IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

WILLIAM S. McDOUGALL, SR., by and through his Guardian *ad Litem*, Paulette McDougall,	) C.A. No. 01C-07-031 - JTV
Plaintiff,	)
v.	)
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, a foreign corporation,	)
Defendant.	)

Submitted: November 14, 2003
Decided: February 24, 2004

William D. Fletcher, Jr., Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Plaintiff.

Christopher J. Sipe, Esq., Bailey & Wetzel, Wilmington, Delaware. Attorney for Defendant.

Upon Consideration of Defendant's
Motion for Summary Judgment
DENIED

Upon Consideration of Plaintiff's
Motion for Summary Judgment
GRANTED

VAUGHN, Resident Judge

OPINION

In November 1991, the plaintiff, William S. McDougall, Sr., began receiving workers' compensation disability payments for a work-related injury. Those payments were made pursuant to an agreement between the plaintiff and his employer, Air Products & Chemicals, Inc. They have continued without interruption ever since.

On November 23, 1998 the Industrial Accident Board ("the Board") awarded the plaintiff additional compensation in the amount of $32,187.47, plus attorney's fees of $2,250 and medical witness fees of $1,724. The employer appealed the Board's decision to the Superior Court, but by stipulation of the parties dated August 3, 1998, the appeal was dismissed. The defendant, National Union Fire Insurance Company ("National Union"), is the employer's workers' compensation insurance carrier. By letter dated July 30, 1999, the plaintiff demanded that the amount awarded by the Board on November 23, 1998 be paid within 30 days under 19 *Del. C.* § 2357. That section provides as follows:

> If default is made by the employer for 30 days after demand in the payment of any amount due under this chapter [the workers' compensation chapter], the amount may be recovered in the same manner as claims for wages are collectible.

In 1999 the plaintiff filed another petition with the Board seeking additional benefits. On September 15, 1999 the parties entered into a settlement under which

the employer agreed to pay additional benefits of $32,019.98,[1] plus $2,250 in attorney's fees and $1,660 in medical witness fees. By letter dated November 2, 1999, the plaintiff demanded that this amount be paid within 30 days.

The defendant did not pay the amounts demanded.

On July 17, 2001 the plaintiff filed this action seeking the amounts set forth above plus liquidated damages, costs and attorney's fees. The request for liquidated damages, costs and attorney's fees is based upon *Huffman v. C.C. Olipant & Son, Inc.,*[2] in which the Delaware Supreme Court recognized that under 19 *Del. C.* § 2357 the remedies available for recovery of unpaid wages are also available for the recovery of wrongfully withheld workers' compensation benefits. These remedies are found in Chapter 11 of Title 19 (Wage Payment and Collection Act) and include recovery of liquidated damages under 19 *Del. C.* § 1103(b)[3] and costs and attorney's fees under 19 *Del. C.* § 1113(c).[4]

In October, 1991, after this action was filed, the defendant paid the workers'

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[1] The similarity between the two amounts is apparently coincidental.

[2] 432 A.2d 1207 (Del. 1981).

[3] "If an employer, without any reasonable grounds for dispute, fails to pay an employee wages, as required under this chapter, the employer shall, in addition, be liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day, except Sunday and legal holidays, upon which such failure continues after the day upon which payment is required or in amount equal to the unpaid wages, whichever is smaller . . . ." 19 *Del. C.* § 1103(b).

[4] "Any judgment entered for a plaintiff in an action brought under this section shall include an award for the costs of the action, the necessary costs of prosecution and reasonable attorney's fees, all to be paid by the defendant." 19 *Del. C.* § 1113(c).

compensation benefits. The plaintiff's *Huffman* claim for liquidated damages, costs and attorney's fees, however, remains unresolved. The parties have filed cross-motions for summary judgment as to the plaintiff's claim for these damages.

