IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SEARS LOGISTICS SERVICES,	)	
	)	
Employer-Appellant,	)	
	)	C.A. No. 05A-09-003
v.	)	
	)	
MARIA FALCONI,	)	
	)	
Employee-Appellee.	)	

Submitted: February 15, 2006
Decided: March 30, 2006

On appeal From the Industrial Accident Board. **AFFIRMED**.

OPINION AND ORDER

Nancy Chrissinger-Cobb, Esquire, Chrissinger & Baumberger, Wilmington, Delaware, Attorneys for Employer/Appellant Sears Logistics Services.

Tabatha L. Castro, Esquire, Rapposelli, Castro & Gonzales, Attorney for Employee/Appellee Maria Falconi.

BRADY, J.

Procedural History

This is an appeal from a decision of the Industrial Accident Board ("Board"). The issue is whether Maria Falconi ("Claimant") is entitled to compensation due to a cumulative detrimental effect injury to her left elbow. A petition for compensation was filed with the Board on February 8, 2005. A hearing on the merits took place before the Board on June 29, 2005. The issues the Board addressed were whether Claimant met her burden of proving a cumulative detrimental effect injury, whether the claim was barred by the Statute of Limitations set forth in DEL. CODE ANN. tit. 19, § 2361 (2005), and whether the Claimant provided adequate notice to Sears Logistics Services ("Employer") pursuant to DEL. CODE ANN. tit. 19, § 2341 (2005). A decision was rendered by the Board on August 16, 2005 granting Claimant's petition. Employer filed an Appeal on September 16, 2005. This is the Court's opinion and order on Appeal.

Standard of Review

The Court has a limited role when reviewing a decision by the Industrial Accident Board. If the decision is supported by substantial evidence and free from legal error,[1] the decision will be affirmed.[2] Substantial evidence is evidence that a reasonable person might find

[1] *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).
[2] *Sirkin and Levine v. Timmons*, 652 A.2d 1079 (Del. Super. Ct. 1994).

adequate to support a conclusion.[3] The Board determines credibility, weighs evidence and makes factual findings.[4] This Court does not sit as the trier of fact, nor should the Court substitute its judgment for that rendered by the Board.[5] Only when there is no satisfactory proof in support of a factual finding of the Board may this Court overturn it.[6] Where a statute of limitations is at issue on appeal, the Court will review the matter as a mixed question of law and fact. The Board's legal interpretations are subject to plenary review. The Board's factual findings relating to a statute of limitations are given the same deference as any other factual finding.[7] "In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below."[8]

Facts

Claimant worked for Employer for seven years packing and unpacking boxes and performing heavy lifting associated with those duties.[9] Claimant had aches in her left elbow beginning in 2002.[10] Claimant began complaining of left elbow pain to her family doctor in June 2003.[11] On

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[3] *Oceanport Indus. Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1994).
[4] *Johnson v. Chrysler Corp*., 213 A.2d 64, 66-67 (Del. 1965).
[5] *Id* at 66.
[6] *Id* at 67.
[7] *Feralloy v. Wilson*, 1998 WL 442937 (Del. Super.).
[8] *General Motors Corp. v. Parker*, 1999 WL 1240820 (Del. Super.).
[9] *Falconi v. Sears Logistics Services*, IAB Hearing No. 1259669 (Aug. 16, 2005).
[10] IAB Hearing No. 1259669 Decision at 3, Transcript at 26, 29.
[11] *Employee/Appellant Answering Brief*, Exhibit B, (*Dr. Sowa Deposition*) at 10; IAB Hearing No. 1259669 Decision at 2.

November 3, 2003 Claimant saw Dr. David Sowa ("Dr. Sowa"), an orthopedic surgeon and qualified hand surgeon for her left elbow pain. At that time, Dr. Sowa gave Claimant an injection therapy in her elbow in an attempt to relieve the pain. Claimant was given injections again in April 2004 and August 2004. On each of the occasions she remained out of work for the rest of that day. In November 2004, Dr. Sowa recommended surgery on the elbow because Claimant continued to experience left elbow pain and discomfort. Dr. Sowa testified he believed from the first visit in November 2003 that the pain in Claimant's elbow was attributable to her work related activities.[12] Claimant was granted relief by the Board under a cumulative detrimental effect theory for work related injuries.

Applicable Law

Delaware has long recognized cumulative detrimental effect as a theory of recovery in workers' compensation claims. The worker must prove to the trier of fact that work demands has a cumulative detrimental effect on the physical condition of the claimant.[13]

Statute of Limitations

The Board found that Claimant, as a reasonable person, was not on notice of the work related nature of her injury until sometime after

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[12] *Dr. Sowa Deposition* at 21.
[13] *Duvall v. Charles Connel Roofing*, 564 A.2d 1132, 1135 (Del. 1989).

