

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

LIBERTY MUTUAL INSURANCE	)	
COMPANY,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No.: N12A-03-003 CLS
	)	
JESUS SILVA-GARCIA AND CITY	)	
WINDOW CLEANING OF	)	
DELAWARE, INC.,	)	
	)	
Appellees.	)	

ORDER

AND NOW, TO WIT, this 5th day of September, 2012, **IT IS HEREBY ORDERED** as follows:

Introduction

Before the Court is Appellant, Liberty Mutual Insurance Company's ("Liberty Mutual" or "Appellant") Petition for Certification of Interlocutory Appeal. The Court notes that Liberty Mutual continues to litigate this case in two counties. Liberty Mutual has recently filed a Petition for Certification of Interlocutory Appeal from Judge Young's Order in Kent County without notifying the Court that the issues are identical.¹ Claimant's Petition to Determine

¹ Based on the two Petitions for Certification of Interlocutory Appeal filed, it appears to this Court that Liberty Mutual attempts to have the same issue reviewed twice.

Compensation Due, (“Petition”) arising from serious injuries, including a left leg amputation, has been pending for 2.5 years. The petition has been stayed numerous times based on Liberty Mutual appealing every order decided by the Industrial Accident Board (“Board”) and from this Court pertaining to the insurance coverage issue. The Application for Certification of an Interlocutory Appeal does not meet the mandatory requirements under Supr. Ct. R. 42. Accordingly, Liberty Mutual’s Application for Certification of Interlocutory Appeal is **DENIED**.

Facts

This case arises from a Petition filed by Claimant, Jose Silva-Garcia (“Silva-Garcia”) on February 18, 2010. The injuries arising in the filing of the Petition allegedly occurred on January 15, 2010 while Silva-Garcia was within the scope of his employment while working for City Window Cleaning (“CWC”). To date, based on the peculiar procedural posture of this case, the Board has not yet heard Silva-Garcia’s Petition.

Shortly after the Petition was filed, an issue of insurance coverage arose before the Board. Since 2005, CWC was insured by Liberty Mutual for workers’ compensation purposes. However, Liberty Mutual claimed that CWC was not a covered entity because the policy was not renewed within the deadline that occurred before the injury. On September 9, 2010, CWC requested an evidentiary

hearing to determine whether CWC renewed Liberty Mutual's policy prior to the date of the injury. On October 8, 2010, Liberty Mutual filed a declaratory action in this Court to determine whether coverage existed on the date of the accident. On October 15, 2010, the Board attempted to conduct a hearing to determine insurance coverage. However, at the hearing, Liberty Mutual argued that the Board lacked jurisdiction to determine the insurance coverage issued based on the declaratory action filed in this Court. CWC and Silva-Garcia filed a motion to dismiss the action. On May 26, 2011, this Court granted the motion to dismiss holding that the Board was the most appropriate entity to resolve the issue of whether CWC had workers' compensation insurance coverage on January 15, 2010.

Subsequently, after this Court granted the motion to dismiss, the Board held a hearing on the insurance coverage issue. In a written decision, the Board held that CWC was covered by Liberty Mutual and ordered Liberty Mutual to reimburse CWC \$250.00 a week for the amount distributed to Silva-Garcia. Liberty Mutual filed a motion for reargument, which was essentially a motion to strike the Board's decision on the existence of insurance coverage. The motion to strike was denied by the Board.

Following the Board's denial of the motion to strike, Liberty Mutual filed an appeal in this Court based on the insurance coverage issue resolved by the Board. Appellee CWC filed a motion to dismiss in this court based liberty mutual's failure

to file in the correct county pursuant to 19 *Del. C.* § 2349. On March 21, 2012, Liberty Mutual filed the same appeal in Kent County, which is where the alleged injury occurred.² The Petition has not yet been heard, as it was stayed, pending the outcome of the insurance coverage issue.

This Court held a hearing on the motion to dismiss and *sua sponte* raised the issue of whether the order from the Board on the insurance coverage issue was interlocutory. This Court concluded that the insurance coverage issue was not a final order of the Board and it was thus interlocutory. Pursuant to Super. Ct. Civ. R. 72(i), this Court remanded the case to the Board to determine the Petition and held that following the Board's decision on the Petition, Liberty Mutual may appeal to the correct county. On June 19, 2012, Liberty Mutual filed a motion for reargument. Appellees, CWC and Silva-Garcia filed a letter stating that they had no position on the motion.

On August 2, 2012, nearly two months before the Court's deadline on the motion, Liberty Mutual filed a letter requesting an expedited decision, as Silva-Garcia requested a hearing to determine his Petition before the Board. On August 19, this Court denied the motion for reargument. In the meantime, on August 8, 2012, a week after Liberty Mutual filed a letter in this county requesting an expedited decision on the motion for reargument, counsel sent a letter to the Judge

²C.A.: K12A-03-003 RBY.

assigned to the Kent County appeal requesting action on the insurance coverage issue. On August 21, 2012, in a letter opinion to counsel, Judge Young stated that “the request for a decision from this Court at this point in the proceedings appears to be an effort to vitiate the Order of Judge Scott in this same case.”³ Further, the letter indicated that counsel’s conduct was “not proper.”⁴ Judge Young dismissed the pending appeal in Kent County without prejudice based on this Court’s order that the insurance coverage issue was interlocutory.⁵ Then, a day after Judge Young’s letter was available on LexisNexis®, Liberty Mutual filed this Petition for Certification of Interlocutory Appeal based on this Court’s ruling that the Order of the Board was interlocutory. On August 31, 2012, Liberty Mutual filed an Application for Certification of Interlocutory Appeal in the case in Kent County arising from the same insurance coverage issue presented before this Court.

