IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

KYLE-HARRIGAN FERRO and ALLSERVE, LLC	)	
Appellants,	)	
v.	)	C.A. No. S13A-02-004 RFS,
	)	C.A. No. S14A-02-001 RFS,
CRISANTO HERNANDEZ,	)	C.A. No. S14A-05-002 RFS
Appellant.	)	

MEMORANDUM OPINION

Upon Appellants' Appeals from Decisions Rendered by the Industrial Accident Board. Affirmed.

Dates Submitted: May 21, 2014, July 3, 2014
Date Decided: August 28, 2014

Blake W. Carey, Esq., The Smith Firm, LLC, 34634 Bay Crossing Boulevard, Suite A, Lewes, DE 19958, Attorney for Appellants

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STOKES, J.

Before the Court are the appeals of Respondents-below Kyle Harrigan-Ferro ("Harrigan-Ferro") and Allserve, LLC ("Allserve") (collectively "Respondents") of decisions rendered by the Industrial Accident Board (the "Board") regarding benefits awarded to Claimant-below Crisanto Hernandez ("Hernandez"). In their first appeal (C.A. No. S13A-02-004 RFS), Respondents seek reversal of the Board's decisions dated December 19, 2012, January 9, 2013, January 10, 2013, and January 25, 2013. In their second appeal (C.A. No. S14A-02-001 RFS), Respondents seek reversal of the Board's decision rendered on January 8, 2014. In their third appeal (C.A. No. S14A-05-002 RFS), Respondents seek reversal of the Board's decision dated April 7, 2014. The Court permitted consolidated briefing for all of these appeals, as they relate to the same underlying arguments. For the reasons stated below, the Board's decisions on all of these matters are **AFFIRMED**.

FACTS & PROCEDURAL BACKGROUND

On August 17, 2012, Hernandez fell from the roof of Gerar Place, a four-story building located in Rehoboth Beach, Delaware. He was working as a roofer. Among other injuries, he sustained a complex fracture of the right leg which required surgery. The parties do not dispute that his injuries stemmed from his fall.

On August 22, 2012, Hernandez filed a petition for compensation due with the Board against Harrigan-Ferro and/or Allserve, seeking workers' compensation

benefits. He also sought a bond hearing because Respondents did not carry workers' compensation insurance at the time. The Board scheduled a hearing on the merits for January 17, 2013.

Hernandez's employment relationship with Respondents is the pivotal issue in this case. Respondents assert that Harrigan-Ferro was not Hernandez's employer in any "way, shape, or form."[1] Nor was Hernandez an employee of Allserve. Rather, Respondents' position is that Hernandez was an independent contractor or sub-contractor of Allserve.

Hernandez later amended his portion of the pretrial memorandum to assert that Allserve was not a valid entity under Delaware law because it failed to produce any Limited Liability Company ("LLC") agreement or bylaws. Hernandez claimed that Allserve had no independent existence apart from its sole owner, Harrigan-Ferro. Thus, Allserve should be considered Harrigan-Ferro's alter ego. Hernandez claimed that, in the alternative, he was employed by Allserve and Harrigan-Ferro jointly. In the further alternative, he claimed that the Board should pierce Allserve's corporate veil and hold Harrigan-Ferro personally liable for Hernandez's injury because Allserve, an entity for which neither itself nor its subcontractors carried workers' compensation insurance, was undercapitalized and had no records of capital

[1] Opening Br. at 1.

contributions, except for a one-time contribution of $10,000 by Harrigan-Ferro.

On October 5, 2012, Hernandez filed a request for production, directing Respondents to respond to thirty-two individual requests. On October 26, 2012, Respondents submitted their replies, stating that their answers were provided without waiver of any objections which could be raised thereafter. In one response, Respondents explicitly disavowed that Hernandez was an employee of Allserve, asserting that he was instead an independent contractor or subcontractor of Allserve.

On November 14, 2012, Hernandez filed a motion to compel with the Board seeking an order compelling complete responses. Hernandez noted that of the thirty-two responses submitted to him, fourteen either declared that no response was available, or that a response would be supplied. On November 19, 2012, Hernandez filed another motion to compel with the Board seeking an order requiring Respondents to provide their portion of the pretrial memorandum.

On November 28, 2012, the Board ordered Respondents to complete, serve, and file their portion of the pretrial memorandum by November 30, 2012, and extended Hernandez's 30-day deadline for identifying documents and witnesses to December 31, 2012. The Board further stated that any defenses that Respondents failed to raise in the memorandum would be barred from consideration at the hearing on the merits. Also on November 28th, the Board ordered Respondents to provide

complete responses to Hernandez's requests for production by November 30th, and further stated that Respondents would be barred from asserting at the hearing on the merits any defenses for which they failed to provide complete responses by November 30th. The Board kept Hernandez's 30-day deadline in place for identification purposes and for amending his portion of the pretrial memorandum.

Respondents provided their supplemental responses on November 30th, noting that all responses were provided without waiver of any objections which may be raised throughout the proceedings. Respondents provided nine supplemented responses. As to evidence of workers' compensation insurance from any other alleged employer of Hernandez, Respondents replied that they had none. Regarding records of payment that Respondents paid to any laborers working on Gerar Place, whether employees or not, Respondents replied that they had none. As to the personnel file of Hernandez's supervisor, Wanderson "Brasil" Nogeria ("Nogeria"), Respondents wrote "please see attached."[2] Regarding any records indicating the information relating to any employees or other witnesses during the relevant time, Respondents provided the names Jami Ferro and James Warren.[3] As to Respondents'

[2] In his reply to these responses on December 11, 2012, Hernandez wrote "Is there no personnel file for Wanderson Nogeria?" App. to Opening Br. at A000270.

