

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

JAN R. JURDEN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
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August 30, 2004

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RE: **Margaret Mullin v. W.L. Gore & Associates**  
**C.A. No. 03A-11-012 JRJ**

Date Submitted: July 14, 2004  
Date Decided: August 30, 2004

***On Appeal from the Industrial Accident Board***  
**REVERSED and REMANDED**

Dear Counsel:

I have reviewed the briefs and caselaw regarding the issue of whether the Industrial Accident Board (“IAB” or the “Board”) erred in granting W.L. Gore and Associates’ (the “Employer”) Motion to Dismiss based on a statute of limitations defense. For the reasons set forth below, the Court **REVERSES and REMANDS** this case to the Board for a further hearing on the statute of limitations issue.

In reviewing a decision on appeal from the Industrial Accident Board, this Court must determine if the decision is supported by substantial evidence and is free from legal error.<sup>1</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept to support a

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<sup>1</sup> *K-Mart v. Bowles*, 1995 WL 269872 (Del. Super. Ct. Mar. 23, 1995) (citing 29 *Del. C* § 10142(d); *Johnson v. Chrysler Corp.*, 213 A.2d 64 (Del. 1965)).

conclusion.<sup>2</sup> Absent an abuse of discretion, this Court must uphold the Board's decision.<sup>3</sup> "Questions of credibility are exclusively within the province of the Board which heard the evidence. As an appellate court, it [is] not within the province of the Superior Court to weigh the evidence, determine questions of credibility or make its own factual findings."<sup>4</sup> The Court will only reverse a decision of the Board if its findings are not supported by substantial evidence, or when the Board has made a legal mistake.<sup>5</sup>

Margaret Mullin ("Claimant") sustained a compensable injury in 1991 while working for the Employer. The parties executed a standard Agreement as to Compensation<sup>6</sup> in that same year. On May 13, 2003, the Claimant filed a Petition to Determine Additional Compensation Due. The Employer successfully argued that Claimant's Petition to Determine Additional Compensation Due was time barred by the five (5) year statute of limitations listed in 10 *Del. C.* § 2361(b).<sup>7</sup> The Board found that "the last payment of benefits related to the work accident made by Employer was on April 27, 1998."<sup>8</sup> Although the Claimant contested the date of last payment, the Board based its finding on a Liberty Mutual Payment Log (the "Payment Log") which indicates April 27, 1998 as the date of last payment.

The Payment Log is hearsay. The Employer did not provide testimony from any witness to lay the proper foundation for its introduction.<sup>9</sup> "Generally, administrative boards have discretion to consider otherwise reliable hearsay [and a]n agency is not necessarily bound by strict evidence rules,

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<sup>2</sup> *Oceanport Ind. v. Wilmington Services*, 636 A.2d 892, 899 (Del. Super. Ct. 1972).

<sup>3</sup> *Id.*

<sup>4</sup> *Unemployment Ins. Appeal Bd. v. Div. Of Unemployment Ins.*, 803 A.2d 931, 937 (Del. 2002).

<sup>5</sup> *Delgado v. Unemployment Ins. Appeal. Bd.*, 295 A.2d 585 (Del. Super. 1972).

<sup>6</sup> See Appendix to Claimant/Appellant's Op. Brief at Ex. A.

<sup>7</sup> 10 *Del. C.* § 2361(b) provides:

Where payments of compensation have been made in any case under an agreement approved by the Board . . . no statute of limitation shall take effect until 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.

<sup>8</sup> Bd. Decision at 1, *Mullin v. W.L. Gore & Associates*, IAB Hrg. No. 931239 (Oct. 31, 2003).

<sup>9</sup> The Court notes that the Employer had a Liberty Mutual representative available by phone at the time of the hearing, but the record fails to reveal why the Board did not take any testimony from this witness (or from any witness). See D.R.E. 801 and 803; *Eastern Shore Poultry, Inc. v. Bernadette*, C.A. No. 98A-12-005, 2000 Del. Super. LEXIS 142 at \*6-7 (Del. Super. Ct. May 4, 2000) (citations omitted).

*but its ruling cannot rest alone upon hearsay.*”<sup>10</sup> The Board should not have admitted and relied upon the Payment Log in the absence of sworn testimony from a witness capable of providing the proper foundation. Admission of the Payment Log without such testimony denied the Claimant the opportunity to attack the substance and accuracy of the Payment Log by cross-examining the witness or witnesses called to lay the foundation for its admission.<sup>11</sup> By relying on the Payment Log without sworn testimony establishing a proper evidentiary foundation for that evidence, the Board abused its discretion. Although it appears from the Payment Log that the claim may be time barred, the Board committed legal error by relying solely upon this hearsay and its decision is not supported by substantial evidence.

For these reasons, the decision of the Board is **REVERSED** and this case is hereby **REMANDED** to the Board for proceedings consistent with this decision.

Very truly yours,

Jan R. Jurden  
Judge

JRJ/pac  
Original to Prothonotary

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<sup>10</sup> *Eastern Shore Poultry*, 2000 Del. Super. LEXIS 142 at \*7 (internal citations omitted) (emphasis added).

<sup>11</sup> In the past, this Court has approved IAB decisions requiring that the other party be given an opportunity to refute evidence. *See e.g. Machamer v. Hepbron Vending Co.*, C.A. No. 96A-03-002-WCC, 1996 Del. Super. LEXIS 581 at \* 10-11 (Del. Super. Ct. November 27, 1996) (holding that the Board acted within its discretion by refusing to allow the written statement of a person unavailable for cross-examination); *Ebert v. State of Delaware*, C.A. No. 02A-07-002 JTV, 2003 Del. Super. LEXIS 244 (Del. Super. Ct. June 19, 2003) (holding the Board acted within its discretion by refusing to accept papers that the claimant attempted to submit as exhibits at the conclusion of the hearing and after the parties had completed their summations).