Discussion

In its Petition, Liberty Mutual requests certification of the following issues: (1) whether the Board’s August 31, 2011 order was interlocutory; (2) Whether the Board properly held that CWC was covered by Liberty Mutual at the time of the injury; and (3) whether the Board was qualified to determine the insurance coverage issue.

³ *Liberty Mutual v. Jesus Silva-Garcia and City Window Cleaning*, C.A. No. K12A-03-003 RBY, at *1 (Del. Super. Aug. 21, 2012).

⁴ *Id.*

⁵ *Id.*

As a preliminary matter, Liberty Mutual's second and third requests are not appealable. As to the issue of whether the Board's August 31, 2011 decision on insurance coverage, this issue has not yet been decided by this Court. The Delaware Supreme Court is a Court of limited jurisdiction and will not consider factual issues not yet resolved by the trial court.⁶ This Court held in its June 13, 2012 Order that the issue of insurance coverage was interlocutory and may be addressed after the pending Petition was heard. Therefore, the Supreme Court of Delaware does not have jurisdiction to determine the issue pertaining to the Board's determination of insurance coverage.

Next, as to whether the Board was qualified to determine insurance coverage, Liberty Mutual raised this issue with this Court on October 8, 2010 by filing a declaratory action to determine whether coverage existed on the date of the alleged injury. This Court determined that the Board was permitted to determine this insurance coverage issue. Liberty Mutual did not appeal the Order of this Court within the requisite time period as provided in Del. Supr. Ct. R. 42(b). Liberty Mutual cannot claim at this juncture that it is entitled to review of a decision from over a year ago. Therefore, the Supreme Court of Delaware also does not have jurisdiction to consider the issue, as Liberty Mutual did not timely file an interlocutory appeal.

⁶ *Star Pub. Co. v. Martin*, 47 Del. 585, 593 (Del. 1953).

The remaining issue pertaining to this application is whether the Board's order denying the motion to strike was interlocutory and thus, cannot be appealed until a final award has been rendered by the Board. Pursuant to Delaware Supreme Court Rule 42, an interlocutory appeal will not be certified unless the trial court's order determines a substantial issue, establishes a legal right, and meets at least one of the five additional criteria set forth in Rule 42(b).⁷

Generally, the Delaware Supreme Court will only hear appeals from final judgments.⁸ A final judgment is defined as a judgment that “determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration.”⁹ “The policy underlying the final judgment rule is one of efficient use of judicial resources through disposition of cases as a whole,

⁷ The five criteria set forth under the rule include the following:

- (i) *Same as Certified Question.* Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or
- (ii) *Controverted Jurisdiction.* The interlocutory order has sustained the controverted jurisdiction of the trial court; or
- (iii) *Substantial Issue.* An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or
- (iv) *Prior Judgment Opened.* The interlocutory order has vacated or opened a judgment of the trial court; or
- (v) *Case Dispositive Issue.* A review of the interlocutory order may terminate or may otherwise serve considerations of justice.

Supr. Ct. R. 42(b).

⁸ *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002).

⁹ *Id.* (citing *Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 796 (Del. 1958)).

rather than piecemeal.”¹⁰ However, in exceptional or extraordinary circumstances the Delaware Supreme Court will hear appeals from trial court decisions prior to a final judgment.¹¹ However, before the Supreme Court will accept an interlocutory appeal, the party seeking the appeal must adhere to the strict requirements set forth in the rule.

This case does not meet either of the two requirements necessary for certification under Rule 42. Liberty Mutual argues that the Board’s decision determined the substantial issue of insurance coverage and a legal right to compensation. Additionally, Liberty Mutual asserts that the order has sustained the Board’s controverted jurisdiction over insurance coverage issues and the issue relates to the construction of 19 *Del. C.* § 2301(A)(i).¹² However, contrary to Liberty Mutual’s assertions, the Board’s order and decision pertaining to insurance coverage does not determine a substantial issue or a legal right. The insurance coverage issue was an issue that arose from the Petition and there is no exceptional or extraordinary circumstance that warrants certification of this interlocutory appeal. Thus, as the insurance coverage issue does not determine a substantial issue and a legal right, the Court need not address the applicability of the other five criteria under Rule 42.

¹⁰ *Id.* (citing *Showell*, 146 A.2d at 795).

¹¹ *Ryan v. Gifford*, 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008).

¹² This statute covers the jurisdiction over the Industrial Accident Board. However, as stated above, the Supreme Court would not have jurisdiction to consider this issue as Liberty Mutual failed to appeal this Court’s Order dated May 26, 2011.

Additionally, this Court recognizes that the Board ordered an “award” of money damages, but Liberty Mutual mischaracterizes the meaning of award as set forth in *Eastburn v. Newark Sch. Dist.*¹³ In *Eastburn*, the word “award” is defined as the “final determination of the Board in the case.”¹⁴ Here, while the Board may have determined the insurance coverage issue, the Petition is the underlying reason for the Board deciding the insurance coverage issue. The Petition has still not been resolved. Thus, in an effort for workers’ compensation cases to not be decided piecemeal, Liberty Mutual may only appeal the insurance coverage issue once the Petition is heard and decided by the Board.

Conclusion

Based on the foregoing, Liberty Mutual’s Application for Certification of Interlocutory Appeal pursuant to Supr. Ct. R. 42 is hereby **DENIED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

¹³ 324 A.2d 775 (Del. 1974).

¹⁴ *Id.* at 776.