

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

JOSEPH LEVAN, )  
)  
Appellant/Employee, )  
) C.A. No. 06A-05-006 MMJ  
v. )  
)  
INDEPENDENCE MALL, )  
)  
Appellee/Employer. )

Submitted: November 21, 2006  
Decided: February 28, 2007

**AFFIRMED IN PART, REVERSED IN PART**

**MEMORANDUM OPINION**

Lawrence Spiller Kimmel, Esquire, Kimmel, Carter, Roman & Peltz, P.A.,  
Newark, Delaware, Attorney for Employee/Appellant

David R. Batman, Esquire, Heckler & Frabizzio, Wilmington, Delaware, Attorney  
for Employer/Appellee

**JOHNSTON, J.**

Joseph LeVan (“Claimant”) has appealed the Industrial Accident Board’s (“Board”) May 3, 2006 decision. The Board ruled that Claimant’s Petition to Determine Additional Compensation Due was barred by the five-year statute of limitations.<sup>1</sup>

### **FACTS AND PROCEDURAL CONTEXT**

During the April 5, 2006 hearing on Claimant’s Petition, the following facts were presented. These facts are essentially undisputed.

Claimant injured his right knee in a work-related accident in October 1989. Independence Mall (“Employer”) acknowledged the injury as compensable and Claimant received worker’s compensation benefits. Employer approved payment of Claimant’s medical bills through August 11, 1999.

On Thursday, February 3, 2000, Employer issued and mailed a check to the medical provider in the amount of \$228.00. The check was the last payment made by Employer relating to Claimant. Claimant continued to receive medical treatment, culminating in surgery on November 2, 2004.

On February 9, 2005, Claimant filed a Petition to Determine Additional Compensation Due. Both Employer and Claimant have stipulated that the medical

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<sup>1</sup>19 *Del. C.* § 2361(b).

expenses sought in the Petition are all reasonable, necessary, and related to the work accident.

The Board considered the testimony of the medical provider's office staff concerning office procedure for handling and depositing checks. The witnesses stated that it would not be uncommon for a period of time to elapse between receipt and deposit of a check. No witness was able to present evidence as to the exact date of receipt of the check. The check was deposited in the medical provider's bank account on Thursday, February 11, 2000.

The Board issued its decision on May 3, 2006. The Board ruled that the claim was barred by section 2361(b) because the claim was made more than five years from the "time of the making of the last payment."

### **THE INDUSTRIAL ACCIDENT BOARD'S MAY 3, 2006 DECISION**

Section 2361(b) provides:

[W]here payments of compensation have been made in any case under an agreement approved by the Board or by an award of 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

Payment of medical benefits is a form of compensation for purposes of Section 2361(b).<sup>2</sup> Such payments re-start the five-year statute of limitations for a claimant.

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<sup>2</sup>See *Starun v. All American Engineering Co.*, 350 A.2d 765, 768 (Del. 1975).

The Board found that the five-year period began to run on the date the last medical payment was made.

The issue is what date is considered the date on which a payment is “made.” Employer argued that payment is made at the time the carrier issued the check. Claimant argued that payment is not made until the payee actually receives the check. The Board considered the law of Delaware and other jurisdictions. The Board ruled that the check was immediately payable at the time it was issued by the carrier. Absent evidence of fraud, deceit or intentional delay in the mailing of the check, the date of issuance is clear and unambiguous. The Board reasoned that the date of receipt argument lacks certainty.

The Board considered that one of the purposes of the Workers’ Compensation Act is “to relieve employers and employees of the expenses and uncertainties of civil litigation.”<sup>3</sup> To begin the five-year statute of limitations on an ambiguous date of receipt would invite litigation. By comparison, the date of issuance of a check is documented both in the insurance carrier’s file and on the face of the check. The Board found that no good purpose would be served by choosing a vague date for the purpose of starting the statute of limitations. To do so would inject harmful uncertainty into the process, causing all parties to engage

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<sup>3</sup>*New Castle County v. Goodman*, 461 A.2d 1012, 1014 (Del. 1983).

in the sort of costly litigation that is contrary to one of the core purposes of the Workers' Compensation Act.

The Board concluded that Claimant had sufficient opportunity to bring a claim on a timely basis. Under the facts of this case, the Board found that Claimant's claim was barred by the applicable statute of limitations.

### **STANDARD OF REVIEW**

In reviewing the decisions of the Board, this Court must determine whether the findings and conclusions of the Board are free from legal error and supported by substantial evidence in the record.<sup>4</sup> Substantial evidence means such relevant evidence as a reasonable person would accept as adequate to support a conclusion.<sup>5</sup> Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.<sup>6</sup> The appellate court merely determines if the evidence is legally adequate to support the agency's factual findings.<sup>7</sup> It also determines if the Board made any errors of law.

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<sup>4</sup>*General Motors Corp. v. Jarrell*, 493 A.2d 978 (Del. Super. 1985); *Talmo v. New Castle County*, 444 A.2d 298 (Del. Super. 1982), *aff'd*, 454 A.2d 758 (Del. 1982).

<sup>5</sup>*Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

<sup>6</sup>*Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

<sup>7</sup>29 Del. C. § 10142(d).

On appeal, the Superior Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions.<sup>8</sup> The Superior Court may not overturn a factual finding of the Industrial Accident Board unless there is “no satisfactory proof” supporting the Board’s finding.<sup>9</sup> It is also well established that “[t]he credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine.”<sup>10</sup> The standard of review of the Board’s legal determination is *de novo*.<sup>11</sup>

## ANALYSIS

The issue in this case is very narrow: when does the five-year statute of limitations begin to run? Employer has not challenged the necessity or reasonableness of Claimant’s medical expenses. Employer has not disputed that the expenses were related to a compensable work injury. The only contention is the timeliness of Claimant’s Petition.

Pursuant to 19 *Del. C.* § 2361(b):

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<sup>8</sup>*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>9</sup>*Id.* at 67.

<sup>10</sup>*Coleman v. Department of Labor*, 288 A.2d 285, 287 (Del. 1972).

<sup>11</sup>*Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).

[W]here payments of compensation have been made in any case under an agreement approved by the Board or by an award of 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.

The interpretation of the phrase “the time of the making of the last payment” has not been adjudicated in Delaware to determine a statute of limitations issue when a gap exists between the date a check is issued and the date of deposit.

This is an issue of first impression in Delaware. The Board ruled, as a matter of law, that Claimant’s petition was barred by the five-year statute of limitations.<sup>12</sup> The Board determined that the last payment is considered “made” at the time of the *issuance* of the last check by Employer.

Although the phrase “time of the making of the last payment,” has never been interpreted by Delaware courts, similar language has been interpreted by other jurisdictions. The majority of the jurisdictions considering this issue have ruled that the statute of limitations begins to run when a check was *received*, not when the check was *issued*.

At least twenty-four states have held that payment is received when the check is received. Seven states consider payment made when the check is cashed. Only three states have found that the date on the face of the check constitutes

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<sup>12</sup>19 Del. C. § 2361(b).

payment.<sup>13</sup> Other jurisdictions have not addressed this issue, or have statutes that mandate a different result.

Pursuant to the Uniform Commercial Code Section 3-602, a check is not “paid” until the person presents the check to the bank and receives money for the negotiated instrument. The United States Supreme Court has held that in bankruptcy transactions, the date the check is honored by the bank is the date that controls.<sup>14</sup>

Delaware Supreme Court Rule 11(c) provides:

*Additional time after service by mail or e-Filing.* When ever a participant has the right to or is required to do some act or take some proceeding within a prescribed period after being served and service is made by mail or by eFiling, 3 days shall be added to the prescribed period. The additional 3 day period applies only as to acts taken by participants and does not apply to actions taken by the Court.<sup>15</sup>

It is well-settled that the provisions of Delaware’s Workers’ Compensation Act are to be construed liberally to effectuate the statute’s intended goal of

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<sup>13</sup>See *Romaine v. Workers’ Comp. Appeal Bd. (Bryn Mawr Chateau Nursing Home)*, 2006 WL1703795, at \*6 (Pa.); *Hunter v. Perquimans County Bd. of Educ.*, 533 S.E.2d 562, 565 (N.C. Ct. App. 2000)(Worker’s compensation statute of limitations phrase, “from the date of the last payment,” means that delivery or receipt of a check in final payment controls); *Hayes v. Federal Shipbuilding & Dry Dock Co.*, 68 A.2d 766, 767 (N.J. Super. Ct. App. Div. 1949)(payment is made on receipt of check, conditioned upon check being honored and when check is honored, payment relates back to date of delivery).

<sup>14</sup>See *Bornhill v. Johnson*, 503 U.S. 393, 395 (1992).

<sup>15</sup>This rule is substantively identical to Superior Court Civil Rule 6(e), providing that whenever service by mail is permitted, 3 days shall be added to the prescribed period.



compensation to the injured employee.<sup>16</sup> The Delaware Supreme Court has stated that if a statute is ambiguous, it should be construed in a way that will promote its apparent purpose and harmonize with other statutes.<sup>17</sup>

Practical ramifications weigh in favor of a receipt date to control the running of the statute of limitations. If deposit dates were controlling, claimants could artificially extend the date and defeat the purpose of the statute of limitations merely by refusing or delaying deposit. If the date on the check controls when the statute of limitations begins to run, the unscrupulous would have an incentive to backdate checks to shorten the statute of limitations.

The party to whom a payment is owed must have a reasonable opportunity to obtain the payment before the payment can be deemed “made.” The date stated on the face of a check is irrelevant if the check is not mailed on that date. As is true in any creditor/debtor relationship, the date of receipt of the check is the date upon which the payment has been made. If there is evidence as to the specific date the payment is received, that date controls the running of the statute of limitations. Of course, if the recipient has avoided timely receipt, or engaged in other dilatory

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<sup>16</sup>*Lawhorn v. New Castle County*, 2006 WL 11174009, at \*3 (Del.Super.).

<sup>17</sup>*Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999).

conduct or been careless in handling mail, the receipt date should be the date upon which the check should have been received.

When, as in this case, there is no evidence of the date of actual receipt of the check by the medical provider, the “making of the last payment” is the date upon which the payment should have been received. In the absence of clearly-demonstrated extraordinary circumstances,<sup>18</sup> the date of receipt shall be the date of mailing plus 3 business days.

### **CONCLUSION**

**THEREFORE**, the statute of limitations in 19 *Del. C.* §2361(b) shall not take effect until 5 years from the time of the making of the last payment, and the making of the last payment shall be the actual date of receipt of the payment (unless the recipient has acted in bad faith). In the absence of proof of the actual date of receipt of the payment, the date of receipt shall be deemed the date of mailing of the payment, plus 3 business days. The portions of the May 3, 2006 decision of the Industrial Accident Board that are inconsistent with this ruling are hereby **REVERSED**.

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<sup>18</sup>Such extraordinary circumstances may include, for example, the cessation of mail service during a hurricane or a postal workers’ strike.

In this case, there is no proof of the actual date of receipt of the last payment; and there is no suggestion that the medical provider recipient acted in bad faith. **THEREFORE**, the date of receipt shall be deemed the date of mailing of the payment, plus 3 days. The Board found the date of mailing to be Thursday, February 3, 2000. The date of receipt shall be calculated as Tuesday, February 7, 2000, which is the date of mailing plus 3 business days. Claimant's Petition to Determine Additional Compensation Due having been filed on February 9, 2005, more than 5 years after February 7, 2005, is untimely. The ultimate ruling of the Industrial Accident Board that Claimant's petition is barred by the statute of limitations in accordance with 19 *Del. C.* § 2361(b) is hereby **AFFIRMED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston