IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JACQUELINE McCLAIN,	**:**	
	:	**C.A. NO: 08A-06-003 (RBY)**
Claimant-Below/Appellant,	**:**	
	:	
v.	**:**	
	:	
KRAFT FOODS, INC.,	**:**	
	:	
Employer-Below/Appellee.	**:**	

Submitted: February 26, 2009
Decided: April 14, 2009

Upon Consideration of Claimant-Below/Appellant's
Appeal from the Decision of the
Industrial Accident Board
AFFIRMED

OPINION AND ORDER

Robert P. Lobue, Esquire, Wilmington, Delaware for Claimant-Below/Appellant.

Francis X. Nardo, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware for Employer-Below/Appellee.

Young, J.

I: FACTS

Appellant Jacqueline McClain ("Appellant") is a former employee of Appellee Kraft Foods, Inc ("Appellee"). Appellant began working in Appellee's factory in April 1989. Beginning in 1999, Appellant started having physical problems due to the repetitive nature of her work. In 2000, she started missing various periods of work due to these conditions. Appellant continued this trend of periodically missing work through the end of her employment in 2007.

On September 24, 2004, Appellant petitioned the Industrial Accident Board ("IAB") to determine compensation due. Appellant stated the basis for her petition was a cumulative detrimental effect caused by her work. She withdrew this petition on January 28, 2005, three days before the evidentiary hearing.

Appellant, instead of pursuing her compensation claim, returned to work. Sometime in 2007, she was asked to perform the "Robot Job." This task required increased and strenuous use of Appellant's upper body. It caused her great pain, eventually leading to Appellant's leaving the factory.

Appellant filed a new petition for compensation with the IAB on October 4, 2007, seeking benefits from June 22, 2007 and continuing. On March 19, 2008, as part of a hearing on preliminary motions, the IAB heard Appellee's motion to dismiss. Appellee sought dismissal on the ground that Appellant's injury actually occurred in 2004. As such, Appellee asserted, the applicable two-year statute of limitations had expired. After some deliberation, the IAB rendered its opinion, agreeing that Appellant's injury stemmed from her May 8, 2004 accident and petition. Therefore, the IAB ruled that her claim was time barred, granting Appellee's motion to dismiss.

On April 23, 2008, Appellant moved the IAB for reargument. Appellant contended that her injuries were cumulative in nature. Appellant urged that the appropriate date to begin the two-year statute of limitations was upon the 2007 injury as its cumulative nature did not become actionable until then. The IAB, however, did not find Appellant's argument persuasive. The IAB considered the testimony of Dr. Ganesh Balu from both a 2005 and a 2008 deposition. The IAB found that Appellant's injury was manifested by no later than 2004. Therefore, the IAB denied Appellant's motion, dismissing her claim based on the expiration of the statute of limitations.

II: STANDARD OF REVIEW

The Court's review of a decision from the Industrial Accident Board is two-fold. The Court is limited to assessing whether the IAB's decision was based on substantial evidence[1] or whether the IAB erred as a matter of law.[2] Reviews of legal errors are performed *de novo*.[3]

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[1] *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998), quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[2] *Id.* citing *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994).

[3] *Id.*

III: ANALYSIS

A) The IAB's decision was supported by substantial evidence.

In making its decision, the IAB considered the only evidence available to it. That evidence was the two depositions of Dr. Balu. Predominantly, the IAB relied on Dr. Balu's 2008 deposition, where he opined that Appellant's injuries that forced her to quit working in 2007 were the same injuries as she had suffered in 2004. The IAB found this testimony sufficient to hold that Appellant's injury date was no later than 2004.

Substantial evidence has been defined in Delaware as "more than a scintilla but less than a preponderance."[4] When considering Appellant's response to the motion to dismiss, the IAB considered all the evidence before it. Based on this evidence, which essentially was limited to two depositions, the IAB granted the motion. No contrary evidence was presented to direct the IAB otherwise. Without any opposition to Dr. Balu's opinion, the IAB ruled in accordance with the substantial evidence. This Court cannot overturn the IAB's factual determination based on the evidence presented.

B) The IAB did not err at law when applying the statute of limitations.

The appropriate statute of limitations for workers' compensation claims is two-

[4] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988), citing *DiFilippo v. Beck*, 567 F. Supp. 110 (D. Del. 1983).

years.[5] For statute of limitations purposes, injuries giving rise to a workers' compensation claim occur when "the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable nature of the injury or disease."[6] In this instance, Appellant became aware of her work related injuries no later than 2004.

Appellant argues that the IAB failed to address the test provided by *Chicago Bridge and Iron Company v. Walker*.[7] This test provides "that a claimant proceeding on a gradual deterioration or cumulative detriment to health theory must prove two points: (1) that his usual duties and work habits contributed to his condition, and (2) that such contributing factors were present on the day when he alleges that his right to compensation commenced."[8]

Appellant urges that the IAB did not consider the second part of the above test. Appellant contends that the cumulative trauma she suffered in 2006 and 2007 was sufficient to succeed on a cumulative detriment theory.

In *Duvall v. Charles Connell Roofing*, the Delaware Supreme Court described the new theory for when an accident occurs.[9] Under *Duvall*, Appellant could be

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[5] 19 *Del. C.* § 2361(a).

[6] *Geroski v. Playtex Family Products*, 1996 WL 69770, at *1 (Del. Jan. 24, 1996), citing *Anderson v. State*, 1992 WL 115948, at *2 (Del. Apr. 9, 1992).

[7] 372 A.2d 185 (Del. 1977), (overruled in favor of "unusual exertion rule" in *Duvall v. Charles Connell Roofing*, 564 A.2d 1132 (Del. 1989)).

[8] *Id.*

[9] *Duvall*, 372 A.2d at 1132.

entitled to the unusual exertion test if she established that the cause of her 2007 injury was an unusual exertion.[10] The evidence and arguments made at the motion hearing below did not present support for this theory. On the contrary, the evidence presented was Dr. Balu's testimony that the injuries were the same. From that, the IAB concluded that the cause was also the same. In considering the evidence, the IAB determined that Appellant's 2007 petition arose out of the 2004 injury.

This Court is not in a position to find new evidence. Therefore, the Court must rely on that evidence which was relied on below. Seeing that the evidence supported the IAB's decision, the statute of limitations began no later than the 2004 injury and expired before Appellant petitioned for compensation in 2007.

IV: CONCLUSION

Because the IAB's decision was supported by substantial evidence and was not contrary to the law, that decision is **AFFIRMED.**

SO ORDERED.

/s/ Robert B. Young
J.

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[10] *Id.*