**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD**

**OF THE STATE OF DELAWARE**

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| BRIDGET REYNOLDS, | ) | |
| | ) | |
| Employee/Grievant, | ) | |
| | ) | **DOCKET No. 08-06-423** |
| v. | ) | |
| | ) | |
| DEPARTMENT OF HEALTH AND SOCIAL SERVICES, | ) | **DECISION AND ORDER** |
| | ) | |
| Employer/Respondent. | ) | |

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on July 22, 2009 at the Cannon Building, 861 Silverlake Boulevard, Suite 203, Conference Room B, Dover, DE 19904. The Board continued the hearing to deliberate on December 3, 2009 after receiving post-hearing submissions by the parties on two legal issues raised at the first hearing.

**BEFORE** Martha K. Austin, Chair, Joseph D. Dillon, Paul R. Houck, and Jacqueline Jenkins, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

**APPEARANCES**

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

David A. Boswell, Esquire
on behalf of Bridget Reynolds

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Health and Social Services

## BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant, Bridget Reynolds (Reynolds), offered and the Board admitted into evidence her trial book with six exhibits (A-1 through A-6). During the hearing the Board also admitted into evidence an Order dated August 6, 2007 by the Industrial Accident Board (No. 1190124) (A-7).

The employer, Department of Health and Social Services (DHSS), offered and the Board admitted into evidence the DHSS trial book with four exhibits (S-A through S-D). During the hearing the Board also admitted into evidence an e-mail dated December 20, 2007 from Deborah S. Johnson to Mark Monroe (S-E).

Reynolds testified on her own behalf. DHSS called one witness: John Kirk, Deputy Director, Division of Industrial Affairs, Office of Worker's Compensation. At the Board's request, DHSS made Debra A. Lawhead, Insurance Coverage Administrator, available to testify. [1]

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[1] In the Pre-Hearing Order dated July 15, 2009, the Board excluded the proposed testimony of Ms. Lawhead regarding the 2005 amendment to Section 5933(a) of Title 29 of the *Delaware Code* and its effect on this grievance because "the Board does not need the testimony of a lay witness to construe the Board's enabling statute." By letter dated July 21, 2009, DHSS objected to the exclusion of Ms. Lawhead's testimony. The Board notes that in its letter DHSS amplified the scope of Ms. Lawhead's proposed testimony to include "the periods of time Ms. Reynolds received worker's compensation benefits and supplemental pay she received associated with the receipt of those benefits." At the hearing, the Board invited Ms. Lawhead to testify about those facts.

## FINDINGS OF FACT

Reynolds works as an Active Training Facilitator at the Stockley Center. In 2001 she was a casual seasonal employee caring for severely disabled patients. Her job included physical labor like turning and lifting patients.

On May 9, 2001 Reynolds was injured at work lifting a heavy metal bucket. By agreement with DHSS she received worker's compensation for the period May 15-20, 2001 for cervical strain and supplemental.

Reynolds returned to work on May 21, 2001 on alternate duty. On May 22, 2001 she suffered a recurrence of her neck injury. She received worker's compensation and supplemental pay for the period May 22 through June 4, 2001. On June 5, 2001 Reynolds returned to work. On June 6, 2001 she suffered a recurrence of her neck injury. She received worker's compensation and supplemental pay for the period June 6 through September 5, 2001.

On September 6, 2001 DHSS placed Reynolds on leave without pay. On January 18, 2002 Reynolds had surgery for carpal tunnel (another injury caused by her May 9, 2001 work accident). She received worker's compensation for the period January 18 through March 12, 2002. [2]

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[2] The record is not clear whether Reynolds received supplemental pay for the period January 18 through March 12, 2002. Reynolds testified that she believed she did. DHSS records indicate that she did not receive any supplemental pay after September 5, 2001 because of the 90-day cap under 29 *Del. C.* §5933(a).

On January 8, 2007 Reynolds petitioned the Industrial Accident Board (IAB) to determine additional compensation for a left shoulder injury. The IAB found in favor of Reynolds. According to the IAB:

> Dr. Morgan clearly marked a succession of changes in Claimant's shoulder that originated with the May 2001 work accident and progressed to Claimant's current condition, which requires arthoscopic surgery.
> . . .
>
> Because causation has been established and Claimant's shoulder injury is found to be compensable, the recommended surgery is authorized and the State is liable for the cost of the surgery.

DHSS denied Reynolds' claim for supplemental pay for her shoulder injury because of a legislative change in 2005 which limits supplemental pay to one period for any work injury.