[3] In his reply, Hernandez asked who was James Warren and what relevant knowledge he had. Hernandez also asked for the names of other persons who were working on Gerar Place at the time of Hernandez's injury.

payroll ledgers and work time records for all employees that they admitted employing during the relevant time period, Respondents replied that they had none. Regarding the documents identifying each owner of any business entity, Respondents replied that there were none, but that Harrigan-Ferro was the sole member of Allserve. As to all documents regarding capital contributions of each owner of any business entity, Respondents replied that there were none, but that Harrigan-Ferro contributed $10,000 to start up Allserve.

In his response on December 11, 2012, Hernandez stated that certain things from Respondents' submission were missing or needed further clarification. For example, Hernandez inquired as to how there could be no records of payments made by Respondents to any laborers working on Gerar Place. Hernandez also noted that Respondents never provided proof of a workers' compensation policy, nor stated that none existed. Additionally, he noted that no LLC agreement, bylaws, or other documents establishing the nature of the entity had been received, nor had Respondents stated that none existed. All Hernandez had received were documents showing that Allserve had registered with the Secretary of the State of Delaware and obtained a business license. Hernandez reminded Respondents that the hearing on the merits was thirty-seven days away, and that he would have no choice but to file another motion to compel with the Board.

On December 19, 2012, the Board ordered Respondents to, *inter alia*, either provide Allserve's LLC agreement or bylaws or state that there was no such evidence to be produced by December 28, 2012. The Board also barred Respondents from, *inter alia*, contesting the average weekly wage and compensation rate alleged by Hernandez due to their failure to produce any payment records to other laborers at Gerar Place. The Board concluded its order with the dictate that, in the event the Respondents did not provide discovery which had been twice-ordered by the Board, the Board would enter default judgment against *both* Respondents as to their liability, and tailor the hearing on the merits to only the issue of the amount of benefits due.

On January 3, 2013, Hernandez filed a motion for default judgment with the Board, stating that Respondents had produced nothing. On January 4, 2013, Respondents submitted their response to the Board. They first stated that Harrigan-Farro denied any employment relationship between Hernandez and himself, and that only a sub-contracting relationship existed between Hernandez and Allserve. Regarding Allserve's LLC agreement or bylaws, Respondents claimed that none existed. However, they claimed that documents previously provided by them indicated the existence of a valid LLC, and that oral testimony of witnesses at the forthcoming trial would demonstrate the employment relationships of all the parties. Further, they argued that even if the Board granted default judgment for Hernandez

and denied Harrigan-Ferro's concomitantly-filed motion to dismiss, discussed below, Harrigan-Ferro should still be afforded an opportunity to provide oral testimony as to his lack of personal liability due to the lack of record evidence establishing a relationship between Hernandez and him, and the judicial policy of hearing matters on their merits. Respondents also added that they provided Hernandez with a statement of Harrigan-Ferro's assets and liabilities, but objected to the request nonetheless as being irrelevant because first, no judgment had been rendered against Harrigan-Ferro; second, their other responses provided enough information to evaluate the actions of Allserve regarding its makeup, assets, and liabilities; and third, the information was not linked to Harrigan-Ferro's personal liability.

With their response, Harrigan-Ferro personally filed a motion to dismiss Hernandez's petition for lack of subject matter jurisdiction. In this motion, Harrigan-Ferro reiterated his contention that no employment relationship existed between Hernandez and him. Harrigan-Ferro claimed that since the inception of Hernandez's action, Hernandez knew of Allserve's existence, as he named Allserve in his original petition for compensation due. Harrigan-Ferro also noted Hernandez's attempt to set aside Allserve's corporate form, and asserted that the Board should dismiss Hernandez's action because the ability to pierce the corporate veil lies exclusively with the Delaware Court of Chancery.

On January 9, 2013, the Board held a hearing on Hernandez's motion for default judgment and Harrigan-Ferro's motion to dismiss. In its written opinion, also dated January 9th, the Board stated that Respondents did not produce the additional discovery by the December 28th deadline, in violation of the Board's December 19th order, having previously not complied with the Board's November 28th order. Therefore, the Board entered default judgment against Respondents jointly and severally on Hernandez's petition for compensation due, restricting the forthcoming January 17th hearing solely to the issue of Hernandez's damages or benefits. The Board barred Respondents from presenting any defenses as to liability. Further, the Board declared that because of Respondents' failure to comply with its prior orders to produce payment records made to other laborers who worked on the roof at Gerar Place during the relevant time, then it would set the average weekly wage at $1,000 per week and a compensation rate of $666.67 per week, as alleged by Hernandez, and would bar Respondents from contesting these figures.

On January 10, 2013, the Board rendered its decision on Harrigan-Ferro's motion to dismiss. It noted Harrigan-Ferro's argument that no employment relationship existed between Hernandez and Harrigan-Ferro, and that, by naming Harrigan-Ferro, Hernandez was attempting to pierce Allserve's corporate veil. Hernandez countered that the Board could find Harrigan-Ferro and Allserve jointly

liable without discarding the corporate form because the Board had entered default judgment against Respondents jointly for failing to comply with discovery orders. The Board ultimately denied Harrigan-Ferro's motion because Allserve and Harrigan-Ferro failed to establish via discovery that Allserve was a valid LLC. Thus, whether the Board could have set aside Allserve's corporate form was irrelevant because Respondents, by failing to comply with their discovery obligations, had failed to prove Allserve was a valid entity.

