DELAWARE STATE BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

WORKERS' COMPENSATION BREAKFAST SEMINAR

LIVE DSBA SEMINAR AT RIVERFRONT EVENTS

SPONSORED BY THE WORKERS' COMPENSATION SECTION
OF THE DELAWARE STATE BAR ASSOCIATION

TUESDAY, JANUARY 17, 2023 | 8:30 A.M. – 12:00 P.M.

3.3 hours CLE credit for Delaware and Pennsylvania attorneys
3.0 hours DE Insurance Continuing Education Licensee credits

ABOUT THE PROGRAM

Join us for our annual breakfast seminar and hear from experienced speakers! This year, our program highlights include: Case Law Update; A keynote address from Superior Court of DE; Forms and Formularies; Presentation and Preservation of Evidence; Pre-Trial Procedure; and Best Trial Practices.

Visit https://www.dsba.org/event/workers-compensation-breakfast-seminar-2023/ for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

WORKERS' COMPENSATION BREAKFAST SEMINAR

CLE SCHEDULE

Moderator

Jessica L. Welch, Esquire
Doroshow Pasquale Krawitz & Bhaya

Program

8:30 a.m. – 9:00 a.m.
Case Law Update
John J. Ellis, Esquire
Heckler & Frabizzio, P.A.
Cassandra Faline Roberts, Esquire
Elzufon Austin & Mondell, P.A.

9:00 a.m. – 9:45 a.m.
Keynote Address
The Honorable Meghan A. Adams
Superior Court of the State of Delaware

9:45 a.m. – 10:15 a.m.
Forms and Formularies
Tara E. Bustard, Esquire
Doroshow Pasquale Krawitz & Bhaya
Andrew J. Carmine, Esquire
Elzufon Austin & Mondell, P.A.
Allison Stein
Delaware Department of Labor

10:15 a.m. – 10:30 a.m. | Break

10:30 a.m. – 11:00 a.m.
Presentation and Preservation of Evidence
Matthew R. Fogg, Esquire
Morris James LLP
Keri L. Morris-Johnston, Esquire
Marshall Dennehey Warner Coleman & Goggin
Jonathan B. O'Neill, Esquire
Kimmel Carter Roman Peltz & O'Neill

11:00 a.m. – 11:30 a.m.
Pre-Trial Procedure
James R. Donovan, Esquire
Doroshow Pasquale Krawitz & Bhaya
Christopher T. Logullo, Esquire
Cobb & Logullo
Andrew M. Lukashanas, Esquire
Tybout, Redfern & Pell

11:30 a.m. – 12:00 p.m.
Best Trial Practices
Jennifer D. Donnelly, Esquire
Kimmel, Carter, Roman, Peltz & O'Neill, P. A.
Stephen T. Morrow, Esquire
Rhoades & Morrow LLC
Gregory P. Skolnick, Esquire
Heckler & Frabizzio, P.A.

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DELAWARE WORKERS COMPENSATION
Industrial Accident Board
CASELAW Update
& Appellate Outcomes

By Cassandra Faline Roberts, Esq.
John J. Ellis, Esq.

JANUARY 17, 2023

DSBA ANNUAL WORKERS COMP BREAKFAST SEMINAR

IAB DECISIONS

BENEFIT INTERPLAY

Timaris Lewis v. UPS, IAB #1395928, (10/17/22). Workers' compensation benefits are not owed for total disability for periods where the claimant is on PIP disability for an *un*related motor vehicle accident. [Gambogi/O'Brien]

CAUSATION

Myra Mitchell v. Beebe Medical Center Inc., IAB #1487160, (7/14/22). On a DACD Petition the Board rules that a rotator cuff tear is age-related where there is a delayed onset between the work injury and manifestation of symptoms and noting that the claimant was 56 years of age. Dr. Crain testified on behalf of the Claimant and Dr. Schwartz testified on behalf of the Employer.
[Laursen/Lukashunas]

Garth Springer v. Amazon.com, IAB #1513726, (8/18/22). The Claimant's DCD Petition for a left shoulder rotator cuff tear and related surgery is denied based on a finding of idiopathic and testimony of Dr. Matz. [McDonald/Ellis]

Ellis Blomquist v. City of Wilmington, IAB #1508439, (12/20/22). Pulmonary embolus onset 10 weeks post-surgery for the compensable work accident undermines causation based on the testimony of Dr. Piccioni. [Stewart/Bittner]

COVID-19 ROUND UP

Carl Fowler v. Perdue, IAB# 1501167 (12/28/22) (Order on Remand). The original IAB Hearing (5/11/20) denied benefits for Covid, finding insufficient evidence of the exposure occurring at work. The Board did not reach issue of whether Covid should be deemed an occupational disease. On appeal the case was reversed and remanded back to the Board based on incorrect burden of proof, failure to show substantial evidence, acting as its own expert and speculating on facts not in the record. The Remand Hearing was to entertain additional testimony from Dr Alfred Bacon (the DME doc) as to additional contacts Claimant had prior to contracting Covid-19 and to apply the preponderance of evidence standard on the issue of whether Covid was the result of a workplace exposure. Upon consideration of additional evidence, Dr. Bacon agreed that Claimant likely contracted Covid-19 due to an exposure at Perdue, specifically in the cafeteria. The peculiar hazard for Claimant was not his job, but the cafeteria was a particularly hazardous environment in the context of Covid-19. The Board on remand ruled that Claimant met his burden of proof as to demonstrating the exposure at work, but did not meet the burden of

establishing Covid as an occupational disease as to this Claimant's particular employment, attaching to that occupation a hazard greater than attendant to employment in general. [Schmittinger/Panico] ***(An appeal is expected)***

Charles Caccchioli (deceased) v. Infinity Consulting Solutions, IAB# 1501061 (ORDER. This matter was heard on a Motion to Dismiss for lack of jurisdiction filed by Claimant's widow whose purpose was to allow a tort case for personal injury and death to proceed to a Superior Court jury. The Employer's position was that Mr. Cacchioli succumb to Covid-19 as an occupation disease and that the widow's remedies should be limited to Title 19, Chapter 23. As such, unlike other Covid litigation before the Board, the parties' positions were basically switched. The Board ruled that there was insufficient evidence to conclude that Claimant's employment presented a hazard "distinct from and greater than" employment in general. Claimant was an office worker and one of his co-workers had Covid-19. *"A mere allegation that the illness was contracted on Claimant's employer's premises is legally insufficient to support a finding that it was an occupational disease."* Accordingly, the Claimant's motion to dismiss on jurisdictional grounds was granted. [Warner/Baker] ***(This ruling was not appealed)***

Carol Hudson v Beebe Medical Center, IAB# 1516467 (10/24/22. Claimant was a nurse in a hospital Covid-19 unit and had direct contact with Covid-19 patients. Her symptoms began on 10/14/20 per her history. She reportedly had multiple exposures at work with Covid patients not wearing masks, and her own mask broke on 10/12/20. She attended a funeral on 10/19 and had gone out to dinner a few times. Her son showed symptoms on 10/19 and died a few days later. In denying benefits, it should be noted that one of the inconsistencies which troubled the Board was the timeline of onset and the suggestion by the Claimant that as of October 2020, she had had similar symptoms "for months", contradicting her other testimony as to onset of symptoms on a specific date in October. Depending on who was testifying at the merits hearing, the Claimant's symptoms started on either 10/12, 10/14, 10/20 -- or the prior summer. If this account was accurate as to the October onset, that would mean Claimant continued to work and attend a family funeral notwithstanding demonstrating Covid-19 symptoms – as a health care professional this is curious to say the least. Additionally, the evidence established that Claimant was religious as to wearing her personal protective equipment and that a number of safety protocols were in place by the hospital. The Board ruled that Claimant failed to demonstrate an exposure at work, and adopted the DME opinion that Claimant more likely acquired Covid from her son Michael, who became ill before Claimant and who passed away the day after Claimant's hospital admission. Claimant's son drove her to work most days and they commonly ate takeout in the confines of the vehicle. The

Board also ruled that the burden of proof for Covid-19 as an occupational disease was not met, with Dr Bacon testifying that the use of PPE mitigates the risk for healthcare workers. [Donovan/Morris-Johnston] ***(This case is on appeal to the Superior Court]***

DISFIGUREMENT

Dwayne Jacobs v. YRC Freight, IAB #1516608, (6/10/22). On a claim for disfigurement a 7-inch scar down the center of the leg which is 1/4 inch wide is awarded 4 weeks of benefits and noting that the injury in question was a post-operative torn quadriceps in the left leg. [O'Neill/Davis]

John Boyden v. Aquaflow Pump & Supply Co., IAB #1471019, (6/3/22). The Claimant is awarded 10 weeks of disfigurement benefits for a lumbar surgical scar and additional 4 weeks of benefits for collective disfigurement on the stomach. [Fredricks/McGarry]

EMPLOYEE V. INDEPENDENT CONTRACTOR

John Mwangi v. Amazon.com, IAB #1516558, (7/8/22). The Claimant delivery driver is deemed ***not*** an employee of Amazon.com. Of note, the Claimant has separate Petitions pending against Amazon.com, Globus Express and Connect Logistics. The Petitions were ***not*** consolidated and involved a motor vehicle accident occurring on 6/3/21 producing multiple injuries. This Hearing was limited solely to the issue of whether the Claimant should be deemed an Amazon.com employee. Of note, Amazon contracts with other companies to deliver packages and does not do package delivery itself. Amazon does not pay, schedule, hire or fire its drivers. Claimant received his route assignments for the day through the owner of Connect Logistics, or from his brother, who worked at Globus Express. The truck he used to deliver packages was rented from Ryder using a Globus Express account. [Legum/Ellis]

JURISDICTION

Norman Davis v. GT USA Wilmington LLC, IAB #1516693, (11/7/22) (ORDER). There is no concurrent jurisdiction of Delaware workers compensation with the Federal Longshore and Harbor Workers Compensation Act and noting that in a prior adjudication the Board had already determined that Claimant was a dock worker entitled to coverage under the LHWCA. [Tice/Lockyear]

MEDICAL MARIJUANA

Patrick Kalix v Giles & Ransome, Inc., IAB# 1280555 (1/4/23). This was Claimant's application to compel the Employer to engage in a relationship with a specific supplier (CannaSense) of medical marijuana and make direct payment, as opposed to the Claimant going to the local dispensary and being reimbursed (which Employer had agreed to until the Claimant selected a local pizza shop as the marijuana delivery point as opposed to his home). Additionally, Employer filed a PFR to reduce Claimant's monthly entitlement of medical marijuana from 90 grams to 50 grams.

Ruling #1: The Board cannot compel a responsible party such as the carrier to contract with a 3rd party online marijuana provider so that prepayment of medical marijuana can be made on claimant's behalf.

Ruling #2: Based on the DE medical marijuana statute, no Delaware approved facility permitted to dispense medical marijuana in the state could lawfully deliver through the mail, marihuana or marijuana products to a third party, and especially to a third party who has not been approved as a medical marijuana caregiver. By requiring the marijuana be delivered to a pizza shop, seems a means by which to afford Claimant circumvention of what DE's legislature clearly included: oversight of a controlled substance for purposes of public safety and a process for approval of a third party to help, handle or assist with one's use of medical marijuana as needed. The pizza ship delivery site would also seem to contravene Claimant's required written statement pledging "not to divert marijuana to anyone who is not allowed to possess marijuana." Request for pizza shop deliver DENIED.

Ruling #3: Petition for Review as to the amount of medical marijuana DENIED but with the Board expressing concern that "something does not seem right in terms of the latitude Claimant has been afforded to self-medicate within the 90 gram per month limit previously established by the Board, particularly without any medical or other oversight." [Marston/Baker]

Michael Jones v. Johnny Nichols Landscaping, IAB #1276947, (4/12/22). On a DACD Petition seeking to compel payment for medical marijuana, the Board rules that the Claimant's use of marijuana is more for recreation than pain control and denies the Petition. Claimant had used marijuana illegally for more than 20 years until he obtained a medical marijuana card 6 to 7 years ago. Once he obtained marijuana legally, he continued to take opioids concurrently for many years and even Dr. Balu agreed that the Claimant was taking opioids on the upper end of the spectrum while also using marijuana illegally for most of that same timeframe.

There is no time when Dr. Balu could say he substituted opioids for marijuana or vice versa. Dr. Schwartz testified on behalf of the defense that the type of marijuana claimant was using was a euphoric THC-based product and not a medicinal and analgesic CBD-based product. [Donovan/Baker]

MEDICAL TREATMENT ISSUES

Michael Jones v. Johnny Nichols Landscaping, IAB #1276947, (11/3/22). With regard to the Carrier's Utilization Review appeal, the Board agrees with the DME testimony of Dr. Eric Schwartz that a proposed Vertiflex procedure, injections, and Toradol infusions are unreasonable and unnecessary. [Donovan/Baker]

Richard Mahan v. The Strober Organization, IAB #1208746, (11/3/22) (ORDER). The carrier can challenge medical treatment that it is ***not*** paying for (opioids) where it is liable for ongoing total disability and has an opinion from a medical provider that detox from opioids would reduce claimant's level of disability. [Bhaya/Wilson]

Billy Hunsucker v. Scott Paper Company, IAB #1037286, (10/4/22). On a Petition for Review and an application by the employer to reduce claimant's opioid pain medication use, the Board orders the claimant's MME be reduced from 420 to 90 per day over a period of six months, based on the defense medical testimony of Dr. Jason Brokaw. [Gregory/Morgan]

Michelle Klein v. The Nemours Foundation, IAB #1509418, (10/13/22). The Board denies a DACD Petition, finding that a total knee replacement is a "rush to judgment" without exhausting conservative care. Dr. Eric Schwartz testified on behalf of the Employer that such a rush to surgery be it TKR or arthroscopic surgery would not be compliant with the Practice Guidelines, the Medicare Guidelines or with the Highmark of Delaware Guidelines. While the Practice Guidelines are merely guidelines, the Board finds that Claimant should have pursued some type of conservative care first. [Welch/Morris-Johnston]

Alfredo Ramirez-Rodriguez v. National Paper Recycling of DE, IAB #1397324, (9/29/22). Benefits are awarded for medical treatment in Indiana where Claimant resides, under Section 2323 B(7), without pre-certification and rules that said treatment is reasonable and necessary based on the testimony of Dr. Eskander. [Pruitt/Gin]

Alejandro Tueros v. BJ's Wholesale Club, IAB #1471828, (8/24/22). On a DACD Petition seeking payment for an orthopedic mattress as reasonable and necessary, and in tandem with granting a Petition for Review, the Board denies the orthopedic mattress based on the testimony of Dr. Schwartz and rejecting the testimony of Dr. Lingenfelter that the mattress was necessary because it "might help his neck" and allow him to work in some capacity. [Silverman/Simpson]

Dale Lebeau v. IG Burton Body Shop, IAB #1463142, (9/19/22). On a DACD Petition for ongoing chiropractic care and based on the testimony of Dr. Zaslavsky, the Claimant is awarded chiropractic treatment. Of note, Claimant had 17 chiro visits in 2020, 11 visits in 2021, and 6 visits thus far in 2022. Claimant is more functional and comfortable when he receives chiropractic care once a month. He is able to sleep at night, do things with the grandchildren, and continue to work due to the chiropractic treatment. [Silverman/Gin]

Shawn Marti v. Pennco Management Inc., IAB #1417897, (12/30/21). Opioid pain management is reasonable where it allows a Claimant a full time return to work. The medications in question were OxyContin and Oxycodone and per the claimant's testimony allowed him to continue working in the job he has held for 35 years without any physical or mental side effects. [Weik/Carmine]

Theresa Bollinger v. Genesis Healthcare Group, IAB #1483393, (2/17/22). The Board denies the Claimant's DACD Petition for a trial of a spinal cord stimulator based on the testimony of defense medical expert Dr. Brokaw that spinal cord stimulators are most effective for treating neuropathic pain in the distal limb which is not a symptom that is a significant portion of Claimant's current complaints, since her primary areas of pain involve the groin, buttock and right hip. "Spinal cord stimulators have a very poor track record in controlling musculoskeletal pain and Claimant's symptoms are clearly musculoskeletal in nature, not neuropathic." [Schmittinger/Lockyear]

Kevin Kurych v. Idex-US Space Virtual, IAB #1504289, (9/23/22). The Board denies an application for stem cell treatment endorsed by Dr. Zaslavsky and referenced the FDA warnings "many of which Dr. Zaslavsky advised he was unaware of" with the further observation that "Dr. Zaslavsky's appreciation of the

body of stem cell research regarding its usefulness may be wanting." Dr. Rushton was the defense medical expert. Dr. Rushton testified that while stem cell use to treat many conditions is being studied, particularly as it relates to hematology, it has not been sufficiently studied for use in orthopedic spinal care. [Stanley/Adams]

OCCUPATIONAL DISEASE

Charles Cacchioli (deceased) v. Infinity Consulting Solutions, IAB #1501061, (3/7/22) (ORDER). A mere allegation that an illness was contracted on the employer's premises does not in itself establish an occupational disease noting that in this instance the employer was arguing in favor of claimant's illness and subsequent death being covered under workers compensation. Claimant was an office worker required to report to work in a small one-room office with no barriers or ability to keep a safe social distance with 6 other co-workers. He was not medical or emergency personnel. In this instance the Board concluded that while Covid exposure can certainly be a compensable occupational disease "in a proper situation", the limited office setting described in the Petition in this case did not establish that claimant's occupation produced a "hazard of contracting Covid-19 distinct from and greater than the hazard attending employment in general." Accordingly, the Board granted the Motion to Dismiss for lack of jurisdiction. [Werner/Baker]

Barry Mullins (deceased) v. City of Wilmington, IAB# 1523018 (12/30/22). City of Wilmington police officer develops ocular melanoma, which is ultimately fatal. The City gives his widow a disability pension, based on a rebuttable presumption in the pension code. In filing for workers compensation death-related benefits, and without a medical expert to establish causation and other indicia of an occupational disease, the widow relies solely on a promissory estoppel claim, arguing the City's acceptance of a disability pension, via the language in the pension code, necessitates this is work-related and thus eligible for WC benefits. The City presents Dr. Joh Parkerson as the only medical expert, who testifies that ocular melanoma is a rare tumor and that there are no medical or scientific journal studies of which he is aware connecting police work to the development of this disease. The Board denied the Petition – "The City 's decision to grant a disability pension to Mr. Mullins does not preclude the Employer from arguing in a workers compensation case that the cancer was not related to Mr. Mullins' work as a police officer." [Schmittinger/Bittner]

PERMANENCY

Priscilla Pressey v. State of Delaware, IAB #s1485640 & 1493571, (11/18/22). On a DACD Petition seeking permanency to the right leg, thoracic spine and lumbar spine, Dr. Meyers appears to falter on the thoracic and lower extremity ratings. The Board awarded a 10% lumbar spine PPD based on Dr. Meyers but no impairment to either thoracic or the right leg. In addition to the defense medical testimony of Dr. Kates, the Employer also relied on video surveillance. [Pruitt/Panico]

Sherry Williams v. State of Delaware, IAB #1482282, (5/31/22). On a claim for PPD benefits related to headache, vestibular dysfunction, convergence insufficiency and cognitive dysfunction, the Board declines to award any impairment to cognitive function/brain in the absence of a neuropsychological evaluation which is the "gold standard" for evaluation of cognitive issues. The benefits were awarded at 15% impairment for headache, 14% impairment for vision, and 16% impairment for the vestibular system. [Owen/Klusman]

Megan Watts v. Bayada Home Health Care, IAB #1491815, (7/5/22). The Claimant's DACD Petition seeking 17% impairment to the lumbar spine is denied by the Hearing Officer based on a failure to establish the Claimant's low back injury has become "fixed and permanent". This case also documents that the proposition that "MMI" is not a formal part of Delaware workers compensation law. [Krayer/Lockyear]

PARTIAL DISABILITY

Patricia Ferguson v. State of Delaware, IAB #1431459, (4/12/22). The Board does not permit a ***Maxey-Wade*** adjustment on temp partial after-the-fact: "The Board must first emphasize that Claimant has already received the benefits at issue pursuant to specific agreements made between the parties; the only reason that the Board is being asked to review these Agreements and Claimant's receipt of benefits is because she changed jobs from Easter Seals to THG at a significant higher wage, unbeknownst to the State. The Board is unconvinced that a ***Maxey-Wade*** adjustment should be made under these circumstances primarily because the 2018 Agreement itself appears to support a meeting of the minds between the parties that Claimant's partial disability should be based on her actual wages without a ***Maxey-Wade*** adjustment." [Schmittinger/Klusman].

Patricia Ferguson v. State of Delaware, IAB #1431459, (4/12/22). Federal PPD benefits paid during Covid constitute "wages" to be utilized in addition to actual wages while calculating partial disability benefit entitlement, reducing the State's partial disability payment liability. [Schmittinger/Klusman]

Andrew Schauber v. Sears Holding Corp., IAB #1481551, (8/22/22). The Board rules that the Carrier's labor market survey is a better indicator of earning capacity than the Claimant's new job and as such, partial disability benefits are denied. The job secured by Claimant yielded an average weekly wage of $660.00 and the LMS jobs averaged $929.86 weekly. The jobs in question were IT jobs and an FCE deemed the claimant capable of a medium duty PDL. Robert Stackhouse testified as the vocational expert. [Silverman/Wilson]

PRACTICE AND PROCEDURE

Annette Davis v. Christiana Care Health System, IAB #1521009, (11/3/22) (ORDER). On a Motion to Compel the Claimant to respond to a RFP of her social media information, the Board noted that employer's surveillance provided evidence "the Claimant is not as physically disabled as she has asserted" and that Claimant's post-accident social media postings "are reasonably calculated to provide further evidence of Claimant's post-accident activity level" in support of Employer's arguments. The Board did ***not*** agree with Claimant's argument that any social media disclosure should be limited to the period of total disability. [Long/Newill]

Julia Bekasy-Quillen v. State of Delaware, IAB #1481999, (8/23/22) (ORDER). There is no legal requirement that the reasoning of any one IAB decision be applied universally. [Harrison/Gambogi]

Michelle Ramsdell v. Ward & Taylor, IAB #1511811, (9/13/22) (ORDER). The Claimant's personal journal entries regarding her contacts with the Carrier or Employer are not protected by privilege. It is noted however, that any journal entries that pertain to conversations between Claimant and her counsel including her impressions of counsel's legal guidance, are protected by privilege and should remain redacted as well as any entry that would disclose the attorney's legal theories, strategies or opinions. [Stewart/Greenberg/Kelly]