I

Summary judgment should be rendered if the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[5] The facts must be viewed in the light most favorable to the non-moving party.[6] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[7] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[8]

II

The defendant advances two reasons why it should receive summary judgment. The first is that the Board has determined it is entitled to a $333,834.04 credit against the payment of workers' compensation benefits. In a decision dated November 16, 2001 the Board determined that the employer was entitled to such a

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[5] Super. Ct. Civ. R. 56(c).

[6] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995); *Figgs v. Bellevue Holding Co.,* 652 A.2d 1084, 1087 (Del. Super. 1994).

[7] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[8] *Wooten v. Kiger*, 226 A.2d 238 (Del. 1967).

credit in connection with a settlement which the plaintiff received in a medical malpractice case in May 1994. The medical malpractice settlement arose from treatment of a condition which was determined to be causally related to the plaintiff's workers' compensation accident.

This contention, however, was rejected by the Delaware Supreme Court in the related case of *National Union Fire Ins. Co. v. McDougall.*[9] In *McDougall*, the issue was whether a previous *Huffman* claim made by this same plaintiff could be maintained for National Union's failure to pay $367,697.66 in workers' compensation benefits awarded by the Board on September 22, 1995. National Union contended, as it does here, that its failure to pay was justified because it was entitled to a credit from the May 1994 medical malpractice settlement. It contended that since its decision not to pay the September 22, 1995 award was made in the good faith belief that it was entitled to a credit from the medical malpractice settlement, the plaintiff's *Huffman* claim should be denied. In a decision dated March 28, 2001, the Supreme Court, noting that the September 22, 1995 award made no mention of any credit, rejected National Union's argument. It reasoned that National Union's failure to pay the September 22, 1995 award was wrongful because it contravened a final order of the Board, notwithstanding National Union's good faith view that a credit existed.

The November 23, 1998 Board order and September 15, 1999 settlement, like the Board's September 22, 1995 award, made no mention of a credit. Therefore, for

[9] 773 A.2d 388 (Del. 2001).

the reasons stated by the Supreme Court in *McDougall*, National Union's failure to pay those amounts when demanded because of its belief that it was entitled to a credit does not defeat the plaintiff's *Huffman* claim in this case. The fact that the employer was subsequently adjudged to be entitled to a credit on November 16, 2001 is not a defense to the *Huffman* claim in this case.

III

The defendant's second contention is that the plaintiff's claim is barred by the applicable statute of limitations. It contends that the applicable statute is 10 *Del. C.* § 8111. That statute provides that an action to recover wages, salary, overtime for work or other damages or benefits arising from work, labor or personal services performed, must be brought within one year of the action's accrual.[10] Since actions under 19 *Del. C.* § 2357 involve the same remedies as those available for collection of unpaid wages, the defendant argues, the statute of limitations applicable to actions to collect wages should apply. In this case, the defendant contends, the plaintiff's actions accrued thirty days after making demand for payment under 19 *Del. C.* § 2357. Under this theory, the expiration of one year from those dates occurred in August and December 2000, respectively, well before the commencement of the action in July 2001.

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[10] "No action for recovery upon a claim for wages, salary, or overtime for work, labor or personal services performed, or for damages (actual, compensatory or punitive, liquidated or otherwise), or for interest or penalties resulting from the failure to pay any such claim, or for any other benefits arising from such work, labor or personal services performed or in connection with any such action, shall be brought after the expiration of one year from the accruing of the cause of action on which such action is based." 10 *Del. C.* § 8111.

The plaintiff contends, in response, that the one year statute of limitations at 10 *Del. C.* § 8111 does not apply. The applicable statute, he contends, is a five year statute found at 19 *Del. C.* § 2361(b). That statute, which is contained within the Workers' Compensation Act itself,[11] reads as follows:

> Where 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 Board.

Since payments are still being made under the original November 1991 agreement, he contends, no statute runs until five years after those payments cease. In the alternative, the plaintiff contends the three year statute found at 10 *Del. C.* § 8106 applies.[12]

In support of its contention that the one-year statute applies, the defendant cites two cases, *Scoa Industries, Inc. v. Bracken*,[13] and *Johnson v. General Motors Corporation*.[14] In *Scoa*, the Delaware Supreme Court held that the one-year statute

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[11] 19 *Del. C.* §§ 2301 - 2397.

