

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

M. DENISE TOLLIVER,)
)
 Claimant-Below,)
 Appellant,) C.A. No. N17A-06-009 JRJ
)
 v.)
)
 DELAWARE FUTURES,)
)
 Employer-Below,)
 Appellee.)

OPINION

Date Submitted: October 2, 2017
Date Decided: November 30, 2017

On Appeal from the Industrial Accident Board: AFFIRMED.

M. Denise Tolliver, 109 Gardengate Road, Camden, Delaware, *pro se* Claimant-Below/Appellant.

Gregory P. Skolnik, Esquire, Heckler & Frabizzio, The Corporate Plaza, 800 Delaware Avenue, Suite 200, P.O. Box 128, Wilmington, Delaware, Attorney for Employer-Below/Appellee.

Jurden, P.J.

I. INTRODUCTION

On April 21, 2017, M. Denise Tolliver (“Tolliver”) filed a Petition to Determine Compensation Due with the Industrial Accident Board (the “Board”), seeking compensation from her former employer, Delaware Futures (the “Employer”), for injuries she allegedly sustained during a workplace incident on November 19, 2012. The Board dismissed Tolliver’s Petition on statute of limitations grounds, pursuant to 19 *Del. C.* § 2361(a). Tolliver now appeals: (1) a Board Order dated June 7, 2017 (“Order to Dismiss”),¹ dismissing Tolliver’s Petition to Determine Compensation Due (the “Petition”); and (2) a Board Order denying her Motion for Reargument dated July 19, 2017 (“Order Denying Reargument”).²

For the reasons explained below, the Court finds that the Board’s Order to Dismiss and Order Denying Reargument are supported by substantial evidence in the record and free from legal error, and that the Board did not abuse its discretion.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

This appeal stems from an incident on November 19, 2012, when one of the Employer’s volunteers refused to leave Tolliver’s office, made menacing statements,

¹ Employer-Below Appellee’s Answering Brief on Appeal, Ex. B, Order Dated June 7, 2017 (“Board’s Order to Dismiss”) (D.I. 17) (Trans. ID. 61096670).

² Employer-Below Appellee’s Answering Brief on Appeal, Ex. D, Order on Claimant’s Motion for Reargument Dated July 19, 2017 (“Reargument Denial”) (D.I. 17) (Trans. ID. 61096670).

and chased Tolliver as she attempted to flee.³ Tolliver alleges she tripped while trying to escape and now suffers from herniated discs, Post Traumatic Stress Disorder (“PTSD”), and a heart condition. According to Tolliver, some of these conditions have caused ongoing disability since May 2014.⁴

On March 1, 2013, Tolliver filed a claim with the Employer, which referred the claim to Zurich, the Employer’s insurance provider.⁵ In a letter to Tolliver dated March 6, 2013 (the “Zurich Letter”),⁶ Zurich denied Tolliver’s entire workers’ compensation claim and provided the following notice as to the applicable statute of limitations:

Delaware Law requires that you be notified that the statute of limitations for worker’s compensation claims is two years. If your claim has been accepted and payment has been made to you or on your behalf, the statute of limitations is five years from the date of last payment.⁷

³ Employer-Below Appellee’s Answering Brief on Appeal, Ex. A, State of Delaware First Report of Occupational Injury or Disease (“First Report”) (D.I. 17) (Trans. ID. 61096670); Employer-Below Appellee’s Answering Brief on Appeal, Ex. A, Industrial Accident Board Pre-Trial Memorandum (“Pre-Trial Memorandum”) (D.I. 17) (Trans. ID. 61096670).

⁴ Pre-Trial Memorandum (D.I. 17) (Trans. ID. 61096670).

⁵ Plaintiff’s Opening Br., at 1 (D.I. 16) (Trans. ID. 61019411); Transcript of Proceedings Dated June 1, 2017, 7:18–20.

⁶ Employer’s Exhibit 1.

⁷ Employer’s Answering Brief, Ex. A, Petitioner’s Ex. B (“Zurich Letter”) (D.I. 17) (Trans. ID. 61096670) (Zurich denied the claim because it did not meet the statutory definitions of accident or injury).

On April 21, 2017, over four years after the date of the alleged incident, Tolliver filed a Petition to Determine Compensation Due with the Board.⁸ On May 21, 2017, the Employer filed a Motion to Dismiss Tolliver's Petition because the Petition was filed with the Board outside the two-year statute of limitations.⁹ Tolliver opposed the Motion and a hearing on the Motion to Dismiss was held on June 1, 2017.

B. The Motion to Dismiss Hearing

Two witnesses testified at the hearing: Eileen M. Kane ("Kane"), a claims specialist at Zurich, on behalf of the Employer; and Tolliver, on her own behalf.¹⁰ Kane testified that the Employer sent Tolliver's claim to Zurich and the claim was denied.¹¹ Kane further testified that Zurich issued the Zurich Letter to Tolliver on March 6, 2013.¹² Zurich kept its file open "for a time" after the Zurich letter was sent, but closed it when Zurich received no protest.¹³ Kane testified that in 2017 Zurich received a call from Tolliver, and it was explained to Tolliver that her claim had been denied.¹⁴ Kane testified that no payment of benefits was made on Tolliver's claim, and the only money spent by Zurich was spent investigating the

⁸ Employer-Below Appellee's Answering Brief on Appeal, Ex. B, Petition to Determine Compensation Due to Injured Employee ("Petition") (D.I. 17) (Trans. ID. 61096670).

⁹ 19 *Del. C.* § 2361.

¹⁰ Transcript of Proceedings Dated June 1, 2017, 6:14 & 21:3.

¹¹ *Id.* at 8:12-17.

¹² *Id.*

¹³ Transcript of Proceedings Dated June 1, 2017, 9:16-17.

¹⁴ *Id.* at 9:16-24.

claim.¹⁵ According to Kane, at no time did Zurich indicate that Tolliver's claim had been accepted.¹⁶ Kane provided a payment ledger, which supported Kane's testimony that Zurich made no payments to Tolliver on her claim.¹⁷ Further, Kane testified there was no record of any communication approving Tolliver's claim or requesting her banking information; and Zurich did not have direct deposit capabilities until 2016, so "there would be no reason" for Zurich to ask Tolliver for a banking and routing number.¹⁸

During the hearing, Tolliver advanced several arguments in opposition to the Motion to Dismiss and argued that misrepresentations in the Zurich Letter entitled her to compensation.¹⁹

First, Tolliver argued the Zurich Letter falsely misrepresented that her claim was not compensable and Zurich gave false reason for denying her claim. She maintains that Zurich obstructed her receipt of workers' compensation benefits and there is no statute of limitations in cases of fraud or obstruction.²⁰ The Board determined that this argument was not relevant to the statute of limitations analysis:

In every case when a claimant files an initial Petition to Determine Compensation Due, an employer or carrier has

¹⁵ *Id.* at 10:12–11:5.

¹⁶ *Id.* at 13:1–14.

¹⁷ *Id.* at 10:12–11:5; *see* Employer's Answering Brief, at 3–4 (D.I. 17) (Trans. ID. 61096670); Board's Order to Dismiss, *supra* note 1, at 2 (The only money Zurich paid in connection with Tolliver's claim was for investigative purposes).

¹⁸ Transcript of Proceedings Dated June 1, 2017, 12:1–12.

¹⁹ Board's Order to Dismiss, *supra* note 1, at 3.

²⁰ Transcript of Proceedings Dated June 1, 2017, 23:21–22.

denied benefits for reasons that the injured employee believes are false. Whenever the Board rules in the favor of the claimant, the Board is agreeing that the stated bases were false. This has no bearing on *when* the injured employee must file a petition with the Board. What is important is that Claimant knew that her claim was denied in 2013, when she received the...[Zurich Letter]. Knowing that the claim was denied, she had two years from the date of accident to file a petition with the Board to have the accident deemed compensable.

The Board found no obstruction by Zurich to Tolliver filing her Petition.²¹

Second, Tolliver argued that the Employer did not challenge her claim.²² The Board noted that this assertion was “unsupported hearsay” and “directly contradicted by the clear denial letter” Tolliver admitted she received.²³ Kane’s testimony – that there was no record of any communication approving Tolliver’s claim or requesting her banking information, and that Zurich did not have direct deposit capabilities until 2016 – coupled with the payment ledger showing no payments to Tolliver, constituted substantial evidence contradicting Tolliver’s assertion.²⁴

Third, Tolliver argued that she was only required to file a claim with the *Employer*, (which she did on March 1, 2013), within the two-year statute of limitations.²⁵ Relying on 19 *Del. C.* § 2361(a) and case law, the Board held that the

²¹ Board’s Order to Dismiss, *supra* note 1, at 7.