On January 15, 2013, Respondents filed a motion to vacate the Board's January 9th decision granting default judgment. They argued that the standards for entering default judgment were not specified in the Board's rules. However, Delaware courts have delineated factors to be considered in granting default judgment (*e.g.*, excusable neglect, a meritorious defense, and substantial prejudice resulting to the party moving for summary judgment). As to excusable neglect, Harrigan-Ferro attached an affidavit describing a series of personal crises he experienced in late 2012, which are described below. As to a meritorious defense, Respondents reiterated their argument that Harrigan-Ferro was not personally liable for Hernandez's injury because Hernandez was not Harrigan-Ferro's employee. Further, Harrigan-Ferro had never actually met Hernandez. As to substantial prejudice resulting to Hernandez, Respondents stated that their motion to vacate was timely and that Hernandez had all

discovery responses in Harrigan-Ferro's possession and upon which Harrigan-Ferro would rely at the January 17th hearing. Additionally, they claimed that Hernandez knew of Harrigan-Ferro's defense since the beginning of Hernandez's action.

In his attached affidavit, Harrigan-Ferro stated that he was the owner and operator of Allserve, under which he conducted his business. He also reiterated that he had never personally met or seen Hernandez, and that Hernandez was hired by Allserve as a subcontractor to perform work which Harrigan-Ferro was not personally obligated to perform.[4] Harrigan-Ferro then outlined the reasons why he was dilatory in responding to Hernandez's discovery requests. He claimed that in early October 2012, some of Allserve's files were inadvertently lost or destroyed due to an accidental mishap with another tenant at the storage facility where the documents were located. In late November 2012, Harrigan-Ferro's grandfather passed away and his father, an alcoholic who had been in recovery for fifteen years, relapsed. In December 2012, Harrigan-Ferro's daughter suffered a seizure causing her to be hospitalized and closely monitored. Lastly, later the same month, Harrigan-Ferro left for a vacation that had been planned for over a year.

On January 17, 2013, the Board conducted a hearing on Hernandez's petition

[4] These are somewhat remarkable positions, as Harrigan-Ferro was the sole player in Allserve.

to determine compensation due, which was restricted solely to the issue of damages or benefits due, without any presentation of Respondents' defenses and without dispute as to the compensable rate. Ultimately, the Board granted the petition.

In its written opinion dated January 25, 2013, the Board began by stating that Hernandez was injured in an industrial accident while employed by Harrigan-Ferro and Allserve, and that Respondents acknowledged Hernandez's injuries, but had not paid any workers' compensation benefits and did not carry any workers' compensation insurance. The Board also noted its prior orders regarding discovery, stating that Respondents had not objected to the wording in the Board's December 19th order indicating that noncompliance would result in a default judgment.

Due to the Board's prior rulings, the parties agreed that no witnesses needed to be presented at the hearing. The only issues before the Board were the amounts of Hernandez's medical expenses and his compensation rate for total disability benefits. Hernandez presented an exhibit establishing that his medical expenses up to that point totaled $80,609. Respondents did not present any evidence as to Hernandez's medical expenses. Because of its grant of default judgment, and Hernandez's evidence of his medical expenses, the Board held that Hernandez's medical expenses were compensable and that he was entitled to payment of those expenses in the amount of $80,609.

Regarding the compensation rate, the Board turned to its January 9th ruling in which it set the average weekly wage at $1,000 per week and a compensation rate of $666.67 per week. Respondents did not present any evidence as to the compensation rate. Based on its prior ruling, the Board found that Hernandez earned $1,000 per week while employed by Respondents and that he was entitled to ongoing disability benefits at the rate of $666.67 per week. The Board also held that, under 19 *Del. C.* § 2320 and in consideration of the requisite factors, Hernandez was entitled to reasonable attorneys' fees.

With their January 15th motion to vacate still pending before the Board, Respondents filed an appeal in this Court on February 23, 2013. Respondents appealed the Board's rulings of December 19, 2012, and January 9, 10, and 25, 2013. They claimed that the Board erred as a matter of law in each ruling and that each ruling was not supported by substantial evidence.

On March 1, 2013, Hernandez filed in this Court a motion to dismiss Respondents' appeal. He claimed that, as Respondents' motion to vacate was still pending before the Board, Respondents should not be allowed to simultaneously appeal the Board's decisions to this Court. They should be able to pursue their appeal in this Court *or* pursue their motion to vacate below, but not both. Nor should they be allowed to keep their appeal active, and then, upon a negative decision by the

Board, file an additional appeal to this Court. These tactics, Hernandez claimed, would prejudice him, as he was totally disabled with his expenses growing.

On March 11, 2013, Respondents replied to Hernandez's motion to dismiss. Not only did they reiterate their prior contentions, but they also noted that on Hernandez's health insurance claim form, he was listed as self-employed. Respondents then stated that they filed their motion to vacate after the Board issued its January 9th ruling, but before its January 25th ruling (*i.e.*, before an appellate period began), and attempted to argue the motion to vacate prior to the running of the appellate period. Their appeal, they claimed, was a cautionary measure to preserve Respondents' rights and jurisdiction within this Court. Respondents requested this Court to hold their appeal in abeyance until the Board ruled on the motion to vacate.

On April 22, 2013, this Court ordered Respondents appeal to be held in abeyance and remanded the case to the Board to rule on the motion to vacate. If the Board were to deny that motion, Respondents could proceed with their appeal in this Court.

On July 31, 2013, the Board denied Respondents' motion to vacate. It found that Harrigan-Ferro could have notified Hernandez about the destruction of documents well before the Board entered default judgment. Instead, Harrigan-Ferro ignored both Hernandez's requests and the Board's orders. Had Harrigan-Ferro

simply telephoned his attorney about the destruction, many problems could have been avoided. Further, all of Harrigan-Ferro's family issues arose before the December 19th hearing. At that hearing, however, the only excuse offered for noncompliance with the November 30th deadline was Harrigan-Ferro's daughter's illness, for which the Board extended Respondents' deadline to December 28th. The Board found that all of Harrigan-Ferro's excuses were known to him on December 19th. Indeed, his vacation at the end of December 2012 had been planned for a year. Yet, with the exception of one, none of Harrigan-Ferro's excuses were presented at either the hearings on December 19th or January 9th. The Board considered this failure to constitute Respondents simply ignoring the process, which contradicted a finding of excusable neglect. Additionally, the Board stated that counsel for Harrigan-Ferro reviewed and had no objection to the language in its December 19th decision, warning of the possibility of default judgment in the event of further noncompliance.

The Board also granted Hernandez's requested bond in the amount of $182,000, which it believed was appropriate in light of Hernandez's medical expenses, total disability, and partial disability benefits, and potential permanent impairment benefits. The Board also, based on the appropriate standards, awarded Hernandez attorneys' fees.

The following year, on January 8, 2014, the Board granted Hernandez's

petition for disfigurement benefits. The parties agreed that Hernandez was entitled to an award of fifty-five weeks of these benefits to resolve the merits of the pending petition. Based on their position throughout prior proceedings, Respondents disagreed that Harrigan-Ferro was personally liable for these benefits. However, the parties consented to an entry of an award for fifty-five weeks at the weekly rate of $666.67, provided that Harrigan-Ferro's objections and appellate rights regarding the award be preserved, for the reasons advanced in other proceedings. Respondents appealed this decision to this Court on February 5, 2014.[5]

On April 7, 2014, the Board granted Hernandez's petition for permanent impairment benefits. The parties agreed that Hernandez was entitled to a finding of a thirty-two percent permanent impairment to his leg, and an award of eighty weeks of these benefits to resolve the merits of the pending petition. Based on their position throughout prior proceedings, Respondents disagreed that Harrigan-Ferro was

[5] Hernandez claims in the present appeals that this appeal is defective because it was entered by consent, and thus waived any errors therein, and should be dismissed because it did not properly identify the errors contained in the Board's previous decisions and orders.

Respondents contest, stating that their Second Notice of Appeal clearly indicated that the Board erred as a matter of law in its order dated January 8, 2014, and that such was not supported by substantial evidence. This order also specifically notes the Board's prior rulings in December 2012 and January 2013, and Respondents' pending appeal of those decisions. Additionally, the Board's decision on January 8, 2014 notes that the parties disagree with the law of the case, inferring both Respondents' previous appeal and the appeal of that decision. The merits of this decision are intimately related to Respondents' appeal of the Board's other decisions. Thus, this appeal is not defective.

personally liable for these benefits. However, the parties consented to an entry of an award for the eighty weeks at the weekly rate of $666.67, provided that Harrigan-Ferro's objections and appellate rights regarding the award be preserved, for the reasons advanced in other proceedings. Respondents appealed this decision to this Court on May 5, 2014.

STANDARD OF REVIEW

When reviewing appeals from the Board, this Court examines only the record upon which the Board relied in making its decision.[6] The sole questions for the Court are whether substantial evidence supported the Board's decision and whether the Board's decision lacked legal error.[7] The requisite degree of evidence is only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] Evaluating the evidence, deciding credibility issues, and determining factual questions are not within the Court's purview.[9] The Court reviews questions of law *de novo*.[10] "Absent errors of law, the standard of review of an IAB decision

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[6] *Burgos v. Perdue Farms, Inc.*, 2011 WL 1487076, at *2 (Del. Super. Apr. 19, 2011).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (citation omitted).

is abuse of discretion."[11]

ANALYSIS

Parties' Contentions

Respondents first argue that the Board committed legal error in granting default judgment. They claim that the Board's rules mention neither default judgment nor sanctions for discovery violations in general.[12] On the other hand, this Court's Civil Rules permit it to enter judgment for violations of court-ordered discovery obligations. However, the Delaware Supreme Court has instructed that the grant of default judgment requires a showing of wilfulness or conscious disregard on the part of the offending litigant.[13] The Delaware Supreme Court has also stated that this remedy is severe, and a tribunal granting it should carefully evaluate certain factors before rendering its decision.[14] Respondents assert that the Board did not employ any

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[11] *Opportunity Ctr., Inc. v. Jamison*, 2007 WL 3262211, at *2 (Del. May 24, 2007) (citation omitted).

[12] Respondents acknowledge that the Board's Rule 11(c) permits a party to move for an order compelling discovery if the nonmoving party is obligated to comply with the moving party's discovery request.

[13] Respondents cite *Sundor Elec., Inc. v. E. J. T. Constr. Co., Inc.*, 337 A.2d 651, 652 (Del. 1975) for this proposition.

[14] Respondents cite *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 718–19 (Del. 2008) (citing and quoting, *inter alia*, *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d. Cir. 1984)) for this proposition.

of this analysis.[15]

Respondents next argue that the Board committed legal error in denying Harrigan-Ferro's motion to dismiss for lack of subject of matter jurisdiction. They claim that the only way for Hernandez to reach Harrigan-Ferro personally is by piercing Allserve's corporate veil. The Board denied Harrigan-Ferro's motion because neither Respondent produced evidence sufficient to determine Allserve's validity. Yet, Respondents argue that it was clear that Allserve was a valid LLC. As part of their discovery obligation, Respondents provided Allserve's certified Certificate of Good Standing on October 26, 2012. This, they claim, clearly demonstrated Allserve's validity. Further, Respondents argue that piercing the corporate veil is an equitable measure which may be performed only by the Delaware Court of Chancery.[16] Respondents also claim that these legal errors, in turn, invalidate the Board's January 25th entrance of an award in Hernandez's favor on his petition to determine compensation due.

Respondents also argue that the Board's decisions granting default judgment, denying Harrigan-Ferro's motion to dismiss, and awarding Hernandez compensation

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[15] Respondents also contend that the Board did not consider any of their arguments contained in their response, dated January 4, 2013, to Hernandez's motion for default judgment, described *supra*.

[16] Respondents cite, *inter alia*, *Mktg. Prods. Mgmt., LLC v. HealthandBeautyDirect.com, Inc.*, 2004 WL 249581, at *3 (Del. Super. Jan. 28, 2004) for this proposition.

due were not supported by substantial evidence. Regarding the Board's grant of default judgment, Respondents contend that the Board must have had substantial evidence demonstrating wilful or conscious disregard of the Board's orders and there must have existed substantial evidence that the Board performed the requisite balancing justifying judgment by default. None of these requirements, they claim, appeared in the Board's decision. A proper showing of wilful or conscious disregard would be, for example, failure to comply with four court orders over the span of three years and a party's failure to cooperate with opposing counsel.[17] On the other hand, even when responses are evasive, default judgment will be considered too severe a penalty when there is an absence of wilfulness, when the time frame involved is relatively short, and when the disobeying party technically complied with the tribunal's order.[18] Here, Respondents claim that they filed discovery responses on October 26, 2012, and supplemental responses in response to the Board's November 30th order. The time frame in this case centers on only several months, and Respondents' best efforts at compliance.

Respondents claim that the Board's denial of Harrigan-Ferro's motion to dismiss was not supported by substantial evidence because the Board never stated

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[17] Respondents cite *Hoag*, 953 A.2d at 716–19 for this proposition.

[18] Respondents cite *Sundor*, 337 A.2d at 652–53 for this proposition.

why it was entitled to set aside Allserve's corporate form and hold Harrigan-Ferro personally liable. The Board merely denied the motion because it granted default judgment. The only evidence the Board referenced was that Respondents failed to provide evidence to establish Allserve's validity. Allserve's validity was established, however, through the production of its Certificate of Good Standing. Respondents also claim that the Board's January 25th order awarding Hernandez compensation due was not based on any evidence of liability or the contested wage rate at all, substantial or otherwise, but rather constituted a flat judgment based on prior rulings.

Hernandez first counters that the Board's denial of Respondents' motion to vacate on July 31, 2013 was final, binding, and entitled to preclusive effect because Respondents did not appeal that particular decision after it was rendered. Under the doctrine of *res judicata*, Respondents are not free to relitigate the issues decided by the Board in that decision (*e.g.*, that Harrigan-Ferro's proffered excuses did not constitute excusable neglect justifying vacating default judgment).[19] These excuses were heard, considered, and rejected by the Board on July 31st. Respondents did not appeal this decision, and hence the propriety of these issues may not be considered

[19] Hernandez cites, *inter alia*, *United States v. Timmons*, 672 F.2d 1373 (11th Cir. 1982) for this proposition.

by this Court.[20]

Even if the Court considers the merits of Harrigan-Ferro's excuses, Hernandez points out that these excuses, other than his daughter's illness, never came to light until January 15th, after the entrance of default judgment. Furthermore, Hernandez claims that these excuses are highly speculative and uncorroborated. Assuming Harrigan-Ferro was so incapacitated by his personal problems that his ability to comply with his discovery obligations was weakened, Hernandez questions how Harrigan-Ferro found the time to form a new entity called Allserve Enterprises, LLC and obtain a federal taxpayer identification in late October 2012, change the name of his business on his workers' compensation insurance policy on November 15, 2012, a policy which was obtained after Herndandez's August injury, and communicate with his counsel in October and November 2012, and January 2013.[21]

Aside from their excuses, Hernandez claims that Respondents' failure to

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[20] Hernandez also asserts that these excuses are barred from their present appeals. With the exception of his daughter's illness, none of the excuses were presented to the Board prior to entry of default judgment. Thus, the profferings of these excuses are waived.

Respondents reply that the factual basis for their appeal is not waived. They are not attempting to relitigate issues presented in the Board's July 31st order. That decision rejected Respondents' excuses. These appeals, on the other hand, center on the Board's decisions from late 2012, early 2013, and early 2014, and focus on the issue of Harrigan-Ferro's personal liability and Hernandez's relationship with Respondents. Also, Respondents remind the Court that it permitted this appeal to proceed if the Board denied their motion to vacate.

[21] Hernandez provides record support for all of these occurrences. The Court does not consider these occurrences, however, because it is unclear as to whether this evidence was before the Board in rendering its decisions.

comply with Board-ordered discovery constituted a waiver of any objection to the imposition of default judgment. First, Respondents never initially made an objection as to a particular discovery response when they submitted their initial responses.[22] Second, Respondents consented to default judgment throughout this process because the Board made it very clear in its December 19th order that further noncompliance would result in default judgment.[23]

Hernandez argues that the Board did not abuse its discretion in granting default judgment. Tribunals have the authority to manage their dockets by setting deadlines and having the power to enforce those deadlines.[24] An administrative agency cannot impose criminal contempt penalties, but has express authority to do all that is

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[22] Respondents admit that they later contended that some of the discovery sought was irrelevant.

[23] Respondents reply that they did not waive any objections by failing to respond. They made their initial response to Hernandez's discovery requests on October 26, 2012. These responses, in which they clearly stated were provided without waiver of any objection, used language which is customarily interpreted as meaning *if* certain documents exist and can be found, they will be provided. Respondents maintained this position throughout the proceedings. Respondents' reply on January 4th to Hernandez's motion for default judgment listed what could not be provided due to nonexistence, and stated what had been provided. Respondents also claim that they provided a statement of assets and liabilities of Harrigan-Ferro, despite there being no reasonable link between such information and Harrigan-Ferro's liability. Thus, to the extent possible, Respondents fulfilled their discovery obligations without waiving any objections. Further, Hernandez would have had the opportunity to probe Allserve's makeup and the relationship between Hernandez and Respondents if Respondents had been able to present these issues at a hearing on the merits, for which Harrigan-Ferro was listed as a witness.

[24] Hernandez cites, *inter alia*, the criminal case of *State v. Wright*, 821 A.2d 330, 332 (Del. Super. 2003) for this proposition.

necessary to allow it to function properly.[25] If the Board were not able to enter default judgment after issuing repeated motions to compel, the Board's authority and ability to conduct hearings would be futile. Indeed, Hernandez asserts that the Board would have abused its discretion had it not granted default judgment.[26]

Hernandez next argues that there was substantial evidence supporting default judgment.[27] This consisted of Respondents' failure to fulfill their discovery obligations, and then ignoring two orders by the Board on motions to compel that discovery. Such demonstrates wilful misconduct and a history of dilatoriness, which is counter to the goal of workers' compensation to provide definitive and prompt remedies.[28]

Hernandez also contends that the Board properly denied Harrigan-Ferro's

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[25] Hernandez cites the Board's procedural authority regarding hearings, contained in Chapter 23, Title 19 of the Delaware Code.

[26] Hernandez cites this Court's decision in *Martin v. Delaware Home & Hosp.*, 2013 WL 1411241, at *2 (Del. Super. Apr. 8, 2013) ("[W]hile administrative boards are not bound by the formal rules of evidence, they may not relax rules which are designed to ensure the fairness of the procedure." (citation omitted)).

[27] Hernandez states that Respondents' failures in this case were not the result of Respondents' counsel, who was admittedly kept in the dark as to Harrigan-Ferro's excuses until after default judgment was entered.

[28] Hernandez asserts that the fact that this case centers on a time frame of a couple of months, rather than a period of years, is irrelevant. Citing the Delaware Supreme Court's opinion in *Simpson v. Coleman*, 2012 WL 3631655 (Del. Aug. 22, 2012) default judgment has been upheld when the period of noncompliance was three months.

motion to dismiss. He claims that Respondents presuppose that the Board should have agreed with their defense that no employment relationship existed between Harrigan-Ferro and Hernandez. Hernandez argues that Respondents cannot claim that Allserve was a valid LLC by pointing solely to its Certificate of Good Standing, while ignoring a complete lack of any type of LLC agreement. Further, Respondents claim that Hernandez was a subcontractor of Allserve, while Harrigan-Ferro's insurance application states otherwise, and Respondents presume that the Board would have disbelieved Harrigan-Ferro's representations in that application. Also, Hernandez again claims that any excuses proffered by Respondents as to why they did not fulfill their discovery obligations were not before the Board when it denied their motion to dismiss.

Hernandez lastly argues that Respondents' contention regarding the notion that only the Court of Chancery may pierce the corporate veil is irrelevant, as the Board was without evidence to determine whether Allserve was, in fact, a valid LLC. There was no evidence to prove the entity's existence, thus justifying default judgment. There existed a multitude of other issues, the most significant being identifying Hernandez's employer, which had nothing to do with the invocation of any equitable measures. Further, Hernandez claims that even if the Board did err by piercing the corporate veil, it was harmless because the Board had jurisdiction over Hernandez's

claim against Harrigan-Ferro personally, and was not barred by lack of subject matter jurisdiction when it entered default judgment against him personally.

Discussion[29]

The Court first examines the Board's January 9th grant of default judgment against Respondents. This Court may grant judgment by default against a disobeying litigant under its Civil Rule 37.[30] The Board's authority to so grant is not as clear. The Board's Rules make no mention of default judgment. However, in the context of discovery specifically, its Rules do provide that a party upon whom a discovery request is made must submit responses, and any objections taken, within a certain time frame, and that "[t]he party submitting the request may move for an order from the Board compelling discovery with respect to any obligation to or other failure to respond to the request . . . ."[31] Also, under 19 *Del. C.* § 2348, unless good cause is shown, a party's failure to appear at a scheduled hearing before the Board "bar[s] such part[y] from . . . further action concerning an adverse decision, *a decision by*

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[29] Although Hernandez asserts numerous procedural arguments, the Court decides these appeals on substantive grounds.

[30] *See* Super. Ct. Civ. R. 37(b)(2)(C) ("If a party . . . fails to obey an order to provide or permit discovery . . . the Court may make such orders in regard to the failure as are just, and among others the following: . . . [a]n order . . . rendering a judgment by default against the disobedient party . . . .").

[31] Industrial Accident Bd. R. 11(C).

default or a dismissal of a petition for hearing and award."[32] Additionally, "it is within the Board's discretion to enforce rules promulgated by it to enable the Board to effectively discharge its duties."[33] Thus, the ability to grant default judgment is within the Board's purview.[34]

The question becomes whether the Board abused its discretion in granting judgment by default. Decisions on the merits are favored over default judgments.[35] "The sanction of dismissal is severe and courts are and have been reluctant to apply it except as a last resort. Nevertheless, . . . a motion for default judgment should be granted if no other sanction would be more appropriate under the circumstances."[36]

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[32] 19 *Del. C.* § 2348(c) (emphasis added).