[12] The plaintiff also contends that the defendant is precluded from asserting a statute of limitations defense because it did not give notice of the applicable statute under 18 *Del. C.* § 3914. Because the motions are decided on a different grounds, it is unnecessary to address either of these contentions.

[13] 374 A.2d 263 (Del. 1977).

[14] 1990 Del. Super. LEXIS 66.

in 10 *Del. C.* § 8111 applied to claims brought under the Wage Payment and Collection Act. That case, however, is distinguishable from this case on its facts, because it did not involve a claim for workers' compensation benefits. It does not necessarily follow that, because workers' compensation benefits may be recovered "in the same manner as claims for wages,"[15] the statute of limitations governing wage claims under Chapter 11 of Title 19 also applies to workers' compensation claims.

The *Johnson* case, however, did involve a workers' compensation claim. The claimant was injured in an industrial accident on February 8, 1985. He filed a claim for workers' compensation and in October 1987, the Board issued a decision awarding him partial compensation for intermittent days for the period from March to September 1985 and determining that his disability ended September 10, 1985. The claimant filed suit against the employer in Superior Court under 19 *Del. C.* § 2357 in January 1989 to recover the benefits awarded by the Board in October 1987. The employer moved for summary judgment, contending that the suit was barred by the one-year limitations statute embodied in 10 *Del. C.*§ 8111. In an opinion issued November 7, 1989, the Court stated: "[a]rguably, Johnson meets the requirements of § 2361(b) [the five year statute]. Since 19 *Del. C.* Ch. 23 has provided exclusive remedies and limitations, I find that 10 *Del. C.* § 8111 has no application to this suit."[16]

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[15] 19 *Del. C.* § 2357.

[16] *Johnson v. General Motors Corp.*, 1989 Del. Super. LEXIS 526, at *6.

On February 5, 1990, however, the Court issued a revised opinion after a motion for reargument.[17] Without referring to its November 7, 1989 decision, the Court noted that the claimant had made a demand for payment of the workers' compensation benefits pursuant to 19 *Del. C.* § 2357 on September 19, 1988. Since suit was brought within a year of that date, the Court reasoned, the action was not barred under the one year statute of 10 *Del. C.* § 8111.

The facts of the case are not entirely clear. While the Court in its first opinion stated that the requirements of 19 *Del. C.* §2361(b) "arguably" were met, it is not clear whether any payments of compensation were made before suit was filed. Thus it is not clear whether the Court ultimately turned to 10 *Del. C.* § 8111 because it determined that 19 *Del. C.* 2361(b) never came into effect, or whether the Court truly concluded that, as between the two, 10 *Del. C.* § 8111 was the applicable statute.[18]

Another relevant case is *Baio v. Frank A. Robino, Inc.*[19] In that case the claimant was injured in an industrial accident on September 15, 1972. On July 3, 1973, he and the employer entered into an agreement for payment of temporary total disability benefits under which the employer was to pay the claimant a weekly benefit. At some point the employer filed a petition to terminate benefits, and from

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[17] *Johnson*, 1990 Del. Super. LEXIS 66.

[18] What statute of limitations, if any, applies to an action brought under 19 *Del. C.* § 2357 where no payments of compensation have been made in the case is a question which the Court does not need to address.

[19] 1987 Del. Super. LEXIS 1183.

then until November 18, 1976 the claimant was paid from the Second Injury Fund. After November 18, 1976, the claimant did not receive any compensation. On May 5, 1985, the claimant filed new petitions with the Board in which he sought, among other things, recovery of the weekly benefit under the original July 3, 1973 agreement for each week after November 18, 1976. The Board denied his petitions on the grounds that the employer was entitled to a credit from a settlement which the claimant made with a third-party tortfeasor.