## CONCLUSIONS OF LAW

Section 5933(a) of Title 29 of the *Delaware Code* provides:

> Whenever an officer or employee of the State, including those exempt from the classified service, qualifies for worker's compensation disability benefits, such officer or employee, for a period not to exceed 3 months from the date such compensation begins, shall not be charged sick leave and shall receive from the State the difference, if any, between the total of : (1) The amount of such compensation, (2) any disability benefits received from the Federal Social Security Act, and (3) any other employer supported disability program, and the amount of wages to which the officer or employee is entitled on the date

> such compensation begins, provided the injury or disease for which such compensation is paid is not the direct result of such officer's or employee's misconduct and occurs during a period of employment for which the employee is entitled to receive wages. **No more than 1 period of supplemental pay shall be made under this subsection for any work injury, including any recurrence or aggravation of that work injury.**

(Emphasis added.)

The General Assembly amended Section 5933(a) effective July 1, 2005 to add the last sentence limiting supplemental pay to one period for any work injury. Under the previous law, as construed by the Delaware Supreme Court, a State employee was entitled to supplemental pay for up to three months each time he or she qualified for worker's compensation. *See Moses v. Board of Education of New Castle County Vocational School District*, 601 A.2d 61, 64 (Del. 1991) (en banc). Under the current law, a State employee is entitled to only one period of supplemental pay for any work injury including any recurrence or aggravation of that work injury.

The Board concludes as a matter of law that applying the 2005 amendment to Reynolds would not be an impermissible retroactive application of the statute impairing a substantive right to supplemental pay. Her cause of action for supplemental pay for her shoulder injury did not accrue until that injury became compensable: in 2007 when the IAB granted her petition to determine additional compensation due for her shoulder injury. At that time, the law limited her to one period of supplemental pay for any work injury.

## A. **Retroactivity**

In *Merganthaler v. Asbestos Corp. of America*, 534 A.2d 272 (Del. Super. 1987), employees exposed to asbestos prior to 1949 sued the employer for personal injury. In 1949 the General Assembly amended the worker's compensation law to include diseases like those caused by asbestos as compensable occupational diseases. The employees did not sue until 1979 after their diseases became evident.

Worker's compensation is an exclusive remedy. If the 1949 amendment to the worker's compensation law applied to the employees, it would bar their claims for personal injury. The employees argued that to apply the 1949 amendment to them would be an impermissible retroactive application of the law. The Superior Court, however, held that the 1949 amendment did not apply retroactively to bar the employees' claims because it was the law in force in 1979 when they sued for personal injury.

> The plaintiffs had no right to compensation for their diseases and no manifestation of harm prior to the present law and the first manifestation of the disease occurred after enactment of the present law. Their claims under the present law are claims which have arisen since enactment of the present law and does not depend on retroactive application of the present law. Retroactivity arises when a claim or a known injury which had matured prior to the statute is sought to be substantially affected by the subsequent statute.

534 A.2d at 277-78 (citation omitted).

Section 5933(a) provides for supplemental pay "Whenever an officer or employee of the State, including those exempt from classified service, qualifies for worker's compensation disability benefits, . . . ." A claim for supplemental pay arises only when a State employee qualifies for worker's compensation. Reynolds did not qualify for worker's compensation for her shoulder injury until the IAB granted her petition to determine additional compensation in 2007, two years after the 2005 amendment to Section 5933(a). Reynolds' claim for supplemental pay for her shoulder injury arose "since the enactment of the present law, and does not rest on retroactive application of the present law." *Merganthaler*, 534 A.2d at 277. [3]

The Board concludes as a matter of law that the 2005 amendment to Section 5933(a) limits Reynolds to one period of supplemental pay for "any work injury" caused by her 2001 workplace accident. She already received two payments of supplemental pay for her neck injury under the old law. If "any work injury" includes her shoulder injury as well, then she is not entitled to any further period of supplemental pay.

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[3] In the cases relied on by Reynolds the change in the statute impaired substantive rights which had already vested. For example, in *A.W. Financial Services, S.A. v. Empire Resources, Inc.*, No. 55, 2009 (Del., Sept. 15, 2009), the legislature amended the Delaware escheat law by changing the definition of "period of dormancy" for stocks. The Delaware Supreme Court held that the new definition did not apply retroactively in civil actions involving stocks escheated prior to the change in the law. "The effect of the amendment is to permit the State to divest a stockholder of a Delaware corporation of a property right (ownership interest in the stock) two years earlier than was previously permitted under the pre-2008 law. Decision at p.7 (footnote omitted). In contrast, the 2005 amendment to Section 5933(a) did not divest Reynolds of a property right to supplemental pay for her shoulder injury because any right only accrued in 2007 – after the change in the law – when she qualified for worker's compensation for her shoulder injury.

