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Date Submitted: September 11, 2002  
Date Decided: October 30, 2002

RE: ***Gil Fleming v. Perdue Farms, Inc.***  
C.A. No. 02A-02-009-RFS

Dear Counsel:

This is my decision on Gil Fleming's ("Claimant") appeal of the Industrial Accident Board's ("Board") decision granting Perdue Farms, Inc.'s ("Employer") Motion to Dismiss. The Board's decision is reversed and remanded for the reasons set forth herein.

#### STATEMENT OF FACTS<sup>1</sup>

On December 2, 1998, Claimant filed a First Report of Injury alleging that an industrial accident occurred on November 10, 1998. Thereafter, Carrier and Claimant corresponded regarding the claim. By letter dated December 22, 1998, Insurance Carrier ("Carrier") denied the claim. On February 22, 1999, Claimant filed a Petition to Determine Compensation Due. Thereafter, this petition was withdrawn without prejudice. On November 7, 2001, Claimant filed the present Petition to Determine Compensation Due. The Board held a legal hearing to address Employer's Motion to Dismiss asserting a statute of limitations' defense. At the January 30,

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<sup>1</sup>There was no factual testimony before the Board. Therefore, this Court adopts the procedural history of the case as admitted by both parties at the legal hearing before the Board.

2002 hearing, there was no factual testimony presented. Instead, the Board heard counsel's legal arguments on the motion. At the conclusion of the hearing, the Board granted Employer's Motion to Dismiss finding that the statute of limitations barred Claimant's action. The Board held that the notice provision of Title 18, Section 3914 of the Delaware Code is inapplicable in Worker's Compensation actions. The Board further held that even assuming that Section 3914 applies, it was not triggered in this case since there was no claim pending. Claimant appealed this decision.

### ISSUES PRESENTED

The first issue is whether the Board erred in declining to apply the notice provision of 18 *Del. C.* §3914<sup>2</sup> to a claim for Worker's Compensation Benefits. Claimant argues that Carrier was required, under section 3914, to provide written notice to Claimant of the applicable statute of limitations for Claimant's action. Claimant argues that since Carrier did not provide such notice, Employer is estopped from asserting the statute of limitations defense.

The next issue is whether the Board erred in its finding that even if section 3914 was applicable, Claimant failed to file a claim triggering the notice provision of this section. Claimant argues that Carrier was required to provide notice upon Claimant's report of the incident to Employer and subsequent acknowledgment of the claim by the Carrier. Claimant asserts that the filing of the accident report and acknowledgment of the claim by the Carrier was sufficient to trigger the notice provision of section 3914.

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<sup>2</sup>Section 3914 provides: "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." 18 *Del. C.* §3914.

## DISCUSSION

### A. Standard of Review

The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence, *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960), and to review questions of law *de novo*, *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del.), *app. disp.*, 515 A.2d 397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, 312 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C. § 10142(d)*.

### B. Application of 18 Del. C. § 3914

The Board erred in failing to apply 18 *Del. C. § 3914* to a claim for Worker's Compensation Benefits. Employer conceded this point in the answering brief based on this Court's holding in *Butterfield v. Conectiv*, Del. Super., C.A. No. 01A-10-010, Herlihy, J. (June 28, 2002) (Mem. Op.); *see also McMillan v. State*, Del. Super., C.A. No. 02A-02-008, Bradley, J. (Sep. 19, 2002) (Letter Op.) (reaching the same result). In *Butterfield* the Court held that the notice provision of 18 *Del. C. § 3914* applies to workers' compensation claims. *Id.* Section

3914 requires insurers to give written notice of the applicable statute of limitations during the pendency of a claim. 18 *Del. C.* §3914.

Section 3914 operates as “an expression of legislative will to toll otherwise applicable time limitations with respect to claims made against insurers.” *Stop & Shop Co. v. Gonzales*, 619 A.2d at 898 (Del. 1993) (citing *Lankford v. Richter*, 570 A.2d 1148, 1149 (Del. 1990)). An insurer who fails to comply with the notification requirements of Section 3914 is estopped from asserting the statute of limitations defense against the claimant. *See Lankford v. Richter*, 570 A.2d at 1150; *Samoluk v. Basco, Inc.*, 528 A.2d 1203, 1204 (Del. Super. Ct. 1987).

The parties dispute whether notice was provided in this case. *See* Tr. at 8. Since evidence regarding whether notice was provided is not a part of the record, the Court cannot determine whether the notice requirement of Section 3914 has been satisfied. However, Employer argues that the duty to provide notice was extinguished based on the factual circumstances and procedural history of this case. Accordingly, the next issue is whether the duty to provide notice was triggered in this matter.

### C. Pendency of a Claim

The Board found that section 3914 is not applicable since a claim was not pending. *See McMillan v. State*, Del. Super., C.A. No. 02A-02-008, Bradley, J. (Sep. 19, 2002) (Letter Op.) (finding that a claim was pending) . The term claim is not defined in the Insurance Code.

Black’s Law Dictionary defines claim as:

“The aggregate of operative facts giving rise to a right enforceable by a court; the assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional; a demand for money or property to which one asserts a right;

an interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing.” Black’s Law Dictionary 240-41 (7<sup>th</sup> ed. 1999).

Here, Claimant filed an accident report and corresponded with the Carrier regarding the claim. Subsequently, Carrier denied the claim and Claimant filed a Petition to Determine Compensation Due which was voluntarily withdrawn at a later date. It was not dismissed with prejudice. The term “without prejudice” generally means that the party may refile the action at a later date. *McCann v. City of Lakewood*, 642 N.E.2d 48 (Ohio Ct. App. 1994), *discretionary appeal not allowed*, 640 N.E.2d 527. Altogether, these actions amount to the “pendency of a claim received pursuant to a casualty insurance policy” triggering the application of section 3914. Pendency is defined as until a final decree is approved or the time to appeal a final decree has expired. *See Russ Togs, Inc. v. Grinnell Corp.*, 426 F.2d 850 (2<sup>nd</sup> Cir. 1970), *cert. denied*, 91 S. Ct. 119; *Electric Theater Co. v. Twentieth Century-Fox Film Corp.*, 113 F.Supp. 937 (W.D. Mo. 1953). Final decree means final order. *Nunley v. Salyers*, 508 S.E.2d 368 (W. Va. 1998).

Employer argues that the duty to provide notice was extinguished once the petition was withdrawn. However, there is nothing in the statutory language mandating such a result. Under the plain meaning of the statute knowledge cannot be presumed. Once a claim was pending, the Carrier was required to provide notice of the statute of limitations. The fact that Claimant later voluntarily withdrew his petition does not change this result. The carrier’s responsibility cannot be discharged or excused in manner argued by Employer. As the Delaware Supreme Court explained:

“While we agree that, in the abstract, notice by an insurer to an attorney of the applicable statute of limitations may appear unnecessary, it must be remembered that § 3914 is an insurance industry regulatory measure. Although the statute is intended to benefit claimants, it must be fairly applied to those who are subject to its notice requirement.”  
*Vance v. Irwin*, 619 A.2d 1163, 1165 (Del. 1993) (Emphasis ours).

This obligation of insurer cannot be waived through claimant’s actions.<sup>3</sup>

However, as already noted, the record in this case is incomplete regarding the issue of whether notice was provided. Accordingly, this case is remanded to the Board in order to hear testimony regarding this issue. If notice was provided, then the Board must dismiss the case as time-barred, due to the failure to file the present petition before the expiration of the statute of limitations. If notice has not been provided, then Carrier is estopped from asserting the statute of limitations as a defense and the Board must conduct a hearing to address the merits of the petition.

## CONCLUSION

Section 3914 applies in this case. This case is remanded for a hearing to determine whether notice was provided. If notice was provided, the case must be dismissed. If notice has not been provided, then the Board must consider the merits of Claimant’s petition. For the

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<sup>3</sup>See generally 28 AM. JUR.2d *Estoppel & Waiver* § 210 (2000) (noting “While a person may waive an advantage of law intended for his or her benefit, the doctrine of waiver does not apply to transactions that are forbidden by statute, violate the public’s interests, are contrary to public policy, or that infringe upon the rights of others. . . In deciding whether to enforce an individual’s waiver of a right, courts ask whether the right implicates institutional and societal values that transcend the individual’s interest.”).

foregoing reasons, the decision of the Board is reversed and remanded.

**IT IS SO ORDERED.**

Very truly yours,

Richard F. Stokes

cc: Prothonotary