The claimant appealed to Superior Court. In the appeal, the employer contended that the claimant's petition for weekly benefits accruing after November 18, 1976 was barred by the one year statute at 10 *Del. C.* § 8111. The claimant contended that the five year statute in 19 *Del. C.* § 2361(b) applied, but he also contended that the statute had never commenced to run because no receipt for any payment which had been made was ever filed with the Board, as required by the statute.

The court in *Baio* held that the one year statute applied and that the claimant's petition for past benefits from November 18, 1976 until the filing of the petition before the Board, brought almost nine years after he last received a weekly payment, was, on that basis, barred. In doing so, the court reasoned that § 2361(b) was designed to govern cases in which a compensation claim is brought after the discharge of a pre-existing compensation agreement. The subsection does not apply, the court reasoned, where a claimant brings an action to enforce such an agreement.

For the reasons which follow, however, I conclude that the plaintiff's claims

in this case are governed by the five year statute, not the one year statute.

Under 19 *Del. C.* § 2357, if an employer defaults upon payment of workers' compensation which is due and owing, "the amount may be recovered in the same manner as claims for wages are collectible." In *Huffman*, the Supreme Court stated that "in order to give effect to the provisions of § 2357, the reference in § 1113(a) to 'wages' must be construed to include claims based on unpaid workmen's compensation benefits."[20] No statute of limitations was in issue in *Huffman*, however, and I do not interpret this or any similar statement which may appear elsewhere as meaning that § 2357 redefines workers' compensation benefits as wages. § 2357 incorporates by reference the same remedies for collection of workers' compensation benefits as are available for the collection of wages, but an action brought under § 2357 remains, nonetheless, an action brought pursuant to the Workers' Compensation Act, not the Wage Payment and Collection Act.

The limitations periods for claims under the Workers' Compensation Act are set forth at 19 *Del. C.* § 2361. With certain exceptions not relevant here, § 2361(a) requires that "all claims for compensation" must be brought within two years of the accident. Once payments of compensation are made in a given case, however, § 2361(b) becomes applicable. I do not interpret the phrase "last payment" in § 2361(b) as referring only to a final payment in full of an agreement or award, as is suggested in *Baio*. The language of the statute does not limit the phrase to such payments. I interpret the phrase more broadly as referring to a last payment which

[20] *Huffman*, 432 A.2d at 1210.

is in fact made in a case, regardless of whether it is a final payment or not. It seems quite obvious that, under the statute as written, if an employer wrongfully stops making payments which are required under an agreement or a Board award, "no statute of limitation" for recovery of withheld benefits will "take effect" until five years from the making of the last payment. In addition, because the statute is triggered where payments are made "in any case," it would seem to follow that once payments are made for an industrial accident, the statute governs additional claims which arise from that particular work-related injury subsequent to the original claim.

It appears that the analysis in *Baio* was influenced, at least in part, by concern that § 2361(b) can create a limitless period of time for bringing compensation claims where the technical requirements of the statute have not been satisfied. However, contentions that the five year statute of § 2361(b) does not apply where there is non-compliance with its technical requirements have been rejected in authoritative decisions in this jurisdiction.[21] I have no doubt that the contention that technical non-compliance with the statute's requirements renders the five year period limitless can also be addressed appropriately by the court in any given case.

Since payments have been and are being made to the plaintiff pursuant to the initial, November 1991 agreement, § 2361(b) applies, and "no statute of limitation" takes effect as to the plaintiff's workers' compensation claims until five years after

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[21] *McCarnan v. New Castle County*, 521 A.2d 611 (Del. 1987); *New Castle County v. Goodman*, 461 A.2d 1012 (Del. 1983); *Starun v. All American Engineering Co.* 350 A.2d 765 (Del. 1975).

those payments have ceased. Accordingly, the defendant's statute of limitations defense must be rejected.

The defendant's motion for summary judgment is ***denied***. The denial of the defendant's motion for summary judgment results in the plaintiff's motion for summary judgment being ***granted.*** A hearing will be scheduled at plaintiff's request to determine the amount of his damages.

IT IS SO ORDERED.

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

oc: Prothonotary
cc: Order Distribution
File