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

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| WILLIAM MCDOUGALL, | ) | |
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| Employee - Appellant, | ) | |
| | ) | C.A. No. 02A-02-008 WCC |
| | ) | |
| v. | ) | |
| | ) | |
| AIR PRODUCTS & CHEMICALS, INC., | ) | |
| | ) | |
| | ) | |
| Employer - Appellee. | ) | |

Submitted: April 14, 2005
Decided: August 31, 2005

**Appeal from Industrial Accident Board. DENIED.**

## OPINION

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**CARPENTER, J.**

## I. Introduction

Before this Court is William McDougall's ("Appellant" or "McDougall") appeal from two decisions of the Industrial Accident Board ("Board"),[1] where Air Products & Chemicals, Inc. ("Appellee" or "Air Products") petitioned the Board to determine whether Air Products was entitled to setoff its liability for workers' compensation benefits pursuant to 19 *Del. C.* § 2363 resulting from Appellant's recovery in a third-party medical malpractice action. Upon review of Appellant's Opening Brief and Reply Brief, Appellee's Answering Brief and oral arguments by both parties, it appears to this Court that Appellant's appeal should be **DENIED**, but the Court will modify the amount of the credit awarded by the Board.

## II. Background

The facts presented are taken in large part from the two Board decisions from which this appeal originates. While McDougall was employed by Air Products, he suffered a compensable one-vehicle accident on July 18, 1990 when he drove a tractor-trailer over a curb and into a ditch. In the course of this accident, McDougall struck his head against the roof of the cab, which resulted in various injuries, including a mild concussion, cervical strain, a head contusion, a dissected vertebral

[1] IAB decisions dated November 16, 2001 and January 30, 2002.

artery, related psychological problems and loose teeth. In November 1990, McDougall relocated to Florida. Shortly thereafter, Air Products entered into an agreement with McDougall under which Air Products agreed to accept the vehicle accident as compensable under the Workers' Compensation Act. In turn, McDougall would receive temporary total disability ("TTD") benefits in the amount of $297.21, plus medical benefits paid through Air Products' compensation carrier. In April 1991, McDougall suffered a stroke.

On July 13, 1993, McDougall filed a medical malpractice action in Florida ("Florida Action"), alleging that his neurologist negligently failed to discover and treat the dissection of his left vertebral artery, which ultimately ruptured and resulted in his stroke. McDougall also alleged negligence against the emergency room doctor who treated him when he suffered the stroke. In May 1994, McDougall settled the action for $1,065,000.00, but his net recovery, after a reduction for costs, fees and expenses, equaled $580,166.78.

In January 1994, McDougall filed a Petition to Determine Additional Compensation Due requesting that the Board find the stroke was causally related to the July 18, 1990 work accident and require Air Products to pay stroke-related medical benefits. The Board held hearings on May 22 and June 2, 1995 to determine whether the stroke was causally related to the July 18, 1990 work accident (the "work

accident"). Following the hearing, the Board determined that the stroke was causally related to the work accident specifically finding that the vertebral artery dissection suffered by McDougall precipitated the stroke.[2] The Board's decision ("1995 Decision") awarded stroke-related medical expenses and lost wages to McDougall.[3]

Before the 1995 Decision, McDougall filed suit against National Union & Fire Insurance Company ("National Union"), Air Products' carrier, alleging bad faith handling of the Delaware workers' compensation claim.[4] The complaint was later amended in September 1997 to include a claim pursuant to the Wage Payment and Collection Act for *Huffman*[5] damages resulting from National Union's nonpayment of the medical expenses and lost wages awarded by the 1995 Decision. In April 2000, the Delaware Superior Court found that National Union did not act in bad faith, but it was still liable for *Huffman* damages and attorney's fees in the amount of $924,529.02. In March 2001, the Delaware Supreme Court affirmed this decision,

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[2]*See McDougall v. Air Products & Chemicals, Inc.*, Del. IAB, Hearing No. 917985, slip op. (June 2, 1995).

[3]Subsequent to the 1995 Decision, McDougall did not receive any money from Air Products or from their insurance carrier, National Union & Fire Insurance Company. Significantly, the damages awarded by the Board in the 1995 Decision were the same damages at issue in the Florida Action.

[4]McDougall did not join Air Products as a party to the suit.

[5]The claim for *Huffman* damages was premised on the decision of *Huffman v. C.C. Oliphant & Son, Inc.*, 432 A.2d 1207 (Del. 1981).

agreeing that the good faith belief of Air Products or National Union was irrelevant and finding that the nonpayment was "wrongful" simply because it contravened the 1995 Decision.[6]

On April 27, 2000, Air Products petitioned the Board to determine, pursuant to 19 *Del. C.* § 2363, the amount of its credit, and the Board held a hearing on August 3, 2000 to consider the petition. However, at that time, McDougall's bad faith and *Huffman* damages claims were pending before the Supreme Court and consequently, the Board issued an Interim Order staying the consideration of Air Products' petition pending final disposition of the appeal. As mentioned above, the Supreme Court issued its decision in March 2001 and subsequently the stay of Air Products' petition before the Board was lifted.

On September 6, 2001, the Board reconvened to determine the merits of Air Products' petition. Thereafter, the Board issued a decision on November 16, 2001. The Board considered the following issues: (1) whether Air Products' petition to determine the amount of credit owed was not in the proper procedural posture because a petition to establish the existence of a credit should have been filed first; (2) whether the doctrine of res judicata barred the Board's consideration of the issue before it because the Delaware Supreme Court had previously denied the existence

[6]*See National Union Fire Ins. Co. v. McDougall*, 773 A.2d 388, 393 (Del. 2001).

of a credit; (3) whether the elements of 19 *Del. C.* § 2363 have been met because the Florida Action resulted in a settlement and there has been no formal finding of a third-party's legal liability in the malpractice action; and (4) whether Air Products released its claim to a 19 *Del. C.* § 2363 credit.[7] The Board rejected McDougall's legal arguments and concluded that Air Products was entitled to a credit in the amount of $333,834.04.[8]

## III. Standard of Review

On appeal from the Industrial Accident Board, the function of the Superior Court is to determine whether the Board's decision is supported by substantial evidence and free from legal error.[9] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[10] The Court is not the trier of fact nor has the authority to weigh evidence or determine questions

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[7]McDougall failed to fully present an argument on this issue. The Board opined that McDougall's failure might be grounds to consider the argument abandoned. *See Feralloy Industries v. Wilson*, 1998 WL 442937, at **3 (Del Super. 1998). Nevertheless, the Board evaluated the merits of this issue.

[8]For a detailed explanation of how the Board arrived at the amount of the § 2362 credit, refer to section F of this Opinion.

[9] *See Devine v. Advanced Power Control, Inc.*, 663 A.2d 1205, 1209 (Del. Super. Ct. 1995) (citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. Ct. 1985)).

[10] *See Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del. 1994).

of credibility[11] but rather, this Court merely determines if the evidence is legally adequate to support the Board's factual findings.[12] The case *sub judice* solely involves an issue of law. Therefore, this Court's review is *de novo*.[13] The Court will first address the legal issues raised by McDougall and then turn to the credit calculation made by the Board.

## IV. Discussion

### A. Award of credit-setoff was not conditional upon a judicial admission or factual determination of negligence on the part of settling party and was consistent with Delaware's public policy.

McDougall argues that the Board erred as a matter of law when it determined that Air Products satisfied the requirements of 19 *Del. C.* § 2363 thus entitling them to a "credit-setoff" against workers' compensation benefits paid to McDougall. When addressing whether a party is entitled to a "credit-setoff" under 19 *Del. C.* § 2363, the Supreme Court has found that two elements must be satisfied. First, Section 2363(a) requires that there must be a third party who is legally liable in tort for the injury or disease requiring compensation and second, Section 2363(e) requires that there must be a recovery as a result of that liability which creates a fund in excess

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

[12] *See* DEL. CODE ANN. tit. 29, § 10142(d) (2003).

[13] *See Stevens v. State*, 802 A.2d 939, 944 (Del. Super. Ct. 2002) (citing *State of Delaware v. Worsham*, 638 A.2d 1104, 1106 (Del. 1994)).

of the paid or currently payable compensation.[14] Subsequent cases have since extrapolated the requirements set forth by the *Moore* court. It has been held that "an objective of § 2363(e) is to provide reimbursement to the employer for payments made as required under the Workers' Compensation Act insofar as recovery from the third-party tortfeasor compensates for a condition for which workmen's compensation has been paid or is payable."[15] Further, workmen's compensation is generally permitted for the direct and natural consequences of the injury caused by a compensable industrial accident.[16] "This principle extends to an aggravation of the original compensable injury by subsequent medical or surgical treatment . . . . [f]ault on the part of the physician does not break the chain of causation and hence workmen's compensation extends to the results of the faulty medical treatment."[17] Further, it is clear that a third-party settlement does not preclude reimbursement under

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[14]*See Moore v. General Foods*, 459 A.2d 126, 128-29 (Del. 1983). Section 2363(e) requires that once the claimant recovers against a third party for damages resulting from person injuries or death, the claimant, after deducting expenses of recovery, must first reimburse his employer or its workers compensation carrier for any amounts paid or payable under the Workers' Compensation Act. The remaining balance is "treated as an advance payment by the employer on account of any future payment of compensation benefits." DEL. CODE ANN. tit. 19, § 2363(e) (2003).

[15]*Stevenson v. Haveg Industries*, 1985 WL 188996, at *2 (Del. Super.) (citing 1 Larson, *The Law of Workmen's Compensation* § 13.11, p. 3-348.91, §13.21, p. 3-407)).

[16]*See id.* (citing 1 Larson, *The Law of Workmen's Compensation* § 13.11, p. 3-415).

[17]*Id*. at *2 (citations omitted).

§ 2363(e) for the employer.[18] The court in *Esterling* held,

> [o]ur cases show reimbursement of workers' compensation payments can come from a settlement. *Moore v. General Foods*, 459 A.2d 126 (Del. 1983), allows future compensation payments to be credited against a settlement. *Harris v. New Castle County*, 513 A.2d 1307 (Del. 1986), allows reimbursement to the carrier from a settlement under an uninsured motorist's policy. The language of *Harris* clearly interprets the language "any recovery" to intend subrogation to be all-inclusive; that is, to include indirect as well as direct recovery of damages from a third-party . . . . Therefore, under Delaware law, the "any recovery" language of § 2363(e) includes settlement recovery.[19]

McDougall's argument, with respect to section 2363(a), is that there was no formal finding of legal liability as to the defendants in the Florida medical malpractice action because the suit ended in a settlement, which contained no admission of liability. As a result, the elements of 19 *Del. C.* § 2363, specifically § 2363(a), cannot be satisfied. In other words, McDougall argues that there is no third-party who shares the same legal liability in tort with Air Products for the "proximate cause" of McDougall's injury because the Florida doctors were liable for negligent diagnosis, which was not the proximate cause of the injury. McDougall argues that he entitled to both the workers' compensation benefits and the settlement proceeds

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[18] *See Esterling v. Board of Trustees*, 1998 WL 77774, at *3 (Del. Super.).

[19] *Id.*

because in its 1995 Decision, the Board did not determine that "but for" the actions of the settling parties in Florida, McDougall would have never had a stroke.[20]

Air Products argues that *Moore*[21] does not stand for the proposition that an admission or finding of fault is a prerequisite for a credit in favor of Air Products.[22] It contends that McDougall incorrectly argued that the Workers' Compensation Act requires a determination of tort liability before an employer may claim a § 2363 credit. Rather, they assert that the *Moore* court found that the purpose of the subrogation provision is to "prevent[] a double recovery by the employee for any one industrial injury and permit[] the employer to recoup its compensation payments."[23] In *Moore*, the court ruled that the third-party settlement served as a credit for all injuries sustained by the claimant as a result of the work accident and was not limited to those covered by the third-party settlement.[24]

In regards to this issue the Court must agree with Air Products. The only relevant issue before the Board was whether the stroke was causally related to the 1990 work accident. The Board noted that the negligence of the Florida doctors was

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[20] *See* Opening Brief at 20.

[21] *Moore v. General Foods*, 459 A.2d 126 (Del. 1983).

[22] *See* Reply Brief at 13.

[23] *Moore*, 459 A.2d 126, 127-28.

[24] *See id.* at 128-29.

not legally material to the issue before them.[25] The Board did not consider the Florida doctors' negligence because Air Products was liable for the stroke, even if caused by malpractice, as long as the work accident set the chain of events in motion. Generally, workers' compensation benefits are permitted for the direct and natural consequences of an injury caused by a compensable industrial accident and this principle extends to an aggravation of the original compensable injury by subsequent medical or surgical treatment.[26] A physician's negligence does not break the chain of causation and as a result, workers' compensation benefits cover the results of faulty medical treatment.[27]

In addition, the Court cannot find anything in *Moore* to support McDougall's position. There, the third-party claim at issue was resolved by settlement and not by judgment. Moreover, there is no indication that the third-party defendant admitted any liability regarding the settlement. In addition, the Supreme Court decision of *Harris v. New Castle County*[28] made clear that "an employer's right to reimbursement

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[25]*See* Opening Brief, App. 5 at 15-16.

[26]*See Stevenson v. Haveg*, 1985 WL 188996, at *2 (Del. Super.) (citing 1 Larson, *The Law of Workmen's Compensation* § 13.11, p. 3-348.91, §13.21, p. 3-407)).

[27]*See id.* (citing 1 Larson, *The Law of Workmen's Compensation* § 13.11, p. 3-415).