Timothy Willis v. UPS, IAB #1512050, (12/15/22) (ORDER). The Board denies the Employer's Motion to Dismiss a DCD Petition based on violation of its safety policy rendering Claimant's conduct outside course and scope of employment, with

the matter to proceed to a merits Hearing for further consideration of the issues including an intoxication defense pursuant to 19 Del Code Section 2353. [Marston/O'Brien]

Ellis Blomquist v. City of Wilmington, IAB #1508439, (12/20/22). Dr. Meyers' change in his permanent impairment opinion without issuing an updated addendum report is deemed to undermine his credibility but does not merit striking his testimony. "The Board has significant concerns over Dr. Meyers' failure to issue an addendum report and Dr. Meyers' decision to wait until the final hour to notify anyone that he would change his opinion. "This is not the first time Dr. Meyers waited until his deposition testimony to change his permanent impairment ratings…Dr. Meyers' decision to apportion a percentage to the motor vehicle accident essentially impeached his credibility, going to the weight of the evidence." [Stewart/Bittner]

Rudolph Hawkins v. United Parcel Service, IAB #1478596, (6/6/22) (ORDER). The "Two Dismissal Rule" of Superior Court does not exist in workers compensation with regard to Superior Court Civil Rule 41(a)(1). [Stewart/Herling]

STATUTE OF LIMITATIONS

Terrance Tate v. City of Wilmington, IAB #1517314, (8/25/22). A claim for injuries to the left shoulder as the result of repetitive motion during his career as a firefighter is deemed barred by the statute of limitations, noting that initial treatment and discussions regarding the shoulder and work activity occurred as early as 2013. [Crumplar/Skolnik]

SUCCESSIVE INJURIES

Marquan Taylor v. Prego and Ferrarra, IAB #1520266, (10/31/22). In a case involving the issue of recurrence of a prior work injury occurring in 2013 versus a new work accident occurring in 2021, the Board applies a ***Nally*** analysis and noting that the 2013 claim had been commuted. Of note, the second work injury involved a motor vehicle accident which would qualify as a "untoward event" capable of shifting liability to a successive carrier but the medical evidence entertained did not support a finding of a new injury or a worsening of a prior injury. Dr. Zaslavsky testified on behalf of the claimant and Dr. Matz testified on behalf of the carrier. [Marston/Skolnik]

TOTAL DISABILITY

Jessica Duncan v. New Castle County, IAB #1510553, (9/20/22). If Claimant is out of work or otherwise not on a full duty work status due to a collective bargaining agreement, ***Wendy's*** can still apply. "While the Board notes it was an issue of total disability versus a return to work in the case of ***Gilliard Belfast v. Wendy's***, whereas it is an issue of work restrictions versus a return to non-restricted work, against a treating doctor's orders, the Board finds that the same logic is applicable." [Long/Norris]

Daphne Davis v. Johson Controls, IAB #1287814, (8/11/22). This case is a delightful tutorial on ***Hoey*** and its distinctions and includes a discussion of the interplay between ***Hoey*** and union membership. Of note, during the period in question the employer had sent out multiple ***Hoey*** notices suggesting the Claimant seek out other employment, which did not overcome Claimant's standing as a long-term employee (35 years) receipt of employment benefits, and the employer's inability to start the termination process per union contract. The Board ruled that Claimant's ***Hoey*** TTD entitlement continued up until the day of the Hearing. [Freebery/Hunt/Kelly]

UTILIZATION REVIEW APPEALS

Carol Clay v. Kohl's Department Store, IAB #1460702, (2/16/22). The Board affirmed a Utilization Review decision which found the Claimant's pain management program to be compliant with the Health Care Practice Guidelines to include plasma-rich protein injections. Of note, Dr. Balu's pain management program allowed the claimant to avoid narcotic pain medication which the Board deemed "commendable". [Schmittinger/McGarry]

APPELLATE OUTCOMES

Cruz-Rodriguez v B&F Paving, C.A. N22A-01-004 FJJ (8/8/22). The claimant appealed the denial of his petition after the Board found his injuries did not occur in the course and scope of employment. He claimed the injuries resulted from lifting a heavy piece of equipment. A co-worker testified that the claimant simply fainted and told him this had happened before. The court affirmed the Decision. The Board was entitled to find the co-worker more credible even though he made some inconsistent statements. The defense medical expert's testimony also supported that the claimant had a syncopal event. [Allen/Logullo]

Elzufon. Austin, Tarlov & Mondell v Lewis, C.A. N22A-03-006 FWW (1/10/23). This claimant sustained an acknowledged right shoulder injury. The issue in this case was whether the two- or five-year statute of limitations applies when the claimant later alleged a work-related neck injury. The employer contended the petition was untimely filed outside the two-year statute of limitations period. The court found that the Board correctly determined that there was no statute of limitations bar to the petition. The five-year statute of limitations applied since the Board found that the neck injury was causally related to the previously accepted right shoulder injury. Alternatively, the petition was also timely under the two-year statute of limitations as the Board found that less than two years had elapsed since she knew or should have known that her neck problems were work-related. [O'Brien/Castro]

Estate of Anderson v. American Seaboard Exteriors, C.A. N22A-03-003 FJJ (10/18/22). The Court rejected multiple challenges to a Board Decision finding that the claimant did not meet his burden to prove his mesothelioma was related to his work as a high-rise window washer. There was no violation of the last injurious exposure rule as they failed to prove any injurious exposure occurred. The Board was entitled to accept the employer experts' testimony that the claimant did not work around asbestos and did not have a high risk of asbestos exposure. The Board properly excluded shipping records the claimant sought to directly submit into evidence. They were not self-authenticating, and a proper foundation was not laid. The court did find that the Board erred by excluding deposition transcripts of individuals who testified decades ago in a separate case that involved the same buildings where the claimant worked. As the parties stipulated that the deposed witnesses were now unavailable, the transcripts were admissible under Rule

804(b)(1). However, the court found this was harmless error as the deponents did not testify that there was any friable asbestos in the locations the claimant was present. [Crumplar/Roberts&Segletes&Ellis]

McLaughlin v. C&D Contractors, C.A. N22A-04-002 FJJ (12/14/22). The issue before the Court was whether the average weekly wage and max compensation rate of a claimant with work-related asbestos exposure should be based on the date of last injurious exposure or date of mesothelioma diagnosis. The last injurious exposure was in 1989 and the diagnosis was made in 2017. The claimant left the company in 1989 and was working for a different employer in 2017. The Court determined that the AWW/compensation rate should be based on the date of diagnosis. The injury date for occupational exposure cases is the manifestation date. [Crumplar/Wilson]

O'Neal v Ruan Transportation, C.A. N21A-12-004 FWW (6/2/22). The Board in this case terminated entitlement to total disability benefits and awarded partial disability benefits based on a labor market survey. The Court reversed and remanded the case back to the Board after the court could not determine from the evidence how the Board calculated the partial disability rate. [K. Carmine/Gin]

Quaile v. National Tire & Battery, C.A. N21A-12-003 JRJ (7/7/22). The court addressed whether the statute permits a claimant to seek payment of medical bills beyond amounts permissible under the Delaware Fee Schedule. The employer disputed injuries to two body parts and while those claims were pending, the claimant paid for treatment through his private health insurance. After the injuries were found compensable, the claimant demanded direct payment of the face value of the bills rather than the amount owed under the Fee Schedule. The court held that the claimant was not limited to payment at the Fee Schedule rates. The introduction of the Fee Schedule to the statute did not eliminate a claimant's ability to seek payment of 'reasonable' expenses, including those above Fee Schedule rates in situations when compensability is in dispute and the claimant has to pay for treatment on his or her own. [Wasserman/Morris-Johnston]

Sheppard v Allen Family Foods, No. 346,2021 (6/23/22). The claimant appealed a decision granting the employer's petition for review challenging ongoing narcotic prescriptions. Specifically, she claimed that the Board erred by not granting a motion

to dismiss. The claimant contended that there was no good faith causation defense, and the disputed treatment should have been referred to Utilization Review. The Supreme Court disagreed and affirmed the Decision. A prior referral of treatment to UR did not preclude the employer from presenting an argument on the issue of causation. Similarly, a prior permanency settlement does not translate into a waiver of all causation defenses in the future. There was a good faith basis for the causation challenge based on new evidence and the motion to dismiss was properly denied. [Schmittinger/Morgan]

St. James v State of Delaware, C.A. N21A-11-002 CLS (8/23/22). The court addressed whether the doctrine of *res judicata* barred the claimant from refiling a permanency petition. The claimant had previously filed a petition alleging 14% permanent impairment. The case went to hearing after the defense expert concluded that there was no permanent injury. The Board concluded that the injury had not resolved, but also did not find the claimant's permanency rating credible. The petition was denied. The claimant obtained a supplemental report from his expert to address the Board's concerns and then refiled the petition. The Board granted the State's motion to dismiss and the claimant appealed. On appeal, the claimant argued that permanency was not finally decided since the Board only rejected a 14% rating and did not explicitly find that there was no permanency whatsoever. The Court affirmed the dismissal order. *Res judicata* applied as the cause of action in the refiled petition was the same as in the first petition that was denied, and the Board Decision on that petition was final. [Donnelly/Ellis]

Nieves v. This and That Co., C. A. No. S21A-11-004 CAK (8/10/22). The claimant filed an appeal of a Board Remand Order that granted the employer's UR appeal petition concerning opioid medications. The claimant argued that the petition should have been dismissed because he had not submitted any requests to the carrier for reimbursement or payment of prescriptions. Further, he denied there were any such prescriptions after 2017. Employer's position was it was entitled to challenge the compensability of such medications which were prescribed by the treating pain management physician. There was evidence of opioid prescriptions beyond 2017 based on the medical records and the claimant's testimony The court reversed the Board Order. The court determined that if a claimant does not make a claim for payment of bills or expenses, the employer does not have legal standing to initiate litigation on the compensability of the bills/expenses. [Pending Supreme Court appeal]. [Schmittinger/Ellis]

This and That Co. v Nieves, No. 326, 2022 (10/11/22). The Supreme Court rules that when a motion for attorney's fees remains pending before the Superior Court, an appeal of the underlying opinion to the Supreme Court is interlocutory. [Ellis/Schmittinger]

Wilson v. Gingerich Concrete No. 114, 2022 (10/3/22). The claimant appealed to the Supreme Court from a Superior Court Opinion in the employer's favor. This concerned denial of a surgery which was deemed non-compensable as the treating surgeon was not a Delaware Worker's Compensation certified provider at the time. Even with understanding of the remedial purpose of the statute, the Court affirmed the Board decision. The plain language of the statute supports that certification is an ongoing requirement for providers. The Court declined to address what would happen if the provider attempted to seek payment directly from the claimant as that issue was not ripe for review. [Schmittinger/Baker]

Keynote Address

The Honorable Meghan A. Adams
Superior Court of the State of Delaware

Forms and Formularies

Tara E. Bustard, Esquire
Doroshow Pasquale Krawitz & Bhaya

Andrew J. Carmine, Esquire
Elzufon Austin & Mondell, P.A.

Allison Stein
Delaware Department of Labor

FORMS AND FORMULARIES

WORKERS' COMPENSATION BREAKFAST SEMINAR
JANUARY 17, 2023

I. Electronic Filing

a. E-Petitions
b. First Report of Injury
-future

II. New Forms

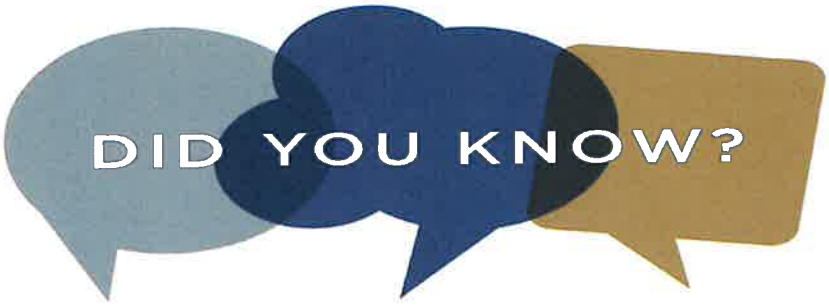
a. First Report of Injury
b. Agreement
c. Agreement for Compensation for Death
d. Receipt
e. Petition for Commutation
f. Petition to Determine Compensation Due
g. Petition to Determine Additional Compensation Due
h. Petition to Appeal a Utilization Review Decision
i. Petition to Determine Compensation Due to Dependents of Deceased Employees
j. Petition to Determine Disfigurement
k. Petition to Review
l. Eligibility Certification Form
m. Request for Public Documentation

III. Instructions for Communicating with the DOL

a. Specialists
Wilmington:
A-K = Erin Schupp
L-Z = SeJai Boggus-Bell
Dover:
A-Z = Lorell Sturgis-Clay

IV. New Pretrial Memorandum and Procedure for Completing/Submitting

I.



Delaware Department of Labor, Division of Industrial Affairs is now offering electronic filings for E-Petitions!!!

Please visit our website: https://scars.delawareworks.com and follow the steps below:

Step One:

Select on what action you want to take: "E-Petitions"

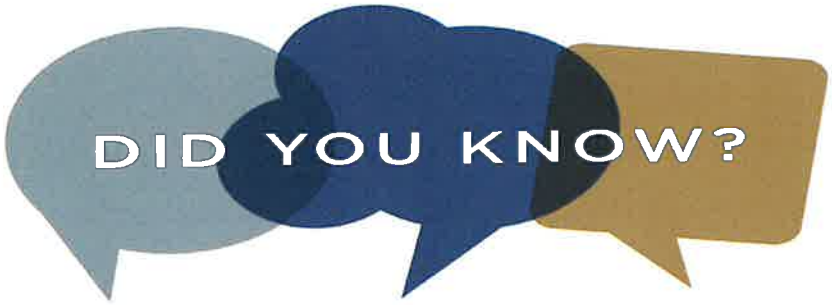
Step Two:

At the bottom of the page, click on "Create an Online Account", and fill out the appropriate information

Step Three:

Once you have successfully submitted your request, you will receive notification from our office within 24-48 hours that your account has been verified and activated. At this time, you will change your password (this feature is time sensitive, please do this ASAP).

It's that easy!!!! You are now set for filing electronic E-Petitions....no more paper, mail or postage!!!!



Delaware Department of Labor, Division of Industrial Affairs is now offering electronic filings for First Reports of Injury!!!

Please visit our website: https://scars.delawareworks.com and follow the steps below:

Step One:

Select on what action you want to take: "File First Report of Injury"

Step Two:

At the bottom of the page, click on "Create an Online Account", and fill out the appropriate information

Step Three:

Once you have successfully submitted your request, you will receive notification from our office within 24-48 hours that your account has been verified and activated. At this time, you will change your password (this feature is time sensitive, please do this ASAP).

It's that easy!!!! You are now set for filing electronic FRI's....no more paper, mail or postage!!!!

II.

STATE OF DELAWARE FIRST REPORT OF OCCUPATIONAL INJURY OR DISEASE

Department of Labor
Office of Workers' Compensation (OWC)
4425 N. Market Street
Wilmington, DE 19802
Telephone 302-761-8200

OWC Case File No. _____

ALL INFORMATION IS REQUIRED, unless not applicable where "if applicable" is noted.

1.EMPLOYEE: FIRST / MIDDLE / LAST		2. EMPLOYEE SOCIAL SECURITY NO.
3. **ADDRESS – INCLUDE COUNTY AND ZIP CODE**	4. **MALE** ☐ **FEMALE** ☐ **UNSPECIFIED** ☐	5. **EMPLOYEE PHONE NUMBER (INCLUDING AREA CODE)**
6. DATE OF BIRTH / /	7.AGE	8. WAGE / 9. WEEKLY HOURS WORKED
10. OCCUPATION (REGULAR)	11. DEPARTMENT OR DIVISION REGULARLY EMPLOYED	12. HOW LONG EMPLOYED

13. **EMPLOYER:**	14. **PERSON MAKING OUT THIS REPORT**
15. ADDRESS - INCLUDE COUNTY AND ZIP CODE	16. EMPLOYER PHONE# (INCLUDE AREA CODE)
17. MAILING ADDRESS-IF DIFFERENT THAN ABOVE	18. NATURE OF BUSINESS -TYPE OF MFG., TRADE, CONSTRUCTION, SERVICE, ETC.

19. **WORKERS' COMPENSATION INSURANCE CARRIER**	20. **WORKERS' COMP INS. CARRIER PHONE # (INCLUDING AREA CODE)**
21. WORKERS' COMP. INSURANCE CARRIER ADDRESS	22. POLICY NUMBER/ CARRIER CASE NUMBER:
23. THIRD PARTY ADMINISTRATOR (TPA), IF APPLICABLE	24. TPA ADDRESS- INCLUDE CITY STATE AND ZIPCODE

DATES: 25. DATE OF REPORT / /	26. DATE OF INJURY / /	27. NORMAL STARTING TIME AM ☐ PM ☐	28. IF EMPLOYEE BACK TO WORK GIVE DATE / /	29. AT SAME WAGE? YES ☐ NO ☐
30. IF FATAL INJURY, GIVE DATE OF DEATH / /	31. DATE EMPLOYER KNEW OF INJURY / /	32. DATE DISABILITY BEGAN / /	33. LAST FULL DAY PAID-DATE / /	

INJURY OR DISEASE:

34. DESCRIBE THE INJURY/ILLNESS AND PART OF BODY AFFECTED.

35. SPECIFY THE DEPARTMENT WHERE INCIDENT OCCURRED AND THE WORK PROCESS INVOLVED.

OCCURRENCE:

36. LIST THE EQUIPMENT, MATERIALS, AND CHEMICALS EMPLOYEE USED WHEN THE INCIDENT OCCURRED, E.G. ACETYLENE.

37. DESCRIBE THE EMPLOYEE'S ACTIVITY AT THE TIME OF INJURY OR ILLNESS, E.G. LIFTING A PATIENT.

38. DESCRIBE HOW THE INJURY/ILLNESS OCCURRED.

39. NAME OF PHYSICIAN (IF APPLICABLE)	40. PHYSICIAN'S ADDRESS
41. HOSPITAL (IF APPLICABLE)	42. HOSPITAL ADDRESS

DISTRIBUTION OF THIS REPORT (1 original and 3 copies)

1. ORIGINAL MUST BE SENT IMMEDIATELY TO THE WORKERS' COMPENSATION INSURANCE CARRIER.
2. COPY TO THE OFFICE OF WORKERS' COMPENSATION (use the address at the top left of this form)
3. EMPLOYER'S COPY - RETAIN AS RECORD
4. EMPLOYEE'S COPY

WORKERS' COMPENSATION

IMPORTANT THINGS TO DO IN CASE OF INJURY

THE EMPLOYER SHOULD:

1. Provide all necessary medical, surgical and hospital treatment from the date of accident.
2. Every employer shall keep a record of all injuries received by employees and make a report within 10 days thereof in writing to the Office of Workers' Compensation
3. Ascertain the average weekly wages of the employee and provide compensation in accordance with the provisions of the law, for disability *beyond the third day* after the accident. All agreements as to compensation must be submitted to the Office of Workers' Compensation for approval.

THE EMPLOYEE SHOULD:

1. Immediately notify the employer in writing of accidental injury or occupational disease and request medical services. Failure to give notice or to accept medical services may deprive the employee of the right to compensation.
2. Give promptly to the employer, directly or through a supervisor, notice of any claim for compensation for the period of disability beyond the third day after the accident. In case of fatal injuries, notice must be given by one or more dependents of the deceased or by a person on their behalf.
3. In case of failure to reach an agreement with the employer in regard to compensation under the law, file application with the Industrial Accident Board for a hearing on the matters at issue within two years of the date of accidental injury or one year of knowledge of the diagnosis of an occupational disease or an ionizing radiation injury. All forms can be obtained from the Office of Workers' Compensation.

OWC CASE FILE NO. _____

CARRIER FILE NO. _____

STATE OF DELAWARE
OFFICE OF WORKERS' COMPENSATION
AGREEMENT AS TO COMPENSATION PAID

Employee _____ Employer _____

Address _____ Address _____

_____ _____

_____ _____

Insurance Carrier/Self-insurer _____ Third party adjuster _____

Address _____ Address _____

_____ _____

_____ _____

The above have reached an agreement in regard to compensation for the injury sustained by said employee and submit the following statement of facts relative thereto:

Date of Injury _____ Date Disability Began _____

Cause/Place of Accident _____

Nature/Part of Body _____

_____

Probable Length of Disability (if known) _____

The terms of this agreement under the above facts are as follows:

This agreement is for (check all that apply) Total Disability _____Temporary Partial Disability _____

Permanent Partial Disability _____ Disfigurement _____ Commutation _____ Medical Only _____

Salary in Lieu of Workers' Compensation _____

That the said _____ shall receive compensation at the rate of

$_____ per week based upon an average weekly wage of $ _____ and that said compensation shall be

payable weekly _____ bi-weekly _____ monthly _____ other_____ (specify) from and including the _____ day of

_____ month _____ year until terminated in accordance with the provisions of the Workers' Compensation

Law of the State of Delaware.

See reverse side

BENEFITS FOR TOTAL/PARTIAL DISABILITY, (LOST WAGES) SHALL REQUIRE YOU TO ADVISE THE NAMED CARRIER/SELF-INSURER/THIRD PARTY ADJUSTER OF ANY CHANGES IN EMPLOYMENT STATUS AND/OR DISABILITY. FAILURE TO NOTIFY A CHANGE IN STATUS IS PUNISHABLE PURSUANT TO TITLE 18, DELAWARE CODE, CHAPTER 24, AND/OR TITLE II, DELAWARE CODE, SECTION 913.

Witness _____
(signature)

Address _____

_____

Employee _____
(signature)

Adjuster/Attorney _____
(signature)

Phone number _____

Date of agreement _____

PURSUANT TO 19 *DEL. C.* §2322E(d), THE "EMPLOYER'S MODIFIED DUTY AVAILABILITY REPORT" SHALL ACCOMPANY THIS AGREEMENT AND THE COMPLETED REPORT SHALL BE FORWARDED TO THE HEALTHCARE PROVIDER/PHYSICIAN MOST RESPONSIBLE FOR TREATMENT WITHIN 14 DAYS. THE INSURANCE CARRIER FOR AN INSURED EMPLOYER SHALL BE INDEPENDENTLY RESPONSIBLE FOR PROVIDING A COMPLETED REPORT OF MODIFIED-DUTY JOBS TO THE PROVIDER/PHYSICIAN.