[33] *Haveg Indus. v. Humphrey*, 1982 WL 590695, at *2 (Del. Super. July 15, 1982) (citation omitted).

[34] *Cf. Holt v. Bartley & Devary Elec. Co.*, 1998 WL 438824, at *1 n.1 (Del. Super. May 14, 1998) ("The 'read-in' hearing is basically a process whereby the employee does not appear at the hearing to oppose employer's petition to terminate. *The process is similar to entering a default judgment against the employee*." (emphasis added)). *Cf. Arch of Kentucky v. Dir., Office of Workers' Comp. Programs*, 556 F.3d 472, 477, 478 (6th Cir. 2009) (rejecting appellant's "wide swing at the [federal] administrative-default rule" and explaining that the rule, "akin to the default-judgment rule in federal court, does not itself violate federal due process or the APA." (citation omitted)). *Cf.* 7 LARSON'S WORKERS' COMPENSATION LAW § 124.06 ("The fact that the standards applied in the course of compensation hearings is less rigorous than those in regular court trials does not, of course, mean that the patience of the board, commission, or fact-finder is limitless."). *But cf. Green v. Whirlpool Corp.*, 389 N.W.2d 504, 505 (Minn. 1986) (holding that a settlement judge in a workers' compensation case did not have the authority to grant judgment by default on the sole reasoning that his authority was clearly limited by statute).

[35] *See, e.g.*, *Apartment Cmtys. Corp. v. Martinelli*, 859 A.2d 67, 69 (Del. 2004) (quotation and citation omitted).

[36] *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008) (citations omitted).

Its purpose is both punitive to the disobeying party and precautionary to future abusers of the system.[37]

Because default judgment is an extreme measure to employ for a discovery violation, "a showing of an element of wilfulness or conscious disregard of court-ordered discovery [is required] before such sanction is imposed."[38] The Delaware Supreme Court has stated that in determining whether the tribunal granting the remedy abused its discretion, a reviewing court should be aided by certain factors:

> [W]e will be guided by the manner in which the trial court balanced the following factors . . . and whether the record supports its findings: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense."[39]

Respondents place much emphasis on the fact that the Board did not apply these factors verbatim in rendering its decision. However, this was not an abuse of discretion because, first, the Board implicitly found that Respondents' wilfully and consciously disregarded its prior orders. In its January 9th decision, the Board stated

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[37] *Id.* (citations omitted).

[38] *Id.* (citations omitted) (internal quotation marks omitted).

[39] *Id.* at 718 (citations omitted) (quoting *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d. Cir. 1984)).

that because Respondents had failed to produce additional discovery to Hernandez by the December 28th deadline in violation of its December 19th order, and that they previously failed to comply with its November 28th order, it implemented remedies identified in its December 19th order.

Second, while it is true that the factors listed above, referred to as the *Hoag* factors from the Delaware Supreme Court's decision in *Hoag v. Amex Assurance Company*, must be considered in deciding whether the ultimate sanction for a discovery violation is justified,[40] when this Court applies the test itself *de novo*, it comes to the conclusion that dismissal by the Board was warranted.[41] Earlier this year, in *Armbrust v. Capital One Bank, USA NA*,[42] this Court performed the *Hoag* balancing itself and held that the Court of Common Pleas's finding that the appellant wilfully and consciously disregarded its orders and had refused to engage in the requisite discovery process was supported by sufficient evidence.

In *Armbrust*, this Court was confronted with an appellant who, from late June to early October 2012, was ordered on three separate occasions by two separate Court

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[40] *See Minna v. Energy Coal S.p.A.*, 984 A.2d 1210, 1215 (Del. 2009) ("In deciding whether a trial court abused its discretion when sanctioning a party, this Court has adopted the" *Hoag* factors. (citation omitted)).

[41] Note that the Court is not conducting the entire appeal *de novo*. Rather, it is merely examining the *Hoag* factors *de novo*.

[42] *Armbrust v. Capital One Bank, US NA*, 2014 WL 1275461 (Del. Super. Jan. 29, 2014).

of Common Pleas judges to serve adequate responses to the appellee's requests for admissions. The first order stemmed from the appellant's not providing any responses at all. The second and third orders stemmed from the appellant's provision of responses which merely stated her contention that the information sought was immaterial.

The question before this Court was whether the record sufficiently supported the finding of the court below that dismissal was appropriate because appellant wilfully and consciously disregarded its orders. The Court began by noting the severity of the remedy imposed and that it was sustainable only upon a showing of wilful and conscious disregard of court orders.[43] The Court then turned to the *Hoag* factors[44] and summarized the Delaware Supreme Court's current precedent regarding default judgment. In three cases, adverse judgments were reversed for failure to meet deadlines because of "failure to attempt lesser sanctions, failure to consider the claim's merit and whether the delay caused prejudice, and the trial court's refusal to step in when asked to resolve discovery difficulties that could have avoided ultimate

[43] The Court examined the sanctions of judgment by default and dismissal interchangeably. Those sanctions have distinctions without differences.

[44] In *Armbrust*, this Court referred to them as the *Drejka* factors from the Delaware Supreme Court's decision in *Drejka v. Hitchens Tire Service*, 15 A.3d 1221 (Del. 2010). The factors, however, are identical.

dismissal."[45] However, the Delaware Supreme Court affirmed default judgment in one case "that followed two motion to compel hearings where the trial court explained the plaintiff's discovery obligations and an additional three day postponement in granting the dismissal to give the plaintiff one last chance to comply."[46] In that case, the high Court held that the trial court properly balanced the *Hoag* factors and found the plaintiff's personal responsibility and the ineffectiveness of lesser sanctions to induce compliance most persuasive. Also taken into consideration was the plaintiff's continuous choice to not submit the requested information.