²² Transcript of Proceedings Dated June 1, 2017, 11:12–24.

²³ Board’s Order to Dismiss, *supra* note 1, at 7.

²⁴ Transcript of Proceedings Dated June 1, 2017, 12:1–12.

²⁵ *Id.* at 30:5–11 (emphasis added).

two-year statute of limitations runs from the date of the incident, not the date on which injuries were discovered or diagnosed.²⁶

Finally, the Board considered whether the statute of limitations should have been extended to five years under 19 *Del. C.* § 2361(b). Given Kane’s testimony and the payment ledger, the Board found that only investigative costs were paid.²⁷ The Board noted that investigative costs are not compensation payments under § 2361(b).²⁸ Consequently, the Board found that Tolliver’s Petition was forever barred under 19 *Del. C.* §2361(a).

C. The Board’s July 19, 2017 Order to Deny Reargument

Before the Board ruled on the Motion to Dismiss, Tolliver filed a “Post-Hearing Motion,” in which she restated the arguments she made during the June 1 hearing.²⁹ The Board treated Tolliver’s Post-Hearing Motion as a Motion for Reargument.³⁰ Because the Motion raised the same issues the Board previously addressed in its June 7 Order to Dismiss,³¹ and provided no additional argument to change the Board’s conclusion, the Board denied it.³²

²⁶ Board’s Order to Dismiss, *supra* note 1, at 4–5 (emphasis added).

²⁷ Board’s Order to Dismiss, *supra* note 1, at 8–9.

²⁸ *Id.*

²⁹ Reargument Denial, *supra* note 2, at 1 (Tolliver filed her Post-Hearing Motion two days after the hearing on the Motion to Dismiss).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

III. STANDARD OF REVIEW

On an appeal from the Industrial Accident Board, the Superior Court must determine if the Board's decision is supported by substantial evidence in the record and free from legal error.³³ "Substantial evidence" is less than a preponderance of the evidence but is more than a "mere scintilla."³⁴ It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³⁵ The Court must review the record to determine if the evidence is legally adequate to support the Board's factual findings. The Court does not "weigh evidence, determine questions of credibility or make its own factual findings."³⁶ If the record lacks satisfactory proof in support of the Board's finding, the Court may overturn the Board's decision. Legal errors are reviewed *de novo*.³⁷ Absent error of law, the Board's Orders are reviewed for abuse of discretion.³⁸ An abuse of discretion occurs when the Board's decision "exceeded the bounds of reason in view of the circumstances, [or] so ignored recognized rules of law or practice so as to produce injustice."³⁹

³³ *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Glanden v. Land Prep, Inc.*, 918 A.2d 1098, 1100 (Del. 2007) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

³⁴ *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

³⁵ *Histed*, 621 A.2d at 342 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

³⁶ *Olney*, 425 A.2d at 614.

³⁷ *Id.* (citing *Pers.-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

³⁸ *Id.* (citing *Pers. Gaines*, 981 A.2d at 1161).

³⁹ *Id.* (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

IV. DISCUSSION

A. Petitions Must Be Filed with the Board Within Two Years of the Incident

19 *Del. C.* § 2361(a) provides:

In case of personal injury, all claims for compensation shall be forever barred unless, within 2 years after the accident, the parties have agreed upon the compensation as provided in § 2344 of this title or unless, within 2 years after the accident, 1 or more of the interested parties have appealed to the Board as provided in § 2345 of this title.⁴⁰

“Where the language of the statute is unambiguous, no interpretation is required and the plain meaning of the words controls.”⁴¹ The Board correctly held that § 2361, as written, starts a two-year clock to file a Petition with the Board from the date of the accident; not the date injuries stemming from the accident are discovered.⁴²

Tolliver alleges she was involved in a work accident on November 19, 2012.⁴³ Her Petition was not filed with the Board until April 21, 2017, over four years after the date of the incident.

⁴⁰ 19 *Del. C.* § 2361(a).

⁴¹ *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000); see also *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, 492 A.2d 1242, 1246 (Del. 1985); see Employer’s Answering Brief, at 8 (D.I. 17) (Trans. ID. 61096670).

⁴² See 19 *Del. C.* § 2361(a); see also Board’s Order to Dismiss, *supra* note 1, at 2.

⁴³ First Report, *supra* note 3.

There is substantial evidence that Tolliver did not file her Petition with the Board within two years of the alleged incident and the Board did not commit legal error by so finding.⁴⁴

B. The Board's Decision to Apply Zurich's Statute of Limitations Defense was Supported by Substantial Evidence, Free of Legal Error, and Not an Abuse of Discretion

After finding that Tolliver did not file her claim with the Board within the two-year statute of limitations, the Board went on to consider whether there were circumstances that would “either prohibit Zurich from asserting the statute of limitations defense or stay the running of the statute of limitations for a sufficient time to permit Tolliver to file her Petition over four years after the date of the incident.”⁴⁵

A. Tolliver Was Notified of the Applicable Statute of Limitations

The Insurance Code requires an insurer to give timely written notice informing a claimant of the applicable statute of limitations.⁴⁶ The Board correctly held that Tolliver was notified of the applicable statute of limitations, in compliance

⁴⁴ See *McMillan v. State*, 2002 WL 32054600, at *3 (Del. Super. 2002) (An insurance claim filed with an employer then referred to an insurer is not the same as a petition with the Board).

⁴⁵ Board's Order to Dismiss, *supra* note 1, at 5–6; see *McMillan v. State*, 2002 WL 32054600, at *3 (Del. Super. 2002) (“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 also Employer's Answering Brief, at 9 (D.I. 17) (Trans. ID. 61096670).

⁴⁶ 18 Del. C. §3914;

with 18 *Del. C.* § 3914, through the Zurich Letter.⁴⁷ The Zurich letter, which Tolliver admits she received, specifically states:

“Delaware law requires that you be notified that the statute of limitations for workers’ compensation claims is two years.”⁴⁸

B. Tolliver’s Argument that Zurich’s Reasons for Denial Were False is Irrelevant to the Statute of Limitations Analysis

The Board correctly held that the reasons for Zurich’s denial were not relevant to the statute of limitations analysis. And there is substantial evidence to show Zurich did not obstruct Tolliver from filing her Petition – it denied her entire claim and advised her as to the applicable statute of limitations. The Board did not commit legal error or abuse its discretion in rejecting this argument.

C. The Employer and Zurich Did Not Approve Tolliver’s Claim

Tolliver argued she should be compensated for her injuries because the Employer told her it did not contest her claim.⁴⁹ As noted earlier, the Board found Tolliver’s testimony on this point to be unsupported hearsay and directly contradicted by the Zurich Letter that Tolliver admitted she received.⁵⁰ It is also contradicted by Kane’s testimony and Tolliver’s statement in her briefing that

⁴⁷ Board’s Order to Dismiss, *supra* note 1, at 6–7; see Zurich Letter, *supra* note 6; see also Employer’s Answering Brief, at 9 (D.I. 17) (Trans. ID. 61096670).

⁴⁸ Zurich Letter, *supra* note 6.

⁴⁹ Transcript of Proceedings Dated June 1, 2017, 31:8–13; Plaintiff’s Opening Br., at 1 (D.I. 16) (Trans. ID. 61019411) (“Plaintiff’s claim was uncontested by [E]mployer.”).

⁵⁰ Board’s Order to Dismiss, *supra* note 1, at 7.

“[w]hile Zurich held open Plaintiff’s claim file, it made no payout to Plaintiff’s medical providers.”⁵¹ The Board found, and this Court agrees, that there is substantial evidence to support the finding that Zurich denied Tolliver’s claim and paid no compensation to her.

D. The Zurich Letter Denied Tolliver’s Entire Claim and was Not Defective

Tolliver argued that a letter sent to her by Zurich in 2017 was defective for not specifically addressing her physical injuries.⁵² She also asserted that the 2017 letter was the first time Zurich specifically addressed her PTSD claim.⁵³ The Board correctly noted that “[t]here is no requirement that the carrier identify and separately deny each and every individual injury within the claim.”⁵⁴ The Board held that Tolliver’s argument also ignored the irrefutable fact that the 2013 Zurich Letter, which she admitted she received, denied her entire claim and notified her of the applicable statute of limitations.⁵⁵ The Board held that Zurich’s letter denied any compensable claim from the accident, and that if Tolliver “disagreed with that

⁵¹ Plaintiff’s Opening Br., at 3 (D.I. 16) (Trans. ID. 61019477) (Tolliver also avers, “Plaintiff filed a lawsuit in Delaware Superior Court against employer for Zurich not paying workers’ compensation claim and other compensation benefits due to Plaintiff [. . .]”).

⁵² See Board’s Order to Dismiss, *supra* note 1, at 3 & 8 (Kane sent the April 2017 letter (Employer’s Exhibit 2) to Tolliver after Tolliver called Zurich and was told her claim had been denied); see also Transcript of Proceedings Dated June 1, 2017, 19:8–24.

⁵³ *Id.*

⁵⁴ *Id.*; see 19 Del. C. § 2362 (An insurance carrier is only required to “notify the Department and the claimant in writing of: the date the notice of the claimant’s alleged industrial accident was received; whether the claim is accepted or denied; if denied, the reason for the denial; or if it cannot accept or deny the claim, the reasons therefor and approximately when a determination will be made,” “within 15 days after receipt of knowledge of a work-related injury.”).

⁵⁵ *Id.*

denial, she had two years from the date of the accident to file a petition with the Board. She did not do so.”⁵⁶ The Board’s ruling is supported by substantial evidence and free from legal error.

C. Substantial Evidence Supports the Finding that Zurich Never Made a Payment of Compensation to Tolliver

The Board examined whether the statute of limitations was extended to five years under 19 *Del. C.* § 2361(b) as a result of “payments of compensation” by Zurich to Tolliver.⁵⁷ Section 2361(b) provides:

Where payments of compensation have been made in any case under an agreement approved by the Board or by an award of the Board, no statute of limitation shall take effect until the expiration of 5 years from the time of the making of the last payment for which a proper receipt has been filed with the Department.

The Board correctly held that the investigative costs Kane testified about are not “payments of compensation” that would extend the statute of limitations under § 2361(b). As the Board noted:

Not every payment made by a carrier constitutes a payment of ‘compensation.’ For example, the payment of litigation cost[s] such as medical witness fees would not be deemed compensation for an injury, nor part of an ‘award’ by the Board [. . .] Other payments made to investigate a claim or for administrative expenses in connection therewith that do not reflect an acceptance of liability do not serve to toll the statute.⁵⁸

⁵⁶ *Id.*

⁵⁷ See 19 *Del. C.* § 2361(b).

⁵⁸ Board’s Order to Dismiss, *supra* note 1, at 8 –9.

Kane testified that Zurich made no compensation payments to Tolliver on this claim,⁵⁹ and Tolliver conceded in her Opening Brief that Zurich made no payments to Tolliver's medical providers."⁶⁰ There is substantial evidence to show that Zurich paid only investigative costs, not compensation, and, accordingly, the Board correctly found that the applicable statute of limitations was not five years, but two, pursuant to § 2361.

D. The Board Correctly Denied Tolliver's Motion for Reargument

The Board denied Tolliver's Motion for Reargument because the arguments within that Motion were fully addressed by the Board in its June 7, 2017 Order to Dismiss, and provided no additional argument to change the Board's conclusion.⁶¹ The Board did not commit legal error or abuse its discretion by doing so.⁶²

V. CONCLUSION

After careful review, the Court concludes that the Board's Orders are supported by substantial evidence in the record and free from legal error. Further, the Board did not abuse its discretion when it granted the Employer's Motion to Dismiss and denied Tolliver's Motion for Reargument.

⁵⁹ Transcript of Proceedings Dated June 1, 2017, 10:12–14; Employer's Answering Brief, at 11 (D.I. 17) (Trans. ID. 61096670).

⁶⁰ Plaintiff's Opening Br., at 3 (D.I. 16) (Trans. ID. 61019411).

⁶¹ Reargument Denial, *supra* note 2.

⁶² *See Clements v. Diamond State Port Corp.*, Board Hearing No. 1141580 (April 4, 2002) at 4 (The Board denied a motion for reargument finding "no basis to change its decision.").

WHEREFORE, IT IS HEREBY ORDERED that the Board's June 7, 2017 Order to Dismiss and July 19, 2017 Order denying Tolliver's Motion for Reargument are **AFFIRMED**.

IT IS SO ORDERED.



Jan R. Jurden, President Judge

Original to Prothonotary
cc: M. Denise Tolliver, *pro se* Appellant
Gregory P. Skolnik, Esq.