IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHRISTINE RASH,	)
	) C.A. No. 06A-01-002 JTV
Appellant,	)
	)
v.	)
	)
METRO BASIC FOODS,	)
	)
Appellee.	)

Submitted: August 17, 2006
Decided: November 30, 2006

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Appellant.

Donald R. Kinsley, Esq., and Daniel P. Daley, Esq., Marks, O'Neill, O'Brien & Courtney, Wilmington, Delaware. Attorneys for Appellee.

Upon Consideration of Appellant's
Appeal From Decision of the Industrial Accident Board
AFFIRMED

VAUGHN, President Judge

Rash v. Metro Basic Foods
C.A. No. 06A-01-002 JTV
November 30, 2006

OPINION

The claimant below, Christine Rash ("Ms. Rash"), appeals a decision of the Industrial Accident Board's ("the Board") in favor of the Employer-Appellee, Metro Basic Foods ("Metro").

FACTS

On October 30, 1996, Ms. Rash suffered an industrial accident while working at Metro and endured a period of disability from October 31, 1996 to November 29, 1996. She entered into an Agreement for Compensation with Metro and it's Insurance Carrier, ESIS, Inc. ("ESIS"), on November 21, 1996. Subsequently, on December 2, 1996, Ms. Rash signed a Receipt of Employee for Compensation acknowledging compensation paid for her period of disability. On December 31, 1996, the aforementioned Agreement as to Compensation was approved by the Board. The last payment received by Ms. Rash was on December 5, 1996, and the last payment for medical services on her behalf was made on June 6, 1997.

On July 15, 2005, over eight years from the date of the last payment related to Ms. Rash's October 30, 1996 injury, Ms. Rash filed a Petition to Determine Additional Compensation Due. On November 30, 2005, Metro filed a Motion to Dismiss the Petition on the grounds that the Petition was time-barred pursuant to the five-year statute of limitations set forth in 19 *Del. C.* § 2361(b).

Formal notice was sent to Ms. Rash regarding the Board hearing on Metro's Motion to Dismiss on December 1, 2005. The hearing took place on December 21, 2005. At the hearing, counsel for Ms. Rash objected to the hearing taking place on

the basis that Ms. Rash was not provided proper notice pursuant to the requirements of the Administrative Procedure Act ("APA"), set forth in 29 *Del. C.* § 10122.

Notwithstanding the objection, the hearing continued. At the hearing, Karen Patterson, Claims Supervisor for ESIS, produced a payment ledger which showed lost time benefits paid to Ms. Rash. The record indicated that the last payment for Ms. Rash's medical treatment was made on June 6, 1997, and the last payment for lost time was December 5, 1996. This evidence was used to support Metro's statute of limitations claim. Counsel for Ms. Rash argued that proper notice of the statute of limitations was never given as required under 18 *Del. C.* § 3914 and that the limitation period under 19 *Del. C.* § 2361(b) never began to run.

Despite Ms. Rash's contentions, the Board held that Metro had presented sufficient evidence that the statute of limitations had run on Ms. Rash's claim and consequently granted Metro's Motion to Dismiss Ms. Rash's Petition for Additional Compensation.

STANDARD OF REVIEW

The scope of review for an appeal of a board decision is limited to examining the record for errors of law and determining whether substantial evidence is present on the record to support the Board's findings of fact and conclusions of law.[1] "Substantial Evidence" is defined as such relevant evidence as a reasonable mind

[1] *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965).

might accept as adequate to support a conclusion.[2] On appeal, the court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[3] The court is simply reviewing the case to determine if the evidence is legally sufficient to support the agency's factual findings.[4]

DISCUSSION

On appeal, Ms. Rash asserts a number of arguments. First, she claims that the Board erred as a matter of law when it decided that Ms. Rash received proper notice of the applicable statute of limitations under 18 *Del. C.* § 3914 and that the Board therefore erred in determining the statute of limitations had run pursuant to 19 *Del. C.* § 2361(b). Second, Ms. Rash argues that the Board's decision is not supported by substantial evidence and is an abuse of discretion because it relied upon improper hearsay testimony when making its decision. Third, Ms. Rash claims that the Board violated her constitutional due process rights by proceeding with the hearing in violation of 29 *Del. C.* § 10122. Finally, Ms. Rash argues that the Board abused its discretion when it commented on the absence of Ms. Rash at the Board hearing.

I. Whether the Board erred as a matter of law in determining that Ms. Rash received proper notice under 18 Del. C. § 3914.