[28] *Harris*, 513 A.2d at 1308 (quoting *Travelers Ins. Co. v. E.I. du Pont de Nemours and Co.*, 9 A.2d 88 (Del. 1939)).

is broader than just recoveries in tort action."[29] There, the court stated that the "obvious purpose of [§ 2363] is that the recipient of compensation benefits shall not collect both the statutory compensation and also the full damages for the injury."[30] Further, the court stated that the public policy against the claimant recovering twice for a single loss requires that the "underlying legislative intent take[] precedence over a literal interpretation of statutory language that arguably supports a contrary result."[31] The claimant in *Harris* put forth similar arguments as McDougall and the court did not find in his favor. It is significant that the court found despite the language in the first sentence of § 2363(e), which references a "tort recovery," the "decisive language of subsection (e) with respect to the breadth of an employer's right of subrogation is found within the second sentence of subsection (e)."[32] This subsection provides in part, "[a]ny recovery against the third party for damages resulting from personal injuries" requires reimbursement to the employer for any amounts payable under the Workers' Compensation Act and any balance is treated as an advance payment against future compensation benefits. As such, the Court

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[29]Board Decision, 11/16/01 at 12.

[30]*Harris*, 513 A.2d at 1308 (quoting *Travelers Ins. Co. v. E. I. du Pont de Nemours and Co.*, 9 A.2d 88 (Del. 1939)).

[31]*Id*.

[32]*Id*. at 1309.

finds, as did the Supreme Court in *Harris*, that the scope of an employer's recovery can be found in the settlement of tort litigation and does not require the formal finding of liability argued by McDougall.[33]

**B. The doctrine of *res judicata* does not bar Air Products from seeking a credit-setoff pursuant to 19 *Del. C.* § 2363.**

McDougall's next argument that the credit awarded by the November 16, 2000 Board decision is barred by the doctrine of *res judicata* is two-fold. First, McDougall argues that the 1995 Decision is final and contains no statement of credit in favor of Air Products. In support of this, McDougall points to the Delaware Supreme Court decision where the court stated that the 1995 Decision was "final, and the Board lost continuing jurisdiction to revisit the issue. Any further action by the Board was a nullity."[34] Under 19 *Del. C.* § 2347, the Board can consider a request to modify a final order only "upon proof of subsequent change of condition,"[35] and only under "specifically delineated . . . circumstances."[36] McDougall argues that none of the specifically delineated §2347 change(s) occurred in this case to support Air Products'

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[33] *See id.*

[34] *Air Products & Chemicals, Inc. v. McDougall*, 1999 WL 734666, at **1 (Del. Supr.) (citations omitted).

[35] *Harris v. Chrysler Corp.*, 1988 Del. LEXIS 127, at *2 (Del. Supr.).

[36] *Betts v. Townsends, Inc.*, 765 A.2d 531 (Del. 2000).

Petition for Review filed on April 28, 2000 and therefore it follows that the Board did not have the authority to decide the issue of a credit-setoff. Accordingly, McDougall contends that the Board erred as a matter of law when it decided that *res judicata* was not a proper defense to the assertion of a credit.

Under Delaware law, a party claiming that the doctrine of res judicata bars a subsequent action must demonstrate the presence of the following five elements: (1) the court making the prior adjudication had jurisdiction; (2) the parties in the present action are either the same parties or in privity with the parties from the prior adjudication; (3) the cause of action must be the same in both cases or the issues decided in the prior action must be the same as those raised in the present case; (4) the issues in the prior action must be decided adversely to the plaintiff's contentions in the instant case; and (5) the prior adjudication must be final.[37]

McDougall contends that the facts support a finding that the doctrine of res judicata prevents the Board from considering Air Products' entitlement to a credit-setoff. Specifically, (1) the Board had jurisdiction to decide the issue of a credit-setoff in the 1995 and 1998 hearings and Air Products had knowledge of the potential availability of a credit-setoff because the Florida settlement occurred in 1994; (2) the parties involved in the 2000 and 2001 reimbursement hearings were the same parties

[37] *Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001) (citations omitted).

as in the 1995 and 1998 hearings; (3) the reimbursement issue, raised in the 2000 and 2001 hearings, could have been raised in the 1995 and 1998 hearings; (4) the issues in the 1995 and 1998 orders were decided adversely to Air Products; and (5) the 1995 and 1998 Board decisions are final.

As to the third element, McDougall asserts that "res judicata extends to all issues which might have been raised and decided in the first suit as well as to all issues that actually were decided."[38] Res judicata "is available if the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action."[39] According to McDougall, by January 1994, he filed a petition seeking payment of medical expenses in excess of $350,000 and any alleged credit arising from the 1994 settlement to setoff this medical liability was required to be asserted in 1995 and/or 1998.

The Court finds McDougall's argument is without merit. This appeal arises from a Petition filed by Air Products on April 27, 2000, where Air Products requested that the Board determine, pursuant to 19 *Del. C.* § 2363, the amount of its credit with

[38] *Cassidy v. Cassidy*, 689 A.2d 1182, 1185 (Del. 1997) (quoting *Foltz v. Pullman, Inc.*, 319 A.2d 38, 40 (Del. Super. Ct. 1974)).

[39] *Ezzes v. Ackerman*, 234 A.2d 444, 445-46 (Del. 1967).

respect to *future* workers' compensation claim benefits. Air Products acknowledges that the award from the 1995 decision is final and has been paid as a result of the Supreme Court's ruling in April 2000. Air Products only seeks a credit for benefits paid through their workers' compensation carrier to McDougall from the Board decision on November 16, 2001 prospectively. At the hearing, which led to the 1995 Decision, Air Products assumed, albeit incorrectly, that McDougall, through his counsel, conceded the existence of a § 2363 credit with respect to the benefits that were the subject of the 1995 Decision. Air Products used this incorrect assumption as a defense in the *Huffman* action. Since the issue of a credit was raised at that hearing, it does not necessarily follow that *res judicata* bars Air Products from forever raising the issue of another credit. Air Products' petition in 2000 is not related to any benefits from the 1995 Decision because it seeks a determination as to prospective payments only. The issue of the credit currently sought could not have been raised by Air Products at the 1995 and 1998 hearings because at the time, the issue was not ripe for adjudication. Accordingly, this Court cannot find that the doctrine of *res judicata* bars Air Products' 2000 petition.

The second *res judicata* argument advanced by McDougall contends that the Delaware Supreme Court already denied the existence of a credit and as a result, the Board was barred by the doctrine of *res judicata* from considering the issue of a

credit-setoff. At the May 22, 1995 Board hearing, which resulted in the 1995 Decision, an exchange occurred between the attorneys regarding a "credit."[40] Subsequent to the 1995 Decision, Air Products failed to pay any money to McDougall in part because Air Products believed McDougall, through his counsel, conceded the existence of a credit. Air Products asserted this as part of its defense in the "Huffman" action. In a bench ruling, the Superior Court, on cross-motions for summary judgment, rejected McDougall's bad faith claim against National Union and granted summary judgment to McDougall on the "Huffman" claim. Thereafter, National Union appealed the award of summary judgment to McDougall. The Delaware Supreme Court affirmed the Superior Court's ruling, observing that the credit issue was never presented to the Board.[41] McDougall argues that based on the Supreme Court decision, the Board could not later address whether Air Products was entitled to a credit because the Supreme Court previously determined that one was not available. The Court disagrees as it does not appear that the Supreme Court ruled on whether a credit was available, but rather they only considered whether the Board had awarded one. As a result, the doctrine of *res judicata* does not prevent the Board from determining whether Air Products is entitled to a § 2362 credit.

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[40] *See* Board Decision, 11/16/01 at 5-6.

[41] *See National Union Fire Insurance Comp. of Pittsburgh v. McDougall*, 773 A.2d 388, 392 (Del. 2001).

## C. The issue of the statute of limitations does not bar Air Products from seeking a credit-setoff.

McDougall argues that Air Products' petition for a credit-setoff is barred by the statute of limitations. The statute of limitations is an affirmative defense, which must be set forth in a "pleading to a preceding pleading" pursuant to Superior Court Civil Rule 8(c).[42] The failure to timely assert an affirmative defense constitutes waiver of the right to do so.[43] In administrative proceedings, an affirmative defense is raised when a fair presentation was made to the agency.[44] Furthermore, "[a] casual statement by counsel is not tantamount to a serious attempt to argue an issue and even by relaxed administrative procedures will not amount to fair presentation of an issue." As stated previously, the role of this Court on an appeal from agency decision is to determine whether the Board's decision is supported by substantial competent evidence free from errors of law.[45]

The record below reflects that two hearings occurred before the Board and McDougall failed to raise the statute of limitations affirmative defense in both

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[42]Super. Ct. Civ. R. 8(c) (2004). *See Feralloy Indus. v. Wilson*, 1998 WL 442937 (Del. Super.).

[43]*See Cannelongo v. Fidelity Am. Small Bus. Invest. Co.*, 540 A.2d 435, 440 (Del. 1988).

[44]*See Feralloy Indus.,* 1998 WL 442937, at *3 (citing *Smith v. Pa. Workmen's Comp. Appeal Bed.*, 670 A.2d 1146 (Pa. 1995)).