November 2003. Claimant testified that she did not know her elbow pain could be work related before visiting Dr. Sowa because there was no identifiable incident that caused her elbow pain.[14] The Board chose to find Claimant acted as a reasonable person and was credible and believable.[15]

"The statute of limitations for filing a workers' compensation claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable nature of the injury or disease."[16] It is well-established Delaware law that cumulative detrimental effect claims are treated as injuries, for statute of limitations purposes.[17] Therefore, the Board correctly applied the two-year standard in DEL. CODE ANN. tit. 19, § 2361(a).

Employer argues that if Claimant advised Dr. Sowa that she thought her condition was work related on her first visit to him in November 2003, then the only logical inference is that Claimant knew of the potential causal relationship between her injury and her work as early as May 13, 2003 when

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[14] On page 17 of the compensation hearing the following exchange took place:

Ms. Castro:	Do you feel that this was a work related accident?
Maria Falconi:	Uh huh.
Ms. Castro:	So why did you never report it?
Maria Falconi:	What happened is that I wasn't thinking. I didn't know that this was called an accident, a work accident related because no body push me, I didn't fall, I didn't go anywhere, I didn't hit myself with nothing so I didn't know that.

[15] IAB Hearing No. 1259669 Decision at 6.

[16] *Geroski v. Playtex*, 676 A.2d 903 (Del. 1996).

[17] *See e.g. Feralloy Industries v. Wilson*, 1998 WL 442937 (Del. Super); *Smith v. Chrysler Corp.*, 1987 WL 17184 (Del. Super.); *Chrysler Motors Corp. v. Hall*, 1988 WL 15312 (Del. Super.); *General Motors Corp. v. Parker*, 1999 WL 1240820 (Del. Super.); *Seaford Machine Works v. Johnson*, 1997 WL 818014 (Del. Super.).

a note appears in Dr. James' file that Claimant was experiencing pain in both her left and right arm.[18] Even if the Court accepts this argument it does not further Employer's position. If the earliest point Claimant could have known of the work related nature of her injury was May 13, 2003, the two-year statute of limitations period is met because Claimant filed her claim on February 8, 2005.

Employer next argues that because Dr. Sowa's records reveal that Claimant had elbow pain dating back to at least November 2002, the statute of limitations ran before February 2005 when Claimant made a claim for workers compensation. This argument is also unavailing. Upon review of all of Claimant's medical records, Dr. Sowa concluded the injury dated to June 2003.[19] The Board found that opinion credible and believable based on the evidence.[20] Furthermore, pain in the elbow in 2002 would not necessarily put a reasonable person on notice that the pain was work related.

There is substantial evidence in the record to support the Board's holding that although Claimant had aches in her elbow in 2002, she was not on notice of the work related nature until sometime after November 2003.

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[18] IAB Hearing No. 1259669 Transcript at 22.
[19] *Dr. Sowa Deposition* at 11.
[20] IAB Hearing No. 1259669 Decision at 2-3; Dr. Sowa testified he thought Claimant's injury was due to her work activities from the first time they met in November 2003, but that does not necessarily mean Claimant knew her injuries were work related before her visit with Dr. Sowa. There is no evidence in the record that Claimant's family doctor (Dr. James) ever told Claimant her symptoms could be work related.

The Board exercised its discretion when it believed Claimant's testimony that she, as a reasonable person, did not know the work related nature of her injury prior to November 2003. The Board also exercised its discretion when it believed Dr. Sowa's opinion that the date of the injury was June 2003. Those holdings are based on substantial evidence and the Court will not disturb them on Appeal. Neither date violates the statute of limitations for period for this claim. Therefore, the claim was filed within the two-year statute of limitations for injuries and is not time-barred. The Board's decision on this point is **AFFIRMED**.

Notice Requirement

Employer next argues that the notice requirement of DEL. CODE ANN. tit. 19, § 2341 was not met by Claimant because she knew her injury was work related for more than 90 days before notifying Employer of her condition. Therefore, Employer asserts she has forfeited any right to compensation under the statute. Employer reads the statute too restrictively. DEL. CODE ANN. tit. 19, § 2341 states:

> Unless the employer has actual knowledge of the occurrence of the injury or unless the employee, or someone on the employee's behalf, or some of the dependents, or someone on their behalf, gives notice thereof to the employer within 90 days after the accident, no compensation shall be due **until such notice is given or knowledge obtained**. (Emphasis added.)

It is well established Delaware law that "[w]here the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls."[21] There is no provision in DEL. CODE ANN. tit. 19, § 2341 for a forfeiture of compensation if notice is not given within 90 days, and employer cites to no opinion of this Court or any other that supports this interpretation. It is unclear from the record when Claimant had actual knowledge of the work related nature of her injury, but that fact is not determinative because there is no forfeiture provision in the statute. The determinative fact is whether notice was given to Employer.