Ms. Rash claims that the Board erred as a matter of law when it decided that

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[2] *Olney v. Cooch,* 425 A.2d 610, 614 (Del. 1981).

[3] *Johnson,* 213 A.2d at 66.

[4] *ILC of Dover, Inc. v. Kelley,* 1999 Del. Super. LEXIS 573, at *3.

she received proper notice under 18 *Del. C.* § 3914 [5] and that the Board therefore erred in determining that the statute of limitations had run pursuant to 19 *Del. C.* § 2361(b).[6] Specifically, Ms. Rash claims that the December 2, 1996 Receipt was inadequate notice and, further, that additional notice was required after the last payment was received by Ms. Rash on July 6, 1997.

In *Brown v. State of Delaware*, a recent Delaware Supreme Court decision, the facts were that the claimant in that case was injured on March 26, 1998.[7] She received workers' compensation benefits between the time of her injury and June 7, 1998. On that date, the claimant signed a one-page, single-sided, form created by the Office of Workers' Compensation and completed by her Employer's representative. The court held that the notice on the form was sufficient to put the claimant on notice of the

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[5] Section 3914 provides that "[a]n insurer shall be required during the pendency of any claim received pursuant to a casualty insurance policy to give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his/her damages." 18 *Del. C.* § 3914.

[6] Section 2361(b) provides that "[w]here payments of compensation have been made in any case under an agreement approved by 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." 19 *Del. C.* § 2361(b).

[7] 900 A.2d 628 (Del. 2006). In that case, The Receipt of Employee for Compensation, signed by the Claimant in *Brown* stated:

"Your signature on this receipt will terminate your rights to receive the workers' compensation benefits specified above on the date indicated. This form is not a release of the employers' or the insurance carrier's workers' compensation liability. It is merely a receipt of compensation paid. The claimant has the right within five years after the date of the last payment to petition the Office of Workers' Compensation for additional benefits."

applicable statute of limitations consistent with the requirements of section 3194. The form involved in this case is substantially similar to the form involved in this case. I find no significant factual difference between the facts of *Brown* and the facts of this case and that the ruling in that case controls the result in this case as to the adequacy of notice under 18 *Del. C.* § 3914.

Relying on the Superior Court opinion in *Brown v. State,*[8] which was subsequently affirmed in the above-referred to Supreme Court *Brown* decision, the Board determined that Ms. Rash received adequate notice of the five year statute of limitations period when she signed the final Receipt of Compensation on December 2, 1996. The receipt Ms. Rash signed specifically states that "This is not a release, it is merely a receipt for compensation paid. The claimant has the right within five years after the date of the last payment to claim a recurrence of the injury for which he or she was paid." The Board did not err as a matter of law in relying on *Brown* to determine that Ms. Rash received proper notice of the applicable statute of limitations on her claim. The Receipt for Compensation, signed by Ms. Rash, was adequate notice as required by section 3914.

Ms. Rash attempts to distinguish the notice received in *Brown* from the notice received in the present action, because in *Brown* the last payment of workers' compensation benefits was concurrent with the Receipt for Compensation; whereas in this case, ESIS made a medical payment on Ms. Rash's behalf six months after the

[8] 2005 Del. Super. LEXIS 340 at *10-12 (Del. Super. Ct.).

December 2, 1996 Receipt for Compensation. The argument hinges on the proposition that an adequate notice does not apply and extend to a subsequent payment made without its own notice; rather, that a new notice must be given with or after the final payment for the statute of limitations to begin to toll. This issue has recently been addressed by this Court in *Lawhorn v. New Castle County*.[9]

In *Lawhorn,* the claimant signed "receipts for payment of benefits" on August 24, 1995 and November 11, 1996. The receipts stated that the "claimant has the right within five years after the date of the last payment to petition the Industrial Accident Board for additional compensation." The last payment arising from the injury was made directly to the claimant's treating physician, on April 28, 1999, nearly two and a half years after the November 1996 receipt was signed. The *Lawhorn* Court concluded that proper notice previously given with a payment also applies to a subsequent final payment, and no new notice is required.[10]

The circumstances surrounding Ms. Rash's notice are analogous to those addressed in *Lawhorn*; therefore, no new notice was required when the final payment was made on June 6, 1997. Since no new notice was required when the final payment was made on June 6, 1997 and the December 2, 1996 Receipt of Employee for Compensation was adequate notice of the applicable statute of limitations, the Board did not err as a matter law in determining that the Receipt for Compensation reviewed

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[9] 2006 Del. Super. LEXIS 187.

[10] *Lawhorn v. New Castle County*, 2006 Del. Super. LEXIS 187 at *12-15, *aff'd*, 2006 Del. LEXIS 605.

and signed by Ms. Rash on December 2, 1996, was adequate notice of the applicable statute of limitations in section 2361(b), as required by section 3194.

II. Whether the Board's Decision is an abuse of discretion and not supported by substantial evidence because it relied upon improper hearsay testimony in making it's decision.

Ms. Rash argues on appeal that the Board erred as a matter of law and abused its discretion because it relied on the hearsay testimony of Karen Patterson when it made its decision. At the hearing, Karen Patterson, Claims Supervisor for ESIS, produced a payment ledger which showed lost time benefits paid to Ms. Rash. The record indicated that the last payment for Ms. Rash's medical treatment was made on June 6, 1997, and the last payment for lost time was December 5, 1996. This evidence was used to support Metro's statute of limitations claim.

The Rules of Evidence are significantly more relaxed in hearings before the Board than in the Superior Court.[11] However, the Board is restrained in its acceptance of hearsay evidence to the extent that such evidence may not be the sole basis upon which a decision is supported.[12] The purpose behind the relaxation of the

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[11] *Morris v. Gillis Gilkerson, Inc.*, 1995 Del. Super. LEXIS 376 at *13-14. Industrial Accident Board Rule No. 14(b) provides: "The rules of evidence applicable to the Superior Court of the State of Delaware shall be followed insofar as practicable; however, that evidence will be considered by the Board which, in its opinion, possesses any probative value commonly accepted by reasonably prudent men in the conduct of their affairs. The Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of its discretion."

[12] *Flowers v. Carpenter Transp.,* 1993 Del. Super. LEXIS 343 at *11.

strict application of the rules of evidence is to prevent the invalidation of otherwise properly entered administrative orders.[13]

Delaware Rule of Evidence 803(6) recognizes the business records exception to the rule against hearsay.[14] Under this exception, four basic requirements must be satisfied before a particular business record may be admitted without the testimony of those who made the record and/or those who compiled the information contained therein.[15] A custodian or other witness must lay the proper foundation before a business record will be admissible.[16]

Here, Ms. Patterson was called by Metro for the purpose of laying a foundation to admit the payment ledger into evidence at the Board hearing.[17] Ms. Patterson properly authenticated the payment ledger as a "qualified witness." Ms. Patterson testified that she has worked for ESIS for thirteen years and is currently a Claims

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[13] *Id.* at *12.

[14] D.R.E. 803(6).

[15] *State of Delaware v. McCabe*, 1995 Del. Super. LEXIS 397 at *6-7. (The record (1) must be prepared and maintained in the regular course of business; (2) it must be made at or near the time of the event recorded; (3) the compilation of the information, its source and the circumstances of recordation must be generally trustworthy; and (4) a custodian or other qualified witness must be available to testify).

[16] *Mullin v. W.L. Gore & Assoc.*, 2004 Del. Super. LEXIS 279 at *4-5.

[17] In *Mullin*, 2004 Del. Super. LEXIS 279, the Superior Court reversed and remanded an IAB decision granting an employer's Motion to Dismiss on statute of limitations grounds where the IAB relied solely on the admission of a payment log detailing payments to the Claimant, without any foundational testimony.

Supervisor with the company. She is responsible for seven claims representatives who handle loss time claims. She has personal knowledge of ESIS's payment ledger procedures and how a ledger is kept. When she was shown the payment ledger relating to the payments made to Ms. Rash, Ms. Patterson identified the ledger as one generated by ESIS. She testified that the payment ledger indicates the check number and the date that the check was issued to the injured worker. Although Ms. Patterson was not asked whether payment ledgers are kept in the regular course of ESIS's business, she testified that the ledger is used to record the date and amount of payments made to injured workers. As an insurance carrier providing coverage to injured workers, it can be inferred that payments are being made to injured workers regularly and those payments are being recorded in ESIS's payment ledger in the regular course of business.

Additionally, the accuracy of payment ledgers is important in the operation of ESIS's business; therefore, the source and the circumstances surrounding the compilation of payment ledgers are generally trustworthy.

On cross examination, Ms. Patterson admitted that she did not conduct any search to determine whether or not any other payments were made to Ms. Rash after June 6, 1997. Any claim that this affects the admissibility of the business record is misplaced. Complaints concerning the accuracy of business records relate to the weight of the evidence, not admissibility.[18] On appeal, it is not the function of this

[18] *Rennick v. Northern Maryland Corp.,* 1989 Del. Super. LEXIS 48 at *8.

