held that such extended the deadline by which an employer had to pay benefits. The court in *Yoder* stated: "the Board's decision became final and the section 2357 default period began to run seven (7) days after the expiration of the appeal period to Supreme Court."[17] The court supported this conclusion by pointing to a prior decision in this Court, *Cunningham v. Acro Extrusion Corp.*,[18] which stated that "Rule 20(B) grants the employer time to determine whether an appeal will be taken and if one is not, requires the employer to pay no later than seven (7) days after the expiration of the appeal period."[19] Accordingly, this Court, in *Cunningham*, held that "the default period starts seven (7) days after the expiration of the appeal period."[20] Although the Delaware Supreme Court later reversed this Court's decision in *Cunningham*, the court did

[16] 2001 WL 337233 (Del. Super. Mar. 30, 2001).
[17] *Id.* at *2.
[18] 790 A.2d 507 (Del. Super. 2001).
[19] *Id.* at 512.
[20] *Yoder*, 2001 WL 337233, at *2.

so while noting that "[t]he Superior Court correctly combined the thirty day appeal period with the additional seven days imposed by Board rule."[21]

Similarly, the Delaware Supreme Court, found that the "grace period" for payment of compensation under a written agreement extended the time for when payment was "due." The court, in *Ramirez v. Murdick*,[22] stated:

> Section 2362(c) of Title 19 defines when an amount is due to be paid after a settlement agreement. Under this provision, "payment of compensation shall commence *within 14 days* of the date of that agreement." There is nothing ambiguous about when payment is due under this provision. Because the settlement agreement between the parties was made on February 8, the statute required that payment be made within fourteen days of that agreement.[23]

As with the statute in *Ramirez*, there is nothing ambiguous about when payment is "due" under 19 *Del. C.* § 2362: "the first payment of compensation shall be paid by the employer or its insurance carrier no later than 14 days after the award becomes final and binding."[24] The Board award became final 30 days after issuance on August 3, 2008.[25] Once the decision was final, Defendants were given a "grace period" until August 16, 2008 to begin payment. Until the 14-day "grace

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[21] *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 348 (Del. 2002).
[22] 948 A.2d 395 (Del. 2008), *aff'g*, 2007 WL 417117, at *1 (Del. Super. Nov. 27, 2007).
[23] *Id.* at 398 (internal citations omitted) (stating that "default occurred on February 23, the 15th day after the date of the agreement[.]").
[24] 19 *Del. C.* § 2362.
[25] 19 *Del. C.* § 2349 ("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 . . . .").

period" ended, Defendants were not in default under the statute. Therefore, the *Huffman* time frame went into effect on August 16, 2008, therefore, giving Defendants until September 16, 2008 to make payment. Payment made on September 8, 2008 was timely.

II. Expert Witness Fees

Plaintiff's Complaint also requests damages arising out of Defendants' payment for expert witness fees tendered on November 19, 2008, arguing that such was untimely under *Huffman*. Defendants request summary judgment arguing that such payment was timely because, by issuing a second *Huffman* demand, Plaintiff waived their original *Huffman* demand and granted Defendants another 30 days following the second demand to make payment. Thus, Defendants contend, since payment was made within the 30-day period following the second demand, such was timely. Plaintiff counters that the first *Huffman* demand controls the time for payment and the second demand does not extend such. Under Plaintiff's analysis, the payment, made after the initial 30-day window, was untimely.

Plaintiff requested expert fees from Defendant on September 24, 2008, attaching a *Huffman* demand. For the purposes of this Motion, the parties agree that the request required payment of the fees by October 8, 2008. However, that

date came and went and Plaintiff issued another *Huffman* demand on November 12, 2008. Payment was made thereafter on November 19, 2008. Plaintiff argues that the November 19, 2008 payment was late because it was after the original deadline of October 8, 2008, established by the first *Huffman* demand. Defendants argue that, by issuing the second *Huffman* demand, Plaintiff waived the October 8, 2008 date and extended the deadline by which Defendant had to pay until December 12, 2008. Thus, Defendant argues, payment was early, rather than late.

This argument has been analyzed in this Court with conflicting results.[26] In *Konkiel v. Wilmington Country Club*,[27] when presented with "several demands for payment" made by Plaintiff's counsel without any response from Defendant within the *Huffman* period, this Court found that

> Plaintiff's first demand letter sufficed for purposes of the demand notice requirement of § 2357, and Defendant's failure to timely respond by paying the maximum attorney fee award pursuant to the Board's decision, culminated in "wrongful" conduct, subjecting it to penalties and damages under *Huffman* and the Delaware Wage and Collection Act.[28]

[26] *Contrast Konkiel v. Wilm. Country Club*, 2004 WL 1543250, *with Shortridge v. Del. Hospice*, 2009 WL 2219283 (Del. Super. June 18, 2009), *aff'd on other grounds*, 984 A.2d 124 (Del. 2009).
[27] 2004 WL 1543250.
[28] *Id.* at *12.

Conversely, in *Shortridge v. Delaware Hospice*,[29] this Court found that a second *Huffman* demand extended the timeline for payment. The court stated:

> the problem in this case for Plaintiff is that whatever merit Plaintiff may have arising from the May 22, 2008 correspondence was waived when the Plaintiff on August 11, 2008 stated that they were making a demand in accordance with statute and case law for the payment of the expert fees. By making this demand on August 11, 2008, and referring to the relevant case law and statutes, the Plaintiff basically gave the Defendant another thirty (30) day window in which to make the payment.[30]

Unfortunately, on appeal, the Delaware Supreme Court declined to address this Court's waiver holding and affirmed the decision on alternative grounds stating: "We have not applied the concept of waiver in this context nor is it necessary to do so. This is because no demand was made by Shortridge or her counsel."[31]

Waiver is the intentional relinquishment of a known right.[32] "The intent to relinquish the right may be demonstrated by words or by conduct that clearly gives rise to an inference to that effect."[33] The Court must determine whether, by sending a second *Huffman* demand, Plaintiff intentionally waived her known right to immediately sue Defendants through a *Huffman* action. This Court finds that Plaintiff did not.

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[29] 2009 WL 2219283 (Del. Super. June 18, 2009), *aff'd on other grounds*, 984 A.2d 124 (Del. 2009).
[30] *Id.* at *1.
[31] *Shortridge v. Del. Hospice*, 984 A.2d 124 (Del. 2009).
[32] *Hanson v. Fidelity Mut. Ben. Corp.*, 13 A.2d 456, 459 (Del. Super. 1940); *Klein v. Am. Luggage Works, Inc.*, 158 A.2d 814, 818 (Del. 1960).
[33] *MacDonald v. Smalls Ins. Co.*, 2000 WL 1611093, at *4 (Del. Super. Aug. 7, 2000).

Unlike in *Shortridge*, the first demand made by Plaintiff was sufficient to invoke *Huffman*. Like the demand in *Konkiel*, Plaintiff's first demand letter sufficed for purposes of the demand notice requirement and Defendants' failure to timely respond by paying the expert witness fees, culminated in "wrongful" conduct, subjecting it to potential penalties and damages under *Huffman* and the Delaware Wage and Collection Act.[34] Thus, it appears that the *Huffman* period began on September 24, 2008 and expired on October 8, 2008. Plaintiff's follow-up letter on November 19, 2008 was merely a reminder that the payment was outstanding and further *Huffman* penalties would be incurred if prompt payment was not made.

If the Court were to hold otherwise, it would be effectively blessing the inaction of Defendants and would be sending the message that such is acceptable to this Court. The Court finds it would be unfair and inappropriate for an employer to ignore *Huffman* demands and, when follow-up requests are sent, reap the benefits of an additional 30 days to make payment. Plaintiff's issuance of a follow-up reminder that payment is outstanding does not negate her right to bring an action for *Huffman* liability arising from the payment in default. Accordingly,

[34] *Konkiel*, 2009 WL 2219283, *12.

the Court is unable to grant summary judgment on this claim as requested by Defendants.

As a final note, the Court has used the date agreed to by the parties of October 8, 2008, for when the *Huffman* demand began to run. It does, however, have questions if this is correct. It appears the actual cost of the expert witness was unavailable to the Board at the time they awarded benefits and the Board decision simply indicated that the expert witness fee was to be reimbursed. It appears that September 24, 2008 was the first time Plaintiff actually provided a dollar figure for expert fees to the Defendants and, instead of simply requesting payment, they added a *Huffman* demand to their calculations. The Court questions whether the Defendants had a reasonable period of time to consider the appropriateness of that amount and what recourse, if any, did they have if they found the fee to be excessive. If they had recourse to address this issue with the Board, should that time frame be included to determine the *Huffman* deadline? To some degree this action has a feeling of "I got you" litigation and is not the type of misconduct attempted to be addressed by the *Huffman* decision. However, at this juncture, the Court need not address this concern but simply raises it for consideration by the Plaintiff as to whether fairness would dictate a reasonable, realistic resolution of this dispute.

CONCLUSION

Therefore, for the aforementioned reasons, Defendants' Motion for Summary Judgment is hereby **GRANTED IN PART**, as to the permanent impairment and attorney's fees and **DENIED IN PART**, as to the expert witness fees.

IT IS SO ORDERED.

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