Employer admits that Claimant promptly gave notice of her injury to Employer in November 2004 when she was unable to return to work.[22] She seeks compensation prospectively from that date. Claimant has done all that is required of her under the statute.

Additional review of supports the conclusion that no forfeiture provision was intended to be in § 2341. There is a forfeiture provision in the occupational disease section located at DEL. CODE ANN. tit. 19, § 2342.[23]

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[21] *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989); *see also Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000) ("Where the language of the statute is unambiguous, no interpretation is required and the plain meaning of the words controls"); *Balma v. Tidewater Oil Co*., 214 A.2d 560, 562 (Del. 1965) ("Courts have discretion to construe statutes only when they are obscure or doubtful in their meaning. Where its language is clear and unambiguous, a statute must be held to mean that which it plainly states, and no room is felt for construction").

[22] *Employer/Appellant Brief* at 9.

[23] The statute provides:

If the legislature intended a forfeiture provision be in DEL. CODE ANN. tit. 19, § 2341 it could have easily done so. It did not.[24]

The Court finds there was substantial evidence for the Board to determine Claimant gave Employer notice of her injury. Therefore, the decision of the Board on this point is **AFFIRMED**.

Dr. Sowa's Opinion

Employer argues that the Board erred when it relied on the opinion of Dr. Sowa as a causal link between Claimant's injuries and her work related duties because there was no evidence that he knew of Claimant's work activities or her job description. Dr. Sowa testified it was his opinion that Claimant's injury was due to her work duties to a reasonable degree of medical probability.[25]

Claimant worked for Employer an average of forty hours per week for seven years packing and unpacking boxes and performing heavy lifting in

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> Unless the employer during the continuance of the employment has actual knowledge that the employee has contracted a compensable occupational disease or unless the employee, or someone in the employee's behalf, or some of the employee's dependents, or someone on their behalf, gives the employer written notice or claim that the employee has contracted one of the compensable occupational diseases, which notice to be effective shall be given within a period of 6 months after the date on which the employee first acquired such knowledge that the disability was, could have been caused or had resulted from the employee's employment, **no compensation shall be payable on account of the death or disability by occupational disease of such employee**. (emphasis added)

[24] Employer may argue § 2342 applies in this case based on a footnote in the Board's decision that § 2342 was more analogous to a cumulative detrimental effects situation. However, that dicta has no binding effect on this Court. As set forth above in the statute of limitations section, it is well-established law that a cumulative detrimental effects claim is treated as an injury, not a disease. Therefore, the notice provision for injuries is applicable to this case.

[25] A higher standard than is required for a Board hearing; *See e.g. Air Mod Corp. v. Newton*, 215 A.2d 434, 438 (Del. 1965).

the course of those duties.[26] Claimant experienced left elbow pain that would radiate when she lifted the boxes.[27] Claimant had intermittent pain when working, but because there was not identifiable accident, she did not think her symptoms were work related until sometime after her November 2003 visit with Dr. Sowa.[28] Based on the nature of the injury to Claimant's left elbow, specifically the left epicondyle, a review his records, Dr. James' records, physical therapy records,[29] and Claimant's presentation of her history,[30] Dr. Sowa concluded the injury was work related.[31]

In Delaware, an injury is compensable under the workers compensation scheme if "…ordinary stress and strain of employment is a substantial cause of the injury."[32]

It is the purview of the Board to determine credibility of witnesses.[33] In *Sears, Roebuck and Co. v. Farley*[34] the Delaware Supreme Court rejected the precise argument the Employer sets forth in this appeal. The Court held where medical testimony is based solely on the subjective complaints of the plaintiff; a finder of fact, such as the Industrial Accident Board, is free to

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[26] IAB Hearing, No. 1259669 Transcript at 10, 12.
[27] IAB Hearing No. 1259669 Decision at 3, Transcript at 15.
[28] IAB Hearing No. 1259669 Transcript at 17, 30.
[29] *Dr. Sowa Deposition* at 24.
[30] *Id* at 3-4.
[31] *Dr. Sowa Deposition* at 9-10.
[32] *Duvall v. Charles Connel Roofing*, 564 A.2d 1132, 1136 (Del. 1989); *Reese v. Home Budget Center*, 619 A.2d 907, 910-911 (Del. 1992).
[33] *Johnson v. Chrysler Corp*., at 66-67.
[34] 290 A.2d 639 (Del. 1972).

accept or reject medical testimony.[35] In the instant case, the Board accepted Dr. Sowa's medical testimony. The Board stated it found Dr. Sowa more persuasive than the Employer's expert Dr. Townsend on all issues.[36] The Court will not re-evaluate the evidence to determine if it would have come to a different conclusion. There is substantial evidence in the record to indicate Claimant's work duties were a substantial cause of her injury. Therefore, the Board's decision on this point is **AFFIRMED**.

Conclusion

For the reasons set forth herein the decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[35] *Id* at 641.
[36] IAB Hearing No. 1259669 Decision at 6.