SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947

March 22, 2010

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RE: Marian A. Chandler v. Pinnacle Foods
C.A. No. S09A-07-002-ESB
Letter Opinion

Date Submitted: November 18, 2009

Dear Counsel:

This is my decision on Marian A. Chandler's appeal of the Industrial Accident Board's denial of her Petition to Determine Compensation Due.

STATEMENT OF THE FACTS

Chandler is 56-years-old. She was employed by Pinnacle Foods in a pickle plant for 33 years, the last 26 of which were as a full-time employee. Chandler sorted and packed pickles into jars and five gallon pails. Her job required her to spend most of her time on her feet leaning over a line of moving pickles, removing rotten and broken pickles and foreign objects. Chandler would also have to twist and turn in order to dispose of these items.

Chandler had low back pain for approximately three years. She managed her back

pain by using over-the-counter medications, sports creams, heat, massages, and a hot tub. Chandler did not miss any work because of her back pain and was able to do her job. Her back pain increased in severity in the last week of January 2008. Chandler went to see Cindy Dickerson, a human resources employee at Pinnacle Foods, about her back pain. Chandler told Dickerson that she felt pain when she got out of her car and that it was so bad that she could barely move. Dickerson told Chandler to go see her family doctor. Dickerson followed up with Chandler the next week to see if she had gone to see her doctor yet. Chandler had not gone to see her doctor yet and was still in pain. She talked to Dickerson a few days later, telling her that she thought her back pain was related to her job. Chandler's back pain got so bad that she went to the Nanticoke Memorial Hospital emergency room on February 19, 2008. Chandler never returned to work and was terminated a year later.

Chandler filed a Petition to Determine Compensation Due with the Board on July 28, 2008. The Board held a hearing on February 25, 2009. Stephanie Parker, Walter Wilman, Cindy Dickerson, Mary Ann Palmer, Richard P. Dushuttle, M.D., Jerry L. Case, M.D., and Chandler testified at the hearing. Parker is a crew leader at Pinnacle Foods. She has worked with Chandler for many years. Parker testified about the nature of Chandler's job. Wilman is Chandler's boyfriend. He testified about Chandler's back pain and how she managed it. Dickerson testified about Chandler's work history and complaints of back pain. Palmer is a vocational case manager. She testified about jobs that Chandler could do. DuShuttle and Case are board certified orthopedic surgeons. DuShuttle testified for Chandler. Case testified for Pinnacle Foods. Both testified about Chandler's back problem and they largely agreed that she has widespread degenerative disk disease at L2-3, L3-4

and L5-S1, with some degenerative spondylolisthesis at L3-4, and a possible annular tear at L3-4, with spondylotic disk protrusion at L5-S1. The two doctors disagreed over whether Chandler's back problems were caused by her job. Dr. Dushuttle testified that Chandler's back problems were aggravated over time by her job. Dr. Case testified that Chandler's back problems were not caused by her job. He testified further that the first time any doctor diagnosed Chandler's back problems was when she went to the Nanticoke Memorial Hospital emergency room on February 19, 2008. Chandler testified about the nature of her job and her back pain. The Board found that Chandler's Petition to Determine Compensation Due was barred by the statute of limitations, reasoning that she should have recognized the nature, seriousness and probable compensable character of her back pain three years before she filed her claim.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is supported by substantial evidence and whether the agency made any errors of law.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual

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[1] *General Motors v. McNemar,* 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

[2] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dism.* 515 A.2d 397 (Del. 1986)(TABLE).

findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to supports its conclusions.[5]

DISCUSSION

Chandler argues that the Board's finding that her Petition to Determine Compensation Due is barred by the statute of limitations is not supported by substantial evidence in the record. The statute of limitations for filing a workers' compensation claim "does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury."[6] The date that the injury becomes severe is the date which the statute of limitations is triggered and the date on which carrier liability may be assessed.[7] "It is well-established Delaware law that cumulative detrimental effect claims are treated as injuries for statute of limitations purposes."[8] The applicable statute of limitations is two years. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

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

[4] 29 *Del.C* § 10142(d).

[5] *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

[6] *Geroski v. Playtex*, 676 A.2d 903 (Table), 1996 WL 69770, at *1 (Del. Jan. 24, 1996).

[7] *Seaford Machine Works v. Johnson*, 1996 WL 190776 (Del. Super. April 1, 1996), citing *Standard Distributing Co. v. Nally*, 630 A.2d 640 (Del. 1993).

[8] *Sears Logistics Services v. Falconi*, 2006 WL 1134777, at * 2 (Del. Super. March 30, 2006).

The Board has made at least three findings about when Chandler, as a reasonable person, should have recognized the nature, seriousness and probable compensable character of her low back pain. The first date is February 19, 2005. This is based on the following statement by the Board:

> "In the case at hand, claimant and Drs. Dushuttle and Case testified that her back symptoms began about three years before she sought treatment and the Board finds that she should have recognized the nature, seriousness and probable compensable character of her condition at that time."

Chandler sought treatment for the first time on February 19, 2008, making the applicable date for statute of limitations purposes February 19, 2005.

The second date is July 28, 2005. This is based on the following statement by the Board:

> "Claimant self-treated her pain with cream, heat, massage and over-the-counter medication and then sought medical treatment only after she was laid off from work. She thought that the back pain had been related to work because it felt better during the periods in which she was laid off and then when she would return to work, the pain would start again. The Board finds that Claimant knew or should have known that her low back symptoms could have been related to work for three years before filing her petition for benefits."

Chandler filed her Petition to Determine Compensation Due on July 28, 2008, making the applicable date for statute of limitations purposes July 28, 2005.

The third date is on or about 2005. This is based on the following statement by the Board:

> "In the case at hand, the doctors actually agree that Claimant reported to all of her doctors that her low back symptoms began three years earlier." The Board finds that Claimant's symptoms began on or about 2005.

This would make "on or about 2005" the applicable date for statute of limitations purposes. Thus, the Board has found two distinct dates and a third date that encompasses

both distinct dates for the start of the statute of limitations.

The Board's multiple findings indicate how difficult it is to determine when the statute of limitations begins when the claimant's injury is progressive in nature. Chandler filed her Petition to Determine Compensation Due on July 28, 2008. The statute of limitations is two years.[9] Thus, based on the Board's finding, Chandler should have realized the nature, seriousness and probable compensable character of her back pain before July 28, 2006. The evidence discussed by the Board to support its finding is that Chandler told Drs. Dushuttle and Case that she had back pain for about three years, that she treated her back pain herself, and that she thought her back pain was related to her job because her back felt better when she was not working. The question is whether this is adequate to support the Board's finding. I have concluded that it is not.

The Board found that when Chandler initially began experiencing back pain, her pain was so severe that she should have recognized the nature, seriousness, and probable compensable character of her back pain. There is not substantial evidence in the record to support this finding. Chandler had back pain for three years that she treated herself. This is all of the evidence in the record about the nature of her back pain. No doctor told Chandler about the nature of her back pain at all until February 19, 2008. Given this, there is not substantial evidence in the record about the nature of Chandler's back pain before July 28, 2006. Chandler's back pain increased over time. She managed her back pain by using over-the-counter medications, sports creams, heat, massages, and a hot tub. Chandler never missed a day of work because of her back pain and was able to do her job

[9] 19 *Del.C.* § 2361(a).

properly in spite of it. It was not until the last week of January, 2008, that Chandler told Dickerson that her back pain was so bad that she could barely move. Moreover, it was not until February 19, 2008, that Chandler's back pain was so bad that she saw a doctor. This was a mere four months before she filed her claim for benefits. Given this, there is not substantial evidence in the record about the seriousness of Chandler's back pain before July 28, 2006. Chandler thought that her back pain was exacerbated by her job. However, this alone is not sufficient to make her condition compensable.[10] In order to be compensable her back injury had to arise out of and be in the course of her employment.[11] No doctor told Chandler that her back pain was caused by her work until February 19, 2008. It is interesting to note that Drs. Dushuttle and Case, with the benefit of their medical training, years of experience, and access to advanced diagnostic testing, disagree as to whether Chandler's job caused her back pain, yet the Board found that three years before she felt unable to work or saw a doctor for treatment or was diagnosed that she should have known the probable compensable character of her back pain.[12] The only evidence that Chandler's back pain was probably compensable became available when she first saw

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[10] *Smith v. Chrysler Corp*., 1987 WL 17184, at *2 (Del. Super. Sept. 16, 1987).

[11] 19 *Del.C.* § 2301(4).

[12] *See Wright v. United Medical & Home Health, Inc*., 2002 WL 499899, at *3 (Del. Super March 21, 2002)("A diagnosis date, while an important consideration, does not automatically trigger the statute of limitations. Being made aware of a condition does not necessarily equate to a recognition of its severity or compensability. Because carpel tunnel is a progressive conditions, a person may be diagnosed early in its development, when it has a minimal impact on the person's daily activities. At that early stage, the condition may be not so severe as to require compensation. A reasonable person, under the circumstances, would not necessarily recognize the compensable nature of the conditions. The statute of limitations would begin to run only after the conditions worsened to the point that a reasonable person recognized its nature, severity, and probably compensable nature.").

a doctor on February 19, 2008. Given this, there is not substantial evidence in the record that Chandler should have known the probable compensable character of her back pain before July 28, 2006.

CONCLUSION

The Industrial Accident Board's decision is reversed and the case is remanded to the Industrial Accident Board for further proceedings to consider the merits of Chandler's Petition to Determine Compensation Due.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley