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

FRANK J. MURPHY,	)	
	)	
	)	
Appellant,	)	
	)	
v.	)	**C.A. No. N12A-02-007 MJB**
	)	
	)	
ALLEN FAMILY FOODS,	)	
	)	
Appellee.	)	
	)	

Submitted: October 2, 2012
Decided: January 23, 2013

Upon Appellant's Appeal from the Industrial Accident Board's Decision.
AFFIRMED.

OPINION AND ORDER

Robert C. McDonald, Esquire, Robert C. McDonald, Esquire, Attorneys for Appellant Frank J. Murphy.

John W. Morgan, Esquire and Anthony N. Delcollo, Esquire, Heckler & Frabizzio, Wilmington, Delaware, Attorneys for Appellee Allen Family Foods.

BRADY, J.

I. INTRODUCTION

Frank J. Murphy ("Murphy") appeals the decision of the Industrial Accident Board ("IAB") granting dismissal of his petition for worker's compensation benefits after concluding it was barred by the statute of limitations.[1] On appeal, the Court must determine whether the IAB's conclusion that Murphy's petition was barred by the statute of limitations is supported by substantial evidence in the record and free from legal error.[2] Upon review of the record, and for reasons set forth in this Opinion, the Court finds that the Board's decision is supported by substantial evidence and free from legal error. Accordingly, the decision of the IAB is **AFFIRMED**.

II. BACKGROUND

Murphy was an employee of Appellee Allen Family Foods ("Allen") on September 16, 2009, when he asserts that he sustained an employment-related injury.[3] Murphy first filed a petition for relief on March 15, 2010.[4] A hearing was initially scheduled before the IAB for July 29, 2010, but was continued until September 21, 2010, to allow Murphy to arrange for an expert medical witness to testify. Prior to the September 21, 2010 hearing date,[5] on September 2, 2010, Murphy withdrew his original petition[6] because "the doctor indicated he would not be in a position to testify…[and] wasn't going to testify."[7] Murphy filed a second petition on September 26, 2011, more

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[1] *Murphy v. Allen Family Foods*, Bd. Hearing No. 1348876 (Jan. 19, 2012).
[2] *Boone v. Syab Servs./Capitol Nursing*, 2012 WL 3861059, at *1 (Del. Super. Ct. Aug. 23, 2012) (citing *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985)).
[3] Record at 5 (hereinafter "R.").
[4] *Id.* at 6 ("Mr. Murphy filed his DCD petition in March 15th, 2010.").
[5] *Id.*
[6] *Id.* Murphy asserts that he withdrew the petition for the same reason he initially requested a continuance of the IAB hearing – i.e. that he was having trouble coordinating with his expert medical witness.
[7] *Id*. at 12. Murphy's attorney described how, knowing that he had no expert medical witness, "[i]t would have been disingenuous for [him] to ask for a continuance." *Id.*

than a year later. Allen filed a motion to dismiss on the ground that the petition was barred by the statute of limitations.[8]

The IAB dismissed Murphy's second petition, concluding that it was barred by the statute of limitations.[9]

A. Parties' Contentions

Murphy contends that the IAB's decision to dismiss his petition pursuant to the statute of limitations was in error, and accordingly should be reversed by this Court.[10] He argues that *O'Lear v. Strucker*[11] should guide the Court, which states "that the saving statute was designed to mitigate against the harshness of the defense of the statute of limitation against a Plaintiff who, through no fault of his own, finds his cause technically barred by the lapse of time."[12] Murphy notes that his original petition was filed well within the statute of limitations, and the second petition was filed outside of the statute of limitations only because of "the inability of the medical expert to testify regarding the Appellant's injury and his work duties."[13] Specifically, he claims that his medical expert was unprepared, within the applicable time constraints, to testify as to any connection between Murphy's injuries and his employment.[14] This, in combination with lack of

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[8] R. at 6 ("So the two dates are 9/16/09 [the date of the alleged accident]; 9/26/11 [the date upon which Murphy re-filed his petition with IAB]. We have a two year statute of limitation. This was filed two years and 10 days so I'm asking that it be dismissed because it was too late.").
[9] *Murphy v. Allen Family Foods*, Industrial Accident Board No. 1348876, at 1 (Jan. 18, 2012). See *also* DEL. CODE. ANN. Tit. 19 § 2361(a) ("In case of personal injury, all claims for compensation shall be barred forever unless, within two years after the accident [compensation has been established or at least one party has appealed]".).
[10] Opening Br., at 4.
[11] 209 A.2d 775 (Del. Super. Ct. 1965).
[12] Opening Br., at 5.
[13] *Id.*
[14] *Id.*

prejudice to the appellee, Murphy argues, fit within the "liberally construed" confines of the statute.[15]

Allen contends that Murphy's action is barred by the statute of limitations, and does not fall within any of the exceptions set forth in Section 8118.[16] Allen asserts that "[a] voluntary withdrawal is not a procedural defect."[17] Accordingly, Allen argues, the IAB was correct in dismissing his petition.[18]

III. STANDARD OF REVIEW

The scope of this Court's review of a decision by the IAB is limited to determining whether the IAB's decision is supported by substantial evidence,[19] and is free from legal error.[20] Substantial evidence consists of "more than a scintilla but less than a preponderance,"[21] and must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[22] Freedom from legal error exists when "the [Industrial Accident] Board properly applied the relevant legal principles."[23] In reviewing the record for substantial evidence, this Court will consider the record in the light most favorable to the party prevailing below.[24] Unless no substantial evidence supports a decision by the IAB, this Court must uphold its decision.[25] This Court must

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[15] *Id.* at 5-6.
[16] Answering Br., at 4.
[17] *Id.* at 5.
[18] *Id.* at 6-7.
[19] *General Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960).
[20] *Boone v. Syab Servs./Capitol Nursing*, 2012 WL 3861059, at *1 (Del. Super. Ct. Aug. 23, 2012) (citing *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985)).
[21] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (citing *Cross v. Califano*, 475 F.Supp. 896, 898 (M.D. Fla. 1979)).
[22] *Olney*, 425 A.2d at 614 (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).
[23] *State v. Kazi*, 1994 WL 637028, at *4 (Del. Super. Ct. Mar. 11, 1994).
[24] *Boone*, 2012 WL 3861059, at *1 (citing *Johnson*, 213 A.2d at 67).
[25] *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

defer to the IAB's expertise[26], and decline to weigh evidence, resolve credibility questions, or make its own factual findings.[27]

IV. DISCUSSION

An individual must file a personal injury claim with the IAB within two years of the alleged accident.[28] Under 19 *Del. C.* § 2361(a), "all claims for compensation shall be forever barred unless, within 2 years after the accident, the parties have agreed upon the compensation…or unless, within 2 years of the accident, 1 or more of the interested parties have appealed to the board."[29] In the case *sub judice*, Murphy initially filed within the statute of limitations, but later withdrew his petition.[30] Murphy later filed a second petition, but the date of filing exceeded the two-year statute of limitations by ten days.[31] Accordingly, Murphy's petition did not meet the deadline set forth in 19 *Del. C.* § 2361(a). The IAB's opinion notes that the statute of limitations is a procedural device, and "it follows that Section 2361 can be avoided in appropriate circumstances."[32] The IAB subsequently opined that while the "savings statute"[33] can serve to mitigate the draconian harshness of procedural devices such as the statute of limitations, it may only do so in certain enumerated circumstances.[34] Concluding that the facts of Murphy's case do not fall within the safety net of the savings statute, the IAB dismissed his petition.[35]

[26] *Noel-Liszkiewicz v. LA-Z-BOY, Inc.*, 2012 WL 4762114, at *8 (Del. Super. Ct. Oct. 3, 2012).
[27] *Id.* (citing *Johnson*, 213 A.2d at 66).
[28] DEL. CODE. ANN. Tit. 19 § 2361(a).
[29] *Id.*
[30] R. at 6.
[31] *Id.*
[32] *Murphy v. Allen Family* Foods, Industrial Accident Board No. 1348876, at 2.
[33] DEL. CODE ANN. Tit. 10 § 8118(a).
[34] *Murphy v. Allen Family* Foods, Industrial Accident Board No. 1348876, at 4 ("[T]o take advantage of the savings statute the factual circumstances must fit one of the six exceptions set forth in the statute.") (citing *Graleski v. ILC Dover*, 2011 WL 3074710, at *4 (Del. Super. Ct. Jul. 26, 2011) (order)).
[35] *Id.* at 5 ("While the savings statute should be read liberally, it cannot be read so broadly as to treat voluntary withdrawl of a petition without prejudice as an abatement of the action.").

"No matter what hardship results," the IAB stated, "statutes of limitations cannot be re-written to provide exceptions where the legislature made none."[36]

The Delaware legislature has carved out enumerated exceptions to the two-year deadline, which apply under limited circumstances.[37] These exceptions are part of what is termed a "savings statute," and are codified under 10 *Del. C.* §8118(a). Pursuant to the statute,

> If in any action duly commenced within the time limited therefore in this chapter, the writ fails or a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein.[38]

Delaware jurisprudence unambiguously holds that there are "only six circumstances that trigger the extra one-year period."[39] "The Savings Statute, 10 *Del. C.* § 8118(a), creates six exceptions to the applicable statute of limitations in circumstances where a plaintiff has filed a timely lawsuit, but *has been procedurally barred from obtaining a resolution on the merits*."[40] This Court has further noted that, "[w]hile liberality of approach in the

[36] *Id.* (citing *Ewing v. Beck*, 520 A.2d 653, 660 (Del. 1987); *Reyes v. Kent General Hosp.*, 487 A.2d 1142, 1146 (Del. 1984)).
[37] DEL. CODE. ANN. Tit. 10 § 8118(a).
[38] DEL. CODE. ANN. Tit. 10 § 8118(a).
[39] *Graleski*, 2011 WL 3074710, at *4.
[40] *Id.* (emphasis added).

construction of these statutes is recommended, an exception should not be read into a statute which does not, in fact, exist expressly or by inference."[41]

In the case *sub judice*, the Court finds the Board correctly interpreted and applied the savings statute. The record does not indicate insufficient service of Murphy's petition, nor "default or neglect" on the part of an officer of the court.[42] Further, the petition was not defeated or avoided due to the death of any party, or a technical matter of form.[43] Moreover, no judgment on Murphy's petition has been vacated or reversed.[44] Finally, the petition was not abated.[45]

Conversely, Murphy re-filed his petition after the statute of limitations had passed because "there was some difficulty with the medical witness."[46] While this problem is not exclusively of Murphy's making, it does not fall within the exceptions enumerated in 10 *Del. C.* § 8118(a). These exceptions provide relief for procedural defects, and voluntary withdrawal neither explicitly nor implicitly fits such criteria. By withdrawing his petition, Murphy sought to avoid a dismissal of his first action at the scheduled hearing because he could not produce a medical expert to relate his injuries to the work accident. He had more than a year to file again, if he had secured such a witness.[47] He did not do so, to his detriment.

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[41] *O'Lear v. Strucker*, 209 A.2d 755, 760 (Del. Super. Ct. 1965) (citing *Vari v. Food Fair Stores, New Castle, Inc.*, 199 A.2d 116, 119 (Del. Super. Ct. 1964).
[42] *Murphy v. Allen Family* Foods, Industrial Accident Board No. 1348876, at 4.
[43] *Id.*
[44] *Id.*
[45] *Id.* ("The common law meaning of abatement has been defined as 'an overthrow of a suit…resulting from the fact that the defendant pleads some matter that defeats the action…[a]n alternative definition of abatement is ' the result…of defects which vitiate the propriety of [a] suit as brought, as opposed to the existence…of the cause of action.") (citations omitted).
[46] R. at 6.
[47] The Court does not opine here whether this action would have been sustained or successful.

V. CONCLUSION

There is substantial evidence in the record from which a reasonable person could conclude that Murphy's petition was barred by the statute of limitations. Because there is substantial evidence to support the decision, and no legal error, the decision of the IAB is **AFFIRMED**.

IT IS SO ORDERED.

__________/s/______________
M. Jane Brady
Superior Court Judge