IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CARL STANLEY,	:	
	:	C.A. No. 07A-08-001 WLW
Appellant,	:	
	:	
v.	:	
	:	
KRAFT FOODS, INC.,	:	
	:	
Appellee.	:	

Submitted: December 21, 2007
Decided: March 24, 2008

ORDER

Upon Appeal from a Decision of the
Industrial Accident Board. Remanded.

Joseph J. Rhoades, Esquire, A. Dale Bowers, Esquire and Stephen T. Morrow, Esquire of Law Offices of Joseph J. Rhoades, Wilmington, Delaware; attorneys for the Appellant.

Francis X. D. Nardo, Esquire of Tybout Redfearn & Pell, Wilmington, Delaware; attorneys for Appellee.

WITHAM, R.J.

Claimant/Appellant, Carl Stanley (Appellant), appeals the Industrial Accident Board's (the Board) decision dismissing his Petition to Determine Additional Compensation Due for an injury that occurred on April 22, 1991. The Board granted Kraft Foods, Inc.'s (Kraft) motion to dismiss, finding that the five-year statute of limitations had run, and that a 2006 case interpreting the applicable statutes does not affect Kraft's duties in 1991. The Court finds substantial evidence sufficient to support the Board's findings of facts but not its conclusion of law. The Court therefore *remands* for analysis in conformity with this decision.

Background

Appellant was employed by Kraft on April 22, 1991 when he was injured at work.[1] He heard a pop in his lower back when we went to pick up a tote. He went to Kent General Hospital on July 3, 1991.[2] The carrier paid two bills, one on August 28, 1991 and the last one on September 10, 1991.[3] Appellant never made a claim for wages, permanency or medical bills after the carrier paid the two bills 16 years prior

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[1]Kraft terminated Appellant on February 3, 2005 after he tested positive for drugs, in violation of company policy.

[2]Appellant withdrew his first petition that stated that he had injured himself on July 1, 1991. The employer did not have any record of Appellant's injury for that date, but had record of an April 22 injury. Appellant subsequently withdrew that petition and filed a second one stating that he was injured on April 22. Records of the medical bills indicate that he went to the hospital on July 3. In the hearing, Appellant testified that he believes that the injury must have therefore occurred on July 2. The Board noted that the date presented in the petition does not align with the dates cited in the testimony and the dates of medical records and payments.

[3]The bills were from Kent General Hospital and Kent Diagnostic, one of which was for $610 and the other was for $228. A reserve was placed on file for $3,342.

to the petition. No agreements were made between the employer and the employee, and there are no receipts from the alleged later bills. Appellant filed a petition for additional compensation with the Board on January 15, 2007 for the April 22, 1991 injury. Finding that both the two-year and five-year statutes of limitations had run, the Board granted Kraft's motion to dismiss. Appellant filed a Motion for Re-argument/Clarification, arguing the Board's order was in error or in the alternative, that the Board should clarify its basis for its decision.

The Board granted re-argument. Appellant argued that he has continued treatment for back problems up to the present day,[4] and therefore his petition should not be dismissed because Kraft failed to give him notice of the 5-year statute of limitations pursuant to 18 *Del.C.* § 3914, *McMillan v. State*,[5] and *Brown v. State*.[6] Kraft argued that the petition should be dismissed because of the expiration of the statute of limitations, for which the accident occurred in April 1991, and no payments have been made since September 1991. Kraft argued that Claimant's case falls under the 2-year statute of limitations and not tolled to five years because there was no

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[4]At the hearing, Appellant testified that he takes over-the-counter pain medication and sometimes his mother's pain medication for her knee because his doctor retired (Dr. Jake Miller) and his new doctor, Dr. Lowendowski, refers him to other doctors that "couldn't do anything for him." Tr. 13. After being terminated from employment at Kraft, he found another job and through that is being treated by Dr. Al Genardi. However, he primarily goes to the chiropractor, Dr. Epps because, he asserts, he cannot take time off for physical therapy. He testified that he is supposed to see the chiropractor twice per week, but because of time constraints, he has not attended treatment regularly, but appears to attend regularly about once per month. Tr. 13-14.

[5]*McMillan v. State*, 2002 WL 32054600 (Del.Super.Ct., September 19, 2002).

[6]*Brown v. State*, 900 A.2d 628, 631 (2006).

agreement. After the two payments, Claimant did not submit any further medical bills for payment and did not file a claim for total disability benefits or for workers' compensation benefits until a later accident occurring in 2005. Since there were no agreements or receipts for the 1991 accident, there was nothing to which to give notice.

The Board found that their prior decision should not be disturbed. The Board further explained that it accepted Kraft's arguments because of the expiration of the statute of limitations. Finally, the Board explained that since the interpretation of the notice requirement by *Brown* did not occur until 2006, and the injury at issue occurred in 1991, the statute of limitations defense applies in this case.