In *Armbrust*, this Court analyzed the *Hoag* factors and concluded that the balancing favored affirming the judgment. In the present case, the Court performs the same balancing. First, Respondents' are personally and completely responsible for their discovery violations. There are no other parties to blame. Second, the prejudice to Hernandez in Respondents' failure was great. It must be kept in mind that from the time of his injury in August 2012 to January 2013, before the Board's entry of default judgment, Hernandez was seriously injured and without compensation. His opponents' failures to meet discovery deadlines only exacerbated his problems. As

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[45] *Armburst*, 2014 WL 1275461, at *2 (citations omitted) (footnotes omitted).

[46] *Id.* (citing *Adams v. Aidoo*, 58 A.3d 410 (Del. 2013)).

to a history of dilatoriness, Respondents are correct that this case does not involve a long time span plagued with a multitude of tardy incidents. However, missing a deadline in November 2012 and then again in December 2012, after being warned of the consequences of further noncompliance, may be considered a pattern of dilatoriness.

As to whether Respondents' actions demonstrated wilful misconduct or bad faith, the Court finds that they did. Harrigan-Ferro fully controlled Respondents' destiny in this case. He may not fall back on a litany of excuses as justifiable grounds for failure to fulfill his obligations. As the Board noted in its July 31st decision denying the motion to vacate, regarding the issue of the destruction of documents, "[a] simple telephone call to his attorney . . . in a timely manner would have resolved the issue."[47] Indeed, the inference from the record is that Harrigan-Ferro's chosen tactic throughout this case was volitional ignorance. Tribunals are not required to tolerate blatant disobedience. Parties are "not free to ignore or disobey [a tribunal's rulings] as [they] s[ee] fit. In an orderly justice system, someone has to have final say over procedural matters."[48] As to the fifth *Hoag* factor, a less extreme sanction would not have been effective. When a party ignores two orders from a tribunal, one

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[47] *See* App. to Defs.' Opening Br. at 3.

[48] *Armburst*, 2014 WL 1275461, at *3.

of which clearly delineated the ramifications of further noncompliance, the only inference to be drawn is that anything less than the ultimate consequence will be ineffectual.

The sixth and final factor hinges on whether Respondents could prove that Allserve was a valid entity. As Respondents admitted, after the December 28th deadline, Allserve's LLC agreement and bylaws did not exist. While "[a] limited liability company is formed at the time of the filing of the initial certificate of formation . . . or at any later date or time specified in the certificate of formation if, in either case, there has been substantial compliance with the requirements of this section," it is also true that "[a] limited liability company agreement shall be entered into or otherwise existing either before, after or at the time of the filing of a certificate of formation . . . ."[49] Thus, without an LLC agreement to examine, Allserve's legitimacy is highly speculative. Respondents' mere pointing to its Certificate of Good Standing does not overcome this.

Based on the *Hoag* factors, there was sufficient evidence before the Board that Respondents' wilfully and consciously disregarded its orders. Thus, the Board did not abuse its discretion in granting judgment against them. It was also not error for the Board to deny Respondents' motion to vacate, although Respondents did not

[49] 6 *Del. C.* § 18-201 (b), (d).

appeal that decision.[50] The Board also did not commit legal error in denying Harrigan-Ferro's motion to dismiss. First, as stated, Respondents' simple pointing to Allserve's Certificate of Good Standing, in an attempt to intuit Allserve's validity, does not *ipso facto* override Respondents' repeated discovery violations and constitute sufficient evidence that Allserve was, indeed, a valid LLC. Second, the issue of piercing the corporate veil is irrelevant because, through Respondents' own fault, there was insufficient proof to conclude that there existed a veil to pierce.

The Board's grant of default judgment was also supported by substantial evidence because, as stated above, the *Hoag* analysis establishes Respondents' wilful and conscious disregard for the Board's two orders. Lastly, the Board's decision denying Harrigan-Ferro's motion to dismiss was supported by substantial evidence because, as stated, through Respondents' own fault, there was insufficient evidence before the Board that Allserve was a valid LLC.

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[50] If Respondents had appealed the Board's denial of their motion to vacate, the Court would have employed a different analysis:

> For the Superior Court to grant relief from a default judgment because of excusable neglect, the defendant must show: (1) excusable neglect in the conduct that allowed the default judgment to be taken; (2) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on the merits; and (3) that substantial prejudice will not be suffered by the plaintiff if the motion is granted.

Christiana Mall, LLC v. Emory Hill & Co., 90 A.3d 1087, 1091 (Del. 2014) (citation omitted) (internal quotation marks and brackets omitted). Had this analysis been employed, the result would have been the same.

Because the Board's granting default judgment in Hernandez's favor and denial of Respondents' motion to dismiss do not contain legal error and were supported by substantial evidence, the Board's order granting Hernandez's compensation due dated January 25, 2013 is upheld. For the same reasons, the Board's January 8, 2014 decision granting Hernandez disfigurement benefits and its April 7, 2014 decision granting Hernandez permanent impairment benefits are upheld.

Based on the above, the Board's decisions dated December 19, 2012, January 9, 2013, January 10, 2013, and January 25, 2013 from which appeal is taken (C.A. No. S13A-02-004 RFS) are **AFFIRMED**. Based on the above, the Board's decision dated January 8, 2014 from which appeal is taken (C.A. No. S14A-02-001 RFS) is **AFFIRMED**. Based on the above, the Board's decision dated April 7, 2014 from which appeal is taken (C.A. No. S14A-05-002 RFS) is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Richard F. Stokes

Richard F. Stokes, Judge

cc: Prothonotary
Juidicial Case Manager