The Board must now decide whether the term "any work injury" in Section 5933(a) includes Reynolds' shoulder injury in addition to her neck injury.

**B. Work Injury**

DHSS contends that "work injury" is synonymous with "work accident." According to DHSS, Section 5933(a) limits supplemental pay to one period for any injury stemming from Reynolds' May 9, 2001 workplace accident, even if she injured multiple body parts (neck, shoulder). According to DHSS, because Reynolds received two periods of supplemental pay in 2001 for injury to her neck, Section 5933(a) bars any further supplemental pay for her shoulder.

Reynolds contends that the statute only limits supplemental pay to one period for any injury to a specific body part caused by her May 9, 2001 workplace accident. Reynolds received supplemental pay for her neck injury, but never for her shoulder injury. According to Reynolds, since the injuries to her neck and shoulder are distinct work injuries, she is still entitled to a single period of supplemental pay under Section 5933(a) for her shoulder injury.

The Merit statutes do not define "work injury." The legislature included the 2005 amendment to Section 5933(a) in the epilogue language of the bond bill and there does not appear to be any legislative history. To interpret the term "work injury" the Board will look to principles of statutory construction.

"'[I]t is well-established, by statute and judicial decision, that legislative terms which are singular in form may apply to multiple subjects or objects. Those which are plural in form may apply to single subjects or objects.'" *State v. Sisson*, 883 A.2d 68, 73 n.22 (Del. Super. 2005), *aff'd* 903 A.2d 288 (2006) (quoting 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* §47.34, at 374-75)).

In Delaware, this principle of statutory construction is codified in Section 304(a) of Title 1 of the *Delaware Code*: "Words used in the singular number include the plural and the plural includes the singular."

The Board will apply this principle of statutory construction to the last sentence of Section 5933(a) to provide for only one period of supplemental pay "for any work injury **[or injuries]**, including any recurrence or aggravation of that work injury **[or those work injuries]**."

The IAB awarded Reynolds worker's compensation for her shoulder injury because it "originated with the May 2001 work accident and progressed to Claimant's current condition, which requires arthoscopic surgery." [4] The same work accident caused two injuries: to Reynolds' neck, and to her shoulder. Section 5933(a) limits her to one period of

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[4] According to the IAB decision (at p.3), Reynolds saw a doctor on May 30, 2001 for her work injuries and "[o]ver the next few months, Dr. Robinson gave her three cortisone shots in her shoulder, which provided temporary relief." Reynolds' "shoulder symptoms gradually worsened and, in 2003, Dr. Robinson recommended left shoulder surgery." *Id.* If Reynolds had sought shoulder surgery at that time, she would have been entitled to another period of supplemental pay. Reynolds "declined, however, because she was still a seasonal/casual employee with the State and she was trying to become a permanent employee, so that she could get benefits." *Id.*

supplemental pay for any injury or injuries caused by that accident. Reynolds already received two periods of supplemental pay for her neck injury before the law changed.

The Board concludes as a matter of law that Reynolds is not entitled to a further period of supplemental pay for her neck injury. Section 5933(a) limits her to one period of supplemental pay for any injuries resulting from her May 9, 2001 workplace accident. Because she received two payments under the old law for her neck injury, the current law bars her from a further payment for her shoulder injury. [5]

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[5] Several members of the Board wanted to note their concern about the potential unfairness of the 2005 amendment to Section 5933(a). They can understand the legislature's intent to curb the expense of the worker's compensation program for the State by denying suspect or fraudulent claims. However, they believe that State employees who suffer multiple injuries on the job or aggravation or recurrence of those injuries and have legitimate claims should not be penalized by the loss of supplemental pay. The Board is bound to apply the law as written even though some members believe that it may be unfair to Reynolds.

**ORDER**

It is this 17th day of December, 2009, by a unanimous vote of 4-0, the Decision and Order of the Board to deny Reynolds' appeal.

Martha K. Austin
Chair

Joseph D. Dillon
Member

Paul R. Houck
Member

Jacqueline Jenkins
Member

## APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

> (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
>
> (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
>
> (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
>
> (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: January 8, ~~2009~~ 2010

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