IN THE SUPREME COURT OF THE STATE OF DELAWARE

WORKERS' COMPENSATION FUND,	§	No. 457, 2006
Plaintiff Below, Appellant,	§	Court Below – Superior Court of the State of Delaware, in and for New Castle County
v.	§	C.A. No. 06M-05-112
INDUSTRIAL ACCIDENT BOARD and KENT CONSTRUCTION CO.,	§	
Defendants Below, Appellees.	§	

Submitted: March 21, 2007
Decided: May 1, 2007

Before **HOLLAND, JACOBS** and **RIDGELY**, Justices.

This first day of May 2007, it appears to the Court that:

1) The plaintiff-appellant, Workers' Compensation Fund ("Fund"), appeals the Superior Court's dismissal of its complaint seeking a writ of prohibition and declaratory judgment preventing the Industrial Accident Board ("Board") from hearing the appellee Kent Construction Co.'s ("Kent") "true second injury" petition, pursuant to 19 *Del C.* § 2327. The Fund makes two related arguments on appeal. First, it claims that the Superior Court erred when it denied its writ of prohibition. Second, it claims that the Superior Court erred as a matter of law when it dismissed its complaint without allowing the Fund to be "fully heard." We have

concluded that neither claim is meritorious. Therefore, the judgment of the Superior Court is affirmed.

2) The defendant-appellee, Kent Construction Co. ("Kent"), employed James Smith on November 15, 1999, when Smith ruptured a disk in his lower back as a result of a work injury. Kent began paying total disability benefits on or around November 30, 1999. By Agreement and Final receipt dated March 30, 2001, Kent acknowledged a 16.5 percent permanent impairment to Smith's lumbar spine. Pursuant to an Industrial Accident Board ("Board") Order dated November 9, 2004, Smith was awarded total disability benefits as of October 2, 2003. The first payment of total disability benefits was made on December 8, 2004.

3) On September 30, 2005, Kent filed a "true second injury" petition,[1] alleging that Smith sustained an injury prior to his employment with Kent and that injury contributed to Smith's permanent disability. The Workers' Compensation Fund ("Fund") filed a motion to dismiss, claiming that Kent's petition was time barred. After a hearing, the Board denied the motion, finding that the two-year time limitation in section 2327 did not begin to run until the first payment of total disability payments were made

[1] *See* 19 *Del. C.* § 2327. In a "true second injury" petition, the employer paying benefits seeks reimbursement from the Workers Compensation Fund because the claimant suffered a previous unrelated injury occurred while employed by a different employer and that injury contributed to the claimant's permanent disability.

after Smith's injury became permanent. The record reflects the first payment of total disability after the injury became permanent was made on November 10, 2004.[2] Thus, under the Board's interpretation of section 2327, Kent's September 30, 2005, petition was timely.

4) On May 22, 2006, the Fund filed a complaint against Kent and the Board in the Superior Court seeking a writ of prohibition preventing the Board from hearing Kent's petition for reimbursement. The Fund also sought a declaratory judgment that the two-year limitation in 19 *Del. C.* § 2327 begins to run upon the date of the first payment of total disability benefits following the date of the second accident. In a written opinion, the Superior Court dismissed the Fund's complaint on July 17, 2006.[3] We review the dismissal of the Fund's complaint *de novo*.[4]

5) The purpose of a writ of prohibition is to prevent a lower tribunal from exceeding its jurisdiction.[5] "The writ of prohibition is a writ

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[2] Citing its own decision in *Benton v. Allied Systems, Ltd.*, the Board stated, "[t]o the effect the overall intent of Section 2327(a), which is to share the burden of total disability payments in second injury cases, the most reasonable reading of the statute is that 'first payment' refers to the first payment of total disability *after the second injury becomes permanent*. An employer cannot be expected to know that reimbursement is even an option until the injury is permanent."

[3] In addition to dismissing the Fund's complaint, the Superior Court ordered that the underlying matter be set for a hearing. According to Kent, a hearing to determine the merit of Kent's petition was held on February 26, 2006. Apparently, no ruling has been issued.

[4] *Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001).

[5] *In re Petition of Edwards*, 2007 WL 44049 (Del. Supr.).

issued by a superior to an inferior tribunal to prevent it from exercising jurisdiction over matters not legally within its cognizance, or to prevent it from exceeding its jurisdiction in matters over which it admittedly has cognizance."[6] The writ of prohibition is an extraordinary remedy, and cannot be used as a substitute for an appeal. Thus, it "will be denied if the petitioner has another adequate and complete remedy at law for the correction of the asserted error of the court below."[7]

(5) A writ of prohibition will only be granted when the lower court's lack of jurisdiction is "manifestly apparent" on the record.[8] In this appeal, the Fund argues, as it did before the Superior Court, that the two year limitation in section 2327 is a statute of repose, as opposed to a statute of limitations, and therefore, the Board is without jurisdiction to hear Kent's petition and the writ should be issued. However, the Board's lack of jurisdiction is not "manifestly apparent" on the record.

6) Whether the Board has jurisdiction over Kent's petition depends upon two questions. First, the Board's jurisdiction depends on when the payment that begins the two-year time limitation in section 2327 was made. Second, it depends on whether the time period in section 2327 is

[6] *Canaday v. Superior Court*, 116 A.2d 678, 681 (Del. 1955).
[7] *Id*. at 682.
[8] *Petition of Hovey*, 545 A.2d 626, 628 (Del. 1988).

a statute of limitations or a statute of repose. The Board expressly determined that the two-year period begins with the first payment after the second injury becomes permanent and implicitly determined that section 2327 is a statute of limitation. Whether the Board erred in either determination is a question that can, and should, be addressed on an appeal from the Board's final decision in the case. Interlocutory appeals from Board decisions are not permitted.[9] Accordingly, we hold that a writ of prohibition is inappropriate in this case.

7) The Fund also argues that the Superior Court should not have ruled on whether the writ should be issued until it had an opportunity to fully brief the merits of the case. The Superior Court denied the Fund's request and based its ruling solely on the complaint. It is clear on the face of the complaint that a writ should not be issued in this case because an adequate and complete remedy at law is available on appeal. Thus, the Superior Court did not err when it dismissed the complaint without briefing on the merits.

[9] *Schagrin Gas Co. v. Evans*, 418 A.2d 997, 998 (Del. 1980) ("[I]nterlocutory orders of the Industrial Accident Board are unappealable. Appellate review of an interlocutory order must await appellate review of the final determination of the Board.") (citing *Eastburn v. Newark School District*, 324 A.2d 775, 776 (Del. 1974)).

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is affirmed.

BY THE COURT:

/s/ Randy J. Holland
Justice