#### IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR KENT COUNTY

ANNA MARIE HOGSTEN, :

C.A. No. K13A-05-001 WLW

Employee-Below,

Appellant,

.

V.

.

STATE OF DELAWARE,

.

Employer-Below,

Appellee. :

Submitted: November 13, 2013 Decided: January 31, 2014

#### **ORDER**

Upon Appellee's Motion to Dismiss. *Granted*.

Walt F. Schmittinger, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorney for Appellant.

Denis J. Menton, Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorney for Appellee.

WITHAM, R.J.

## **ISSUE**

The issue before the Court is whether the Appellee's Motion to Dismiss pursuant to Civil Rule 72(i) should be granted.

## **BACKGROUND**

On May 28, 2013 the Industrial Accident Board (hereinafter "the Board" or "the IAB") denied a Petition to Determine Additional Compensation Due filed by Appellant Anne Marie Hogsten (hereinafter "Appellant"). Appellant had filed the Petition in regards to a knee injury Appellant suffered decades earlier while working as a public school physical education teacher for the State (hereinafter "Appellee"). On May 31, 2013 Appellant filed her Notice of Appeal. Appellant was represented by counsel throughout the IAB proceedings and when her Notice of Appeal was filed. As far as the Court is aware, Appellant is still represented by counsel.

On August 30, 2013 this Court issued a brief schedule for the case. Appellant was required to file an opening brief by September 23, 2013. Appellant never filed an opening brief, nor has Appellant filed a request with the Court for additional time to file an opening brief.

On October 11, 2013 Appellee filed the instant Motion to Dismiss pursuant Superior Court Civil Rule 72(i). In the Motion, Appellee claims that counsel for Appellee contacted counsel for Appellant on three separate occasions—September 9, September 17, and September 30—to inquire as to whether Appellant intended to proceed with her appeal. Appellee claims that counsel for Appellant never responded to any of these inquiries.

By letter dated October 11, 2013 the Court informed Appellant that her response to the Motion was due no later than 10 days from the date of the letter. Appellant never filed a response.

## **DISCUSSION**

Superior Court Civil Rule 72(i) provides that upon a motion to dismiss by any party, the Court may dismiss an appeal from an agency decision for any reason deemed by the Court to be appropriate, including *inter alia* "for failure of a party diligently to prosecute the appeal." Civil Rule 107(f) provides that if a brief is not filed within the time required by the Court, the Court "may, in its discretion. . .consider the motion as abandoned. . . ."<sup>2</sup>

In *Buck v. Cassidy Painting, Inc.*, this Court dismissed a *pro se* litigant's appeal from an agency decision based on the litigant's "complete disregard of the requirements of Rule 107 and his unexplained failure to comply with the briefing schedule. . .[which] confirms that he has failed diligently to prosecute this appeal." The Court explained that "[1]itigants, whether represented by counsel or appearing *pro se*, must diligently prepare their cases for trial or risk dismissal for failure to prosecute." While *pro se* litigants are afforded some degree of latitude in presenting

<sup>&</sup>lt;sup>1</sup> Del. Super. Ct. Civ. R. 71(i).

<sup>&</sup>lt;sup>2</sup> Del. Super. Ct. Civ. R. 107(f).

<sup>&</sup>lt;sup>3</sup> Buck v. Cassidy Painting, Inc., 2011 WL 1226403, at \*2 (Del. Super. Mar. 28, 2011).

<sup>&</sup>lt;sup>4</sup> *Id*.

their cases,<sup>5</sup> such courtesy is not given to litigants represented by counsel, because any error or failing of counsel will be considered "directly attributable" to the represented party.<sup>6</sup>

Appellant's counsel has never filed a motion to withdraw with the Court, nor has the Court received any explanation whatsoever from counsel or the Appellant as to why no action has been taken on this appeal or the instant Motion. Should this be intentional on the part of counsel, the Court deems this practice to be unacceptable. As far as the Court is concerned, Appellant remains represented by counsel during this appeal. Thus, the leniency extended to *pro se* appellants will not be extended here.

A brief schedule was issued by this court; no opening brief was ever filed by the deadline. Appellant's counsel never responded to any of Appellee's inquiries as to whether this appeal was being pursued. Finally, Appellant has not even filed a response to the instant Motion to Dismiss. This illustrates a complete disregard for the requirements of Rule 107 similar to the *pro se* litigant in *Buck*. The unexplained actions of Appellant's counsel (or more accurately, the lack of any action) are directly attributable to Appellant. Based on the foregoing and given the fact that almost five months have lapsed since the filing of the appeal, the Court considers this appeal to be abandoned.

<sup>&</sup>lt;sup>5</sup> *Id*.

<sup>&</sup>lt;sup>6</sup> Fletcher v. Shahan, 2002 WL 499883, at \*5 (Del. Super. Mar. 6, 2002) (original emphasis included).

Anna Hogsten v. State of Delaware C.A. No. K13A-05-001 WLW January 31, 2014

This appeal is dismissed pursuant to Rule 72(i) for Appellant's failure diligently to prosecute this appeal. The appeal shall be dismissed with prejudice.

## **CONCLUSION**

Appellee's Motion to Dismiss is **GRANTED** pursuant to Civil Rule 72(i). Appellant's appeal from the decision of the IAB is hereby dismissed with prejudice, unless counsel or Appellant can show good cause for the silence.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh