

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

LARRY MARSHALL,	)	
	)	
Appellant,	)	
	)	
v.	)	C. A. No. 04A-08-005-JEB
	)	
BRAND INSULATION and	)	
CATALYTIC INCORPORATED,	)	
	)	
Appellee.	)	

Submitted: April 19, 2005  
Decided: May 26, 2005

*Appeal from a Decision of the Industrial Accident Board.  
Reversed and Remanded.*

**OPINION**

*Appearances:*

Richard T. Wilson, Esquire, Wilmington, Delaware.  
Attorney for Larry Marshall.

Richard P.S. Hannum, Esquire, Wilmington, Delaware.  
Attorney for Brand Insulation.

Nancy Chrissinger-Cobb, Esquire, Wilmington, Delaware.  
Attorney for Catalytic Incorporated.

**JOHN E. BABIARZ, JR., JUDGE**

This case is an appeal of a decision of the Industrial Accident Board (“Board”) dismissing Claimant Larry Marshall’s petition for workers’ compensation benefits based on the statute of limitations. The Court concludes that the board erred in determining the date on which the statute of limitations was tolled and that the case must be remanded.

### **FACTS**

On July 12, 2002, Claimant filed a petition for workers’ compensation benefits against numerous employers alleging that he had contracted asbestos and kidney cancer due to asbestos exposure in his workplace. Because the parties were unable to agree to a hearing date, they entered into a stipulation which provided that Claimant would withdraw his petition and refile it within 60 days, and that the original filing date of July 12, 2002 would toll the statute of limitations. Claimant made a timely refile, naming only Brand Insulation and Catalytic Inc., as Employers, and the Board held a hearing in May 2004.

At the conclusion of Claimant’s case, counsel for Employers moved to dismiss the petition on grounds that the suit was time-barred under the statute of limitations and the notice provisions for occupational diseases. Following post-hearing briefing, the Board granted Employers’ motion to dismiss, finding that Claimant did not file his petition within the statute of limitations for workers’ compensation benefits. set

forth in DEL. CODE ANN. tit. 19, § 2361(c). The Board did not address the notice issue. Claimant filed a timely appeal to this Court, challenging the dismissal, as well as evidentiary rulings made by the Board during the hearing.

### **STANDARD OF REVIEW**

In reviewing a decision of the Board, the Court's role is to determine whether the Board's findings are supported by substantial evidence and are free from legal error.<sup>1</sup> Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion.<sup>2</sup> The Court does not weigh the evidence, determine questions of credibility or make factual findings.<sup>3</sup> It merely determines if the evidence is legally adequate to support the Board's findings.<sup>4</sup>

### **DISCUSSION**

The parties agree that the first issue to be addressed is the date upon which the statute of limitations was tolled. They also agree that the Board erred in finding that the statute was tolled as of January 7, 2004, the date upon which Claimant refiled his petition. The record shows that all parties entered into a stipulation which provided

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<sup>1</sup>*Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. Ct. 1979).

<sup>2</sup>*Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1998).

<sup>3</sup>*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1960).

<sup>4</sup>DEL. CODE ANN. tit. 29, § 10142(d).

that the original filing date of July 12, 2002 would toll the statute of limitations. The Court concurs as a matter of law and instructs the Board on remand to adopt July 12, 2002, as the operative date for purposes of the statute of limitations.

The parties have presented argument to the Court regarding resolution of the statute of limitations and notice issues. Resolution of the statute of limitations issue requires a factual finding as to when the claimant knew or should have known that his kidney carcinoma was arguably caused by asbestos exposure. Resolution of the notice issue requires consideration of whether the employer waived that defense by not raising the defense in a pre-trial memorandum required by Board Rule 9(c). Both of these issues are properly decided first by the Board.

The decision of the Industrial Accident Board is reversed and remanded for proceedings consistent with this opinion.

***IT IS SO ORDERED.***

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Judge John E. Babiarz, Jr.

Original to Prothonotary  
JEB,jr/bjw/ram