Standard of Review

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's finding of fact and conclusions of law.[7] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[9] Errors of law are reviewed *de novo*. Absent error of law, the standard of review for

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[7]*Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

[8]*Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (*quoting Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

[9]*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

a Board's decision is abuse of discretion.[10] The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."[11]

Discussion

Appellant's argument relies on the Delaware Supreme Court's decision in *Brown v. State*.[12] *Brown* discussed the statute of limitations for workers' compensation, which, pursuant to 19 *Del.C.* § 2361, is either two years (§ 2361(a)) or five years (§2361(b)), depending on the nature of the case. The two-year limitation is for personal injuries for which an agreement was made according to § 2344;[13] and the five-year limitation is for any case for which there has been an agreement approved by the Board. *Brown* held that this provision is to be read together with the notice provision of 18 *Del.C.* § 3914,[14] for which "an insurer shall be required during the pendency of any claim received pursuant to a casualty insurance policy to give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his/her damages."[15] *Brown* found that reading 18 *Del.C.* § 3914 and 19 *Del.C.* §2361 together provides that the statute of limitations does not begin to run until notice of the limitations is given to the

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[10] *Digiacomo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

[11] *Willis v. Plastic Materials Co.*, 2003 WL 164292, *1 (Del.Super.Ct., January 13, 2003).

[12] *Brown v. State*, 900 A.2d 628 (Del. 2006).

[13] 19 *Del.C.* § 2344 is for "Agreements on compensation or benefits; filing and approval; conclusiveness."

[14] *Brown* at 631.

[15] 18 *Del.C.* § 3914.

claimant.

Appellant's case demonstrates that an agreement was never formed. A plain reading of the statute leads to the conclusion that absent an agreement, the situation does not fall under 19 *Del.C.* §2361, and therefore there is no notice requirement.[16] However, Delaware Courts have found agreements to form for purposes of § 2361(b) even without a formal filing with the Board. *Brown* provides very little input on the question.

McCarnan v. New Castle County[17] lays out the rule for when an agreement forms even when the parties had not entered into an agreement, and when no agreement had been approved by the Board. In that case, claimant injured his wrist but did not miss any work. Two bills were paid. About two and a half years later, claimant re-injured his wrist. It was treated and surgery was performed. His wrist continued to deteriorate. Claimant then filed for additional compensation—nine years after his initial wrist injury. The Board found 20% partial disability from the recent accident and 15% from the first accident. They found that the medical payment attributed to the first accident was just a "minor bill" and did not invoke the "last payment" provision of the statute, which tolls the two-year statute of limitations to five years after the last payment of compensation. The Delaware Supreme Court affirmed.

McCarnan found that "where the facts indicate that the employer or its carrier

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[16]19 *Del.C.* §2361(a), (b).

[17]*McCarnan v. New Castle County*, 521 A.2d 611 (Del. 1987).

made a payment under a feeling of compulsion, then an agreement within the meaning of § 2361(b) ha[s] arisen."[18] No employer can feel compelled or obliged to pay unless the employee misses "more than three days work at the time the payments were made[,] [] and under the circumstances, the carrier had no obligation under the statute[]" pursuant to 19 *Del.C.* § 2321.[19] Claimant's initial injury was therefore time barred by the two-year statute of limitation of 19 *Del.C.* 2361(a).

The Court finds that the Board's findings and conclusions did not address the agreement in accordance with *McCarnan v. New Castle County*. It incorrectly concluded that a present day case interpreting an action from the past for a statute already in existence at the time of the accident does not carry weight. However, statutory interpretation must, by its very nature, act somewhat retroactively.[20] Therefore, the Court remands for further fact finding and conclusions to determine whether Appellant's two medical bills that were paid in 1991 where made from a feeling of compulsion.

In the alternative, the Court concedes that regardless of any finding of an

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[18]*Id.* at 616 (*quoting New Castle County v. Goodman*, 461 A.2d 1012, 1013 (Del. 1983)).

[19]*Id.* at 617. In 1991, 19 *Del.C.* § 2321 read:

> The statutory "waiting provision," 19 Del.C. § 2321, plainly states that "no compensation shall be paid for an injury that does not incapacitate the employee for a period of 3 days...." Applying § 2321, this Court recently held that a claimant must show that he was incapacitated for a period of three days in order to recover under the Act. *Smith v. Feralloy*, 460 A.2d 516, 518 (Del. 1983).

McCarnan at 617. The statute was revised in 1995, after Appellant's injury.

[20]*Bateman v. 317 Rehoboth Ave., LLC*, 878 A.2d 1176, 1182 (Del.Ch.,2005) (*citing Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del.1985).

agreement, fifteen years seems to be an excessive length of time to wait to petition for additional compensation due, especially when there has been no notice to the employer that Appellant is continuing treatment since the last payment in 1991.

> The defense of laches normally requires a showing by a defendant that (a) plaintiff knew (or should have known) of its rights or claim; (b) plaintiff failed to assert its rights or claim; and (c) defendant has materially changed its position or otherwise materially relied on plaintiff's failure to assert. The plaintiff can defeat the defense by showing any one of these elements is missing.[21]

Therefore, the Board's inquiry should also include whether its ultimate conclusion may be supported by the doctrine of laches.

Conclusion

Based on the foregoing, the Court *remands* for a full and proper hearing, in conformity with this decision.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

[21] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 714 A.2d 96, 104 -105 (Del.Ch. 1998). *See McGlinchey v. Phoenix Steel Corp.*, 293 A.2d 585 (Del. 1972).