Court to re-weigh evidence, determine issues of credibility or substitute its own factual findings for that of the Board's.[19]

Accordingly, the Board did not err as a matter of law when it admitted the payment ledger into evidence. Therefore, its decision was supported by substantial evidence.

III. Whether Ms. Rash's constitutional due process rights were violated when the Board proceeded with the hearing allegedly in violation of 29 *Del. C.* § 10122.

On December 1, 2005, notice was mailed to Ms. Rash regarding the Board hearing on Metro's Motion to Dismiss. At the December 21, 2005 hearing, Ms. Rash objected to the hearing on the grounds that 20 days notice was not provided as required by 29 *Del. C.* § 10122.[20] Ms. Rash contends that the delay in notice was a violation of her due process rights.

Ms. Rash argues that since the notice was mailed on the 1st, there is no way that proper notice was received within 20 days of the hearing, which took place on the 21st. Despite Ms. Rash's contentions, the Board found that 29 *Del. C.* § 10122 had not been violated and proceeded with the hearing. The Board noted that notice is not mailed by the Board before the Board telephonically schedules a hearing with all parties involved. Therefore, the Board reasoned that Ms. Rash necessarily received

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[19] *Olney,* 425 A.2d at 614.

[20] "Whenever an agency proposes to proceed for a case decision, it shall give 20 days' prior notice to all parties..." 29 *Del. C.* § 10122.

notice of the hearing on or prior to December 1, the day the notice was mailed.

It is unnecessary to determine whether Ms. Rash received notice telephonically on December 1, because Ms. Rash was not harmed by the alleged delay. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[21] "Due process is flexible and calls for such procedural protection as the particular situation demand."[22] "A rudiment of procedural due process is the right to receive notice and to be heard 'at a meaningful time and a meaningful manner,' prior to the deprivation of a protected interest."[23]

Here, Ms. Rash claims that her procedural due process was violated because she failed to receive notice within 20 days of the Motion to Dismiss hearing. However, the only claimed prejudice by Ms. Rash is that the Board decided against her at the hearing. Ms. Rash does not claim that she was unaware of the nature of the hearing or that the delay in notice affected her preparation or defense in any way. Ms. Rash appeared at the hearing by counsel and was afforded an opportunity to be heard. Despite the alleged delay in notice given by the Board, it is evident that Ms. Rash's due process rights were not violated in this case.

IV. Whether the Board abused its discretion when it commented on the

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[21] *Crumlish v. Sadler*, 1995 Del. Super. LEXIS 39 *9-10 (*quoting Matthews v. Eldridge*, 424 U.S. 319, 334 (1976.).

[22] *Id.*

[23] *Seaford Feed Co., Inc.,* 1987 Del. Super. LEXIS at *7-8 (*quoting Amstrong v. Manzo*, 380 U.S. 545, 552 (1965).

absence of the claimant at the legal hearing.

The Receipt for Compensation signed by Ms. Rash was offered by Metro to show that Ms. Rash received notice of the applicable statute of limitations. At the hearing, Ms. Rash's counsel argued that the signature on the Receipt needed to be authenticated. Thereafter, the Board commented on Ms. Rash's non-attendance at the hearing and stated that Ms. Rash could have authenticated the signature had she been present. The Board then reiterated that it was in Ms. Rash's best interest to attend hearings that involve her.

Ms. Rash claims that the Board abused its discretion in commenting on and apparently considering the absence of Ms. Rash at what was a legal, rather than evidentiary hearing. It appears that Ms. Rash believes that the Board's remarks at the hearing indicate that they took Ms. Rash's absence into consideration when deciding Metro's statute of limitations claim.

Ms. Rash's presence was not required at the hearing to authenticate her signature on the Receipt for Compensation. The Receipt for Compensation was part of the Board's record before the hearing on Metro's Motion to Dismiss and therefore, already part of the evidence.[24] Furthermore, there is nothing in the record to support Ms. Rash's assertion that the Board's decision was influenced by her absence. If anything, the Board's comments would constitute harmless error.

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[24] Additionally, Ms. Rash's counsel never contested the authenticity of Ms. Rash's signature on the Receipt of Compensation at the hearing, she merely suggested that it was Metro's burden to establish the authenticity of the Receipt.

Therefore, the Board's decision granting Metro's Motion to Dismiss is ***affirmed.***

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File