[45]*See State v. Cephas*, 637 A.2d 20, 22-23 (Del. 1994); *Johnson v. Chrysler Corp.*, 212 A.2d 64, 66 (Del. 1965).

hearings. However, at the close of the initial hearing, the Board inquired, on its own, as to whether either party "had any knowledge of any case law that regards timing of a request for credit to the Industrial Accident Board."[46] McDougall relied, "[w]e're not aware of any authority that allows you to consider a credit five years after a hearing."[47] The remaining record is silent as to any further references to a statute of limitations issue. Air Products contends and the record reflects that the Board's decision does not address the affirmative defense because the issue was not presented to them. Further, McDougall filed a Motion for Reargument, in which he failed to raise this affirmative defense. As previously stated, a casual statement by counsel does not amount to a fair presentation of an issue for purposes of an appeal.

McDougall failed to properly raise the statute of limitations affirmative defense as provided under Superior Court Civil Rule 8(c) and he failed to fairly present this defense at the Board hearings. It appears to the Court that McDougall made a comment, in passing, to the Board after the Board initiated the discussion. The Court is not persuaded by McDougall's assertion that he was prevented from raising this defense. Additionally, contrary to McDougall's claim that the Board has a "duty" to give full effect to the statutes contained in Title 19 of the Delaware Code, the Board

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[46]Opening Brief, App. 37 at 45.

[47]*See id.* at 46.

has no duty to present affirmative defenses on behalf of any party. As such, the Court rejects McDougall's statute of limitations argument as being without merit.

**D. Air Products has not released its statutory entitlement to a credit**

Next, McDougall contends that Air Products released any potential claim under § 2363 because Air Products executed the "Release of All Claims" ("Release") on September 12, 1994. McDougall argues that the Release is applicable to "any and all liability by way of [a] lien . . . through . . . statutory subrogation,"[48] which means Air Products is precluded from asserting a claim for a statutory subrogation credit.

Generally, releases fall into two categories, specific and general. McDougall contends that the Release at issue is an unqualified general release, which must be upheld regardless of any subjective, unspoken intent of the employer, here Air Products, then or now.[49] He argues that the Release applies to Air Products as the "statutory subrogation credit is clearly controlled by the above language." There is no requirement that a release "specifically identify each and all of the obligations it extinguishes."[50] A "general release" extinguishes all claims owed by the released party to the releasor, including claims that either party did not have in mind at the

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[48]Opening Brief, App. 25.

[49]*See Chakow v. Outboard Marine Corp.*, 429 A.2d 984, 986 (Del. 1981).

[50]*Corp. Prop. Assocs. v. Hallwood Group Inc.*, 792 A.2d 993, 1007 (Del. Ch. 2002).

time the release was executed and it must be upheld regardless of any subjective, unspoken intent of a party.[51] Conversely, a "specific release" identifies each of the intended extinguished claims.[52]

McDougall contends that the Release is silent as to the claims owed by McDougall to Air Products. Therefore, the Court should find that the language of the Release shows a clear intention that the Release covers Air Products' statutory claim. Moreover, McDougall contends that Air Products was reimbursed for its expenses through the Release where McDougall paid $150,000.00 and Air Products should be precluded from seeking additional settlement proceeds.

Air Products argues in response that the Release was signed on behalf of their health care carrier and as a result, they contend that the Release does not apply to the credit currently sought. They claim the Release purports to release only claims under Air Products' "Medical Plan" and not to release Air Products' lien with respect to workers' compensation coverage. Therefore, they contend that the Release on its fact is inapplicable to Air Products' statutory entitlement to a credit.[53]

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[51] *See id.*

[52] *See id.* at 1007-08.

[53] *See Clark v. Brooks*, 377 A.2d 365, 372-73 (Del. Super. Ct. 1977).

The Release, executed subsequent to the Florida settlement, was executed by J. P. McAndrew, who is the Vice President of Human Resources at Air Products. Through the Release, McDougall reimbursed Air Products' health care insurance carrier, CIGNA, $150,000 for the stroke-related medical expenses it had paid. In exchange for this, Air Products' health insurance carrier executed a document that purports to release, among others, McDougall and the doctors involved in the Florida malpractice action, from

> any and all liability by way of lien or claim through common law or statutory or contractual right of subrogation or reimbursement, or any other claim or lien of whatsoever kind and nature **under the Air Products and Chemicals, Inc. Medical Plan for Hourly Employees and Air Products and Chemicals, Inc. through Integrated Behavioral Health Plan, CIGNA Health Plan, and any other Healthcare Plans**, if any there be, of Air Products and Chemicals, Inc., in connection with benefits and services provided . . .[54]

The Board noted, "[t]his negotiated released was in lieu of the healthcare plans seeking reimbursement out of the settlement proceeds and the specific reference to the healthcare plans makes it clear that this was not meant as a general release affecting a workers' compensation lien pursuant to Section 2363."[55]

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[54]App. 25.

[55]Board Decision, 11/16/01 at 15.

The Court must agree with the Board's findings. Despite McDougall's arguments to the contrary, the Court interprets the document as a release specifically relating to the claims under Air Products' health care plans. The language of the Release is clear and unambiguous and it is apparent to the Court that it is only in relation to the payments made by the health care providers. This was in lieu of the health care plans seeking reimbursement out of the settlement proceeds, as the health care plans had paid a portion of McDougall's medical expenses. Consequently, the Court finds the Release is not a general release and has not released Air Products' claims for a credit pursuant to 19 *Del. C.* § 2363.

After the Board's decision McDougall filed a Motion for Reargument and in deciding this Motion, the Board reviewed and reiterated its findings concerning the Release. The Court agrees with the Board's findings. Upon review of the Release, the Board did not err in finding that the Release, on its face, was not a general release of all claims, but rather the Release pertained to any and all liability under Air Products' medical plan, the Integrated Behavioral Health Plan and CIGNA Health Plan. The language specifically releases the aforementioned parties and their claims, but it clearly does not release all claims in general or any claims for a workers' compensation lien.

## E. Air Products has not waived its statutory entitlement to a credit

Essentially, McDougall argues that Air Products strategically held back the assertion of its statutory entitlement to a credit, which amounts to a wavier of said credit. Waiver is defined as the "voluntary relinquishment of a known right or conduct such as to warrant an inference to that effect. It implies knowledge of all material facts and of one's rights, together with a willingness to refrain from enforcing those rights."[56] McDougall asserts that Air Products' strategy was as follows: In 1994, Air Products knew of its entitlement to a § 2363 credit upon receipt of $150,000 in settlement funds, but Air Products failed to assert its right to the credit until April 18, 2000. During the hearings in 1995, held to determine whether the stroke was causally related to the work accident, Air Products did not assert its right to a credit. Similarly, in the 1998 hearings regarding McDougall's osteoporosis, Air Products again failed to raise its right to a credit. Thereafter, in the 1998 bad-faith litigation, McDougall asserts that Air Products manipulated the issue of whether a credit exists to extend discovery deadlines and postpone trial.

In response, Air Products explains that McDougall is essentially arguing that Air Products is barred by the doctrine of equitable estoppel from asserting a credit

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[56] *Delaware Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *10 (Del. Ch.) (citations omitted).

against McDougall's third-party recovery. Air Products maintains that equitable estoppel was not an issue raised before the Board and as a result, the issue was not properly preserved for appeal. Further, Air Products counters that at the time of the Florida Action, the relationship of McDougall's stroke to the work accident had not been established. It follows that Air Products had no entitlement to a credit until the stroke was found to be a component of the work accident.

While § 2363 does not require that an employer give notice of a potential lien, it is possible for an employer to waive its § 2363 rights if the employer knowingly engages in conduct inconsistent with its continued assertion of those rights.[57] The Board found and this Court agrees that there are no extenuating circumstances in this case that indicate such waiver occurred. The facts supporting this are that the Florida Action, filed in 1993, was settled in May of 1994 and McDougall did not file a workers' compensation petition until January of 1994 alleging that Air Products was liable to pay stroke-related benefits. Air Products was not found liable for the stroke-related benefits until the 1995 Decision and until such liability was established, Air Products did not have a § 2363 claim against future workers' compensation benefits. As such, Air Products' failure to give notice of its potential § 2363 does not amount to a waiver of its right to a § 2363 credit.

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[57] *See* Board Decision, 11/16/01 at 17 (*citing Baio v. Commercial Union Ins. Co.*, 410 A.2d 502, 507-08 & n.5 (Del. 1979)).

**F. The amount of credit to which Air Products is entitled**

The Board calculated Air Products' Section 2363 credit against workers' compensation benefits as follows: McDougall's total settlement recovery from the Florida Action was $1,065,000.00 of which $484.833.00 was paid to satisfy attorneys' fees and costs. Air Products paid a total of $612,855.43 in benefits, which constitutes approximately 57.55 percent of McDougall's total settlement recovery. The Board explained that Air Products must be charged with 57.55 percent of McDougall's attorneys' fees and costs, which were $484.833.00 and 57.55 percent of this amount equals $279,021.39. This number was then subtracted from the amount of Air Products' payment and the remainder equals $333,834.04. It is this amount that the Board found to represent Air Products' Section 2363 credit against workers' compensation benefits.[58]

It is this portion of the Board's decision that the Court has struggled most to understand. Frankly, the way the settlement decisions were handled in Florida and the disjunctive manner the malpractice and workers' compensation matters were litigated contributed significantly to this confusion. The Court held two oral arguments and required counsel to submit supplemental briefing in litigation that is normally heard simply upon written submissions. The Court appreciates the patience

[58] *See* Board Decision, 11/16/01 at 19-20.

of counsel and the excellent presentations they made to assist the Court in untangling the factual underpinnings of this litigation. When one moves beyond the procedural quagmire of this litigation, several critical facts surface.

(1) The Florida litigation relating to the medical malpractice conduct asserted as damages the medical expenses relating to McDougall's care and treatment while in Florida. These expenses totaled $367,697.66.

(2) In settlement of the medical malpractice suit, Mr. McDougall received $1,065,000.00 of which he had to pay as costs and counsel fee $484,833.00. This left a distribution of $580,167.00 to Mr. McDougall.

(3) As a result of Air Products' health plan paying for at least some of the medical expenses from Florida, a lien of $150,000.00 was recognized and subsequently paid by McDougall to Air Products' health care providers.

(4) McDougall then obtained a decision from the Board determining that the medical expenses from Florida were related to the accident and Air Products was forced to pay to McDougall $367,697.66 relating to the same Florida medical expenses.

When the Court looks at these facts, it is clear that Mr. McDougall received a double recovery relating to these medical expenses which is prohibited by 11 *Del. C.* § 2363. In other words, his malpractice suit requested damages for medical expenses

relating to his treatment in Florida. These expenses would have been included in the million dollar settlement that was obtained as a result of the Florida litigation. In addition, he was then able to convince the Board that the stroke-related injuries that occurred in Florida were connected to his work-related accident and therefore were compensable under his workers' compensation coverage. So he again received the amount of these expenses from Air Products and that distribution has been made.

However, once the Court attempts to go beyond this clear set of facts it cannot find substantial evidence to support the additional credit calculation established by the Board. At best, their calculation is based upon assumptions unsupported by the evidence presented at the hearing and is made without any attempt to correlate what Mr. McDougall received in the Florida litigation to that already paid in the workers' compensation claim. The parties have consistently emphasized to the Court that the purpose of 11 *Del. C.* § 2363 is to prevent a double recovery. However, to award a credit, credible evidence, not assumptions or speculations, must be provided to the Board to establish this double recovery has occurred. The Court finds that beyond the $367,697.66 relating to medical expenses, this has not occurred, and the Board's decision regarding the amount of the credit is simply not supportable. As a result, the Court finds the Board's decision relating to the appropriate amount of the credit is only supportable up to the amount of $200,284.83. This amount was calculated in the

same manner as that performed by the Board except the starting point was $367,677.66 and not the $612,855.43 used by the Board in its decision. $367,677.66 represents 34.53% of the total amount awarded to McDougall in his Florida litigation, and this percentage relating to the fees and costs of that litigation equals $167,412.83. When these amounts are subtracted, the credit becomes the difference of $200,284.83.[59]

Finally, the Court appreciates this final conclusion will in all likelihood not be favored by either party. This however may be a good sign that it may be a fair resolution of the matter. However, regardless of counsels' desires or opinions in this matter, it is clearly time for the sake of your clients to stop this litigation. Simply, enough is enough. By this decision, each of your clients have gained something. It is time for the attorneys in this litigation to perform a lawyer's historical responsibility of providing wise and reasonable "counsel" to their client and to tell them to stop bickering. It is in the finest tradition of the Delaware bar that counsel are not simply litigation mouthpieces barking the orders of their clients but Delaware

[59] The Court finds the $150,000.00 payment that McDougall made to the medical carriers to satisfy their lien does not affect this calculation. Put another way, McDougall received $367,677.66 from the medical malpractice case but of this amount $150,000.00 was paid by these carriers to hospitals, doctors, etc. relating to these same medical expenses. Therefore McDougall's net recovery from the medical malpractice litigation relating to medical expenses was $217,677.66. The subsequent award by the Board of $367,677.66 therefore also included the reimbursement of $150,000.00 and as a result McDougall has been made whole for the total amount of medical expenses incurred.

lawyers have for centuries been looked upon by their community to be wise and reasonable counsel. It is time to perform that responsibility and bring this litigation to an end.

## V. Conclusion

Therefore, for the reasons stated above, McDougall's appeal from the Board is DENIED with a modification to the amount of the credit ordered by the Court consistent with this Opinion.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.