For Accounting Use Only by Delaware OWC

Approved by _____

Date of Approval _____

OWC Case File #_____

AGREEMENT FOR COMPENSATION FOR DEATH

To the Industrial Accident Board of the State of Delaware Sitting in and

for _____ **County**

(Memorandum of this Agreement must be filed with the Board)
(SECTION 107)

We the undersigned, being all the dependents who are entitled to compensation on account of the death of

_____

from a personal injury sustained by him or her by an accident arising out of and in the course of his or her employment and

_____

in whose service the said _____

was employed at the time of said injury, have reached an agreement in regard to the compensation to be paid by said employer.

Date of accident _____

Place of accident _____

Cause of injury _____

Nature of injury _____

Date of Death _____

The terms of the agreement under the above facts are as follows:

That the compensation payable shall be at the rate of $_____ per week, based upon an average weekly wage of $ _____at the time of said injury and shall be paid from the _____day of _____, 20____, until terminated, to the following person, or persons, or their legal representative, in accordance with the provisions of the "Delaware Workers' Compensation Act (Title 19, Ch. 23 of the Delaware Code), as amended and in the amount herein designated.

_____ $_____ per week

_____ $_____ per week

_____ $_____ per week

_____ $_____ per week

_____ $_____ per week

Dated this _____day of _____, 20_____

Witness: _____

_____

_____

Signature of Dependents

_____

_____

Signature of Employer / Attorney

OWC CASE FILE NO. _____

CARRIER FILE NO. _____

STATE OF DELAWARE

OFFICE OF WORKERS' COMPENSATION

RECEIPT OF COMPENSATION PAID

DATE _____

Received of _____
(Insurance Carrier/Self-Insurer/Third Party Adjuster)

the sum of $ _____, making in all the total sum of $ _____

in settlement of compensation due for the _____ of
(type)

_____ which began
(Employee Name)

on _____, and terminated on _____
(date) (date)

_____
Employee Signature

_____
Address

_____

Your signature on this receipt will terminate your rights to receive the worker's compensation benefits specified above on the date indicated. This form is not a release of the employer's 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.

Revised 10/01/2022

PETITION FOR COMMUTATION

TO THE INDUSTRIAL ACCIDENT BOARD OF THE STATE OF DELAWARE

SITTING IN AND FOR _____ COUNTY

_____) _____ _____

Claimant) SS# Carrier File#

)

vs.) _____

) Carrier / Self-Insurer Name

_____)

Employer) _____ _____ _____

) Date of Injury DOB OWC Case File No

The undersigned prays that your Honorable Board shall, after due notice of the time and place of hearing served on all parties in interest, hear and determine the matter in accordance with the facts and the law, and state its conclusions of fact and rulings of law.

Petition for Commutation of Benefits, Pursuant to §2358:
(Please check the appropriate blocks(s))

_____ Total Disability, Pursuant to §2324

_____ Partial Disability, Pursuant to §2325

_____ Permanent Impairment, Pursuant to §2326

_____ All Benefits, Except Medical Expenses

_____ 2nd Injury Fund, Pursuant to §2327

_____ All Benefits, Including Medical Expenses

_____ Medical Expenses Only

_____ Other _____

_____

Petition for Commutation of Benefits, Pursuant to §2358:

_____ The parties agree to the above settlement commutation to be presented by stipulation to the board.

The person who the parties agreed with is _____

_____

_____ The parties contest the above commutation and request a pre-trial hearing.

Dated this _____ day of _____ 20 _____

_____
Name of Petitioning Party

_____
Address

_____

Revised 10/01/2022

PETITION TO DETERMINE COMPENSATION DUE TO INJURED EMPLOYEE

To the Industrial Accident Board of the State of Delaware

Sitting in and for _____ County

Claimant SS# _____

_____
Claimant

vs.

Date of Birth _____

Insurance Carrier _____

OWC Case File No._____

_____
Employer

The undersigned petitioner respectfully represents:

That the above named claimant and the above named employer have failed to reach an agreement in regard to compensation due said claimant as an employee of said employer.

The undersigned therefore prays that your Honorable Board shall, after due notice of the time and place of hearing served on all parties in interest, hear and determine the matter in accordance with the facts and the law and state its conclusions of fact and rulings of law.

My signature on this petition is authorization for any doctor, hospital, other health care provider, or State of Delaware Division of Vocational Rehabilitation to supply any and all medical records and reports to the bearer of the original or a copy of this petition regarding any medical condition provided all requests for this information are in writing.

Dated this _____day of _____20_____

_____
Claimant's Signature

Name of Attorney, if applicable _____

INDUSTRIAL ACCIDENT BOARD
STATE OF DELAWARE

Statement of Facts Upon Failure to Reach an Agreement

1. Name of Employee _____

   Address _____

   City_____State_____Zip _____

   Telephone Number _____E-mail (optional) _____

2. Date of Accident _____ 3. Place of Accident _____

4. Name of Employer _____

   Employer Contact Name_____E-mail (optional) _____

   Address _____

   City_____State _____Zip _____

   Telephone Number _____Fax# _____

5. Name of Insurance Carrier/ 3rd Party Administrator _____

6. Occupation of employee at the time of accident _____

7. Describe accident/illness and how it happened _____

_____

_____

_____

8. List the body part(s)/illness _____

_____

_____

9. Did employee receive medical, surgical or hospital service? Yes____ No_____

10. When was notice of injury given to or received by employer? _____

11. Give names and addresses of all employers for the last 5 years. If more space is needed, attach a separate sheet.

NAME:	ADDRESS:

12. State weekly wage when injured _____

13. State names and addresses of all treating doctors for this claim. If more space is needed, attach a separate sheet.

NAME:	ADDRESS:

14. State names and address of all other treating doctors for the last 10 years. If more space is needed, attach a separate sheet.

NAME:	ADDRESS:

15. Give names and addresses and dates of treatment of all hospitals and institutes treating you for this injury. If more space is needed, attach a separate sheet.

NAME:	ADDRESS:

16. To what extent did injury prevent employee from working and for how long _____

_____

17. State whether or not employee has fully recovered and if only partially to what extent _____

_____

18. If employee has resumed work, state

a) when and give name of present employer _____

_____

b) what trade or occupation and weekly wages _____

_____

19. Identify, give description and dates of all previous and subsequent injuries.

_____

_____

20. State any other important facts bearing on the case above presented _____

_____

_____

I swear or affirm that the information contained in this statement is true and correct to the best of my knowledge and recollection. I understand and acknowledge that any falsehood contained in this statement may expose me to civil or criminal liability.

Dated: ___ Day of _____, 20____

_____

Employee Signature

PETITION TO DETERMINE ADDITIONAL COMPENSATION DUE TO INJURED EMPLOYEE

To the Industrial Accident Board of the State of Delaware sitting in and for

_____ County.

_____ Claimant	)	_____ SS#	_____ Carrier File #
vs.	)	_____ Carrier/ Self-Insurer Name	
_____ Employer	)	_____ Date of Injury	_____ OWC Case File No.

The undersigned prays that your Honorable Board shall, after due notice of the time and place of hearing served on all partied in interest, hear and determine the matter in accordance with the facts and the law, and state its conclusions of fact and rulings of law.

Petition for additional compensation due - Please check the appropriate block(s):

☐ Recurrence of the total disability benefits, pursuant to §2324 for the period(s) _____

☐ Recurrence of partial disability benefits, pursuant to §2325 for the period(s) _____

☐ Permanent impairment, pursuant to §2326.*

Permanency Percentage:				
Part of Body:				
Dr. who rated permanency:				

☐ Transportation expenses

☐ Medical expenses/bills, other than appeals for a utilization review determination. Use the DACD petition dedicated for utilization review determination appeals for those medical expenses.

☐ Other _____

My signature on this Petition is authorization for any doctor, hospital, other health care provider, or State of Delaware Division of Vocational Rehabilitation to supply any and all medical records and reports to the bearer of the original or a copy of this petition regarding any medical condition provided all requests for this information are in writing.

Dated this _____day of _____ 20_____

_____
Claimant's Signature or Counsel for Claimant

_____
Address

_____
City, State, and Zip Code

_____
Phone Number

_____
Name of Employer's Attorney

Revised: 10/01/2022

***Permanency Report Required**

APPEAL A UTILIZATION REVIEW (UR) DETERMINATION

To the Industrial Accident Board of the State of Delaware sitting in and for

_____ County.

_____	)	_____	_____
Claimant,	)	SS#	Carrier File #
	)		
vs.	)	_____	
	)	Carrier/ Self-Insurer Name	
_____	)	_____	_____
Employer.	)	Date of Injury	OWC Case File No.

The undersigned prays that your Honorable Board shall, after due notice of the time and place of hearing served on all partied in interest, hear and determine the matter in accordance with the facts and the law, and state its conclusions of fact and rulings of law.

This petition is a *de nova* review of a UR determination, pursuant to Title 19 **Del.C.** §2322F(j) and 19 **DE Admin Code** 1341. Please provide the information below:

1. Date petitioner received the UR Determination via certified mail (appeal must be filed within 45 days from date of UR determination receipt). _____

2. Date (s), Practice Guideline(s), and Treatment(s) involved in the Utilization Review.

	Date(s):	Practice Guideline(s):	Treatment(s):
1)	_____	_____	_____
2)	_____	_____	_____
3)	_____	_____	_____

3. Name and Address of the Health Care Provider(s) whose treatment was questioned in this UR.

Dated this _____ day of _____ 20 _____

_____
Name of Petitioning Party

_____
Address

_____
City, State, and Zip Code

_____
Phone Number

*UR Determination must be attached.

PETITION TO DETERMINE COMPENSATION DUE TO DEPENDENTS OF DECEASED EMPLOYEE

_____

To the Industrial Accident Board of the State of Delaware

Sitting in and for _____County

_____
Claimant (Deceased Employee)

vs.

_____
Employer

}

Claimant SS# _____

Date of Birth _____

Insurance Carrier _____

OWC Case File No. _____

The undersigned petitioner respectfully represents:

That the above named claimant and the above named employer have failed to reach an agreement in regards to compensation due to the dependent of _____ _____a deceased employee of said employer.

The undersigned therefore prays that your Honorable Board shall, after due notice of the time and place of hearing served on all parties in interest, hear and determine the matter in accordance with the facts and the law and state its conclusions of fact and rulings of law.

Dated this _____day of _____ 20

Witness:

_____
Signature

_____
Print Name

Name:

_____
Signature

_____
Print Name

INDUSTRIAL ACCIDENT BOARD
STATE OF DELAWARE

Statement of Facts Upon Failure to Reach an Agreement

1. Name of Employee _____

   Address _____

   City _____ State _____ Zip _____

   Telephone Number _____ E-mail (optional) _____

2. Date of Accident _____ 3. Place of Accident _____

4. Name of Employer _____

   Employer Contact Name _____ E-mail (optional) _____

   Address _____

   City _____ State _____ Zip _____

   Telephone Number _____ Fax# _____

5. Name of Insurance Carrier/ 3rd Party Administrator _____

6. Occupation of employee at the time of accident _____

7. Nature of accident and how it happened _____

_____

8. Describe the nature of injury _____

_____

9. Did employee receive medical, surgical or hospital service? Yes _____ No _____

10. When was notice of injury given to or received by employer? _____

11. Give names and addresses of all employers for the last 5 years. If more space is needed, attach a separate sheet.

NAME:	ADDRESS:

12. State weekly wage when injured _____

13. State names and addresses of all treating doctors for this claim. If more space is needed, attach a separate sheet.

NAME:	ADDRESS:

14. State number of weeks employed during the last twelve months _____

15. State at what trade or occupation employed during the last twelve months _____

_____

16. Date of death _____

17. What were the expenses of last sickness and burial _____

_____

18. Amount of these expenses paid by the employer _____

_____

19. Name of widow or widower of deceased, if dependent _____

_____

20. Names and dates of birth of dependent children under sixteen years of age.

_____ _____

_____ _____

_____ _____

_____ _____

21. Names and addresses of surviving father and mother of deceased, if dependent.

_____ _____

22. Give names and dates of birth of dependent sibling(s) of deceased under sixteen years of age.

_____ _____

_____ _____

23. State any other important facts bearing on the case above presented.

_____

_____

_____

I swear or affirm that the information contained in this statement is true and correct to the best of my knowledge and recollection. I understand and acknowledge that any falsehood contained in this statement may expose me to civil or criminal liability.

Dated: ___ Day of_____, YEAR

_____

Dependent Signature

PETITION TO DETERMINE DISFIGUREMENT

_____

To The Industrial Accident Board of the State of Delaware Sitting in and for _____County

_____ Claimant)
)
vs.) OWC Case File No. _____
_____)
)
_____Employer)

The undersigned petitioner respectfully represents:

Being desirous of having a hearing on the ground that _____has sustained a disfigurement to the following part/parts of the body _____ resulting from a compensable industrial accident which occurred on_____ and became permanent as of _____, the undersigned respectfully prays that your Honorable Board shall, after due notice of the time and place of hearing served on all parties in interest, hear and determine the matter in accordance with the facts and the law, and state its conclusion of fact and rulings of law.

Dated this _____day of _____, 20_____

_____
Name of Petitioning Party

_____
Employer Attorney

*Add Employer Counsel if Known

_____
Address

_____

Revised 10/01/2022

PETITION TO REVIEW

To the Industrial Accident Board of the State of Delaware sitting in and for _____ County.

_____	) _____	_____	_____
Employer,	) **SS#**	**OWC Case File #**	**Case File #**
	)		
vs.	) _____		_____
	) **Carrier/Self-Insurer Name**		**Name of Adjuster**
_____	) _____	_____	_____
Claimant.	) **Date of Injury**	**Adjuster's Phone #**	**Adjuster's Email, if Applicable**

The undersigned prays that your Honorable Board shall, after due notice of the time and place of hearing served on all parties in interest, hear and determine the matter in accordance with the facts and the law, and state its conclusions of fact and rulings of law.

Petition for Termination of Benefits, Pursuant to §2347:*

*By checking below Fund benefits will be issued upon receipt of completed ECF- N/A Self-Insured (L)

_____ Claimant is physically able to return to work

_____Claimant's partial disability has terminated or diminished

Petition for Termination of Benefits:

_____ Claimant returned to work

_____Failure to sign agreement(s) / receipt(s)

_____Missed employer medical examination (s), pursuant to §2343 (b)

_____Failure to comply with Board's order for vocational rehabilitation services

_____Other: _____

Petition to Order Vocational Rehabilitation, Pursuant to §2353 (a):

_____To obtain an order requesting the claimant's cooperation with vocational rehabilitation services

Petition for Workers' Compensation Fund, Pursuant to §2327:

_____Reimbursement from the Workers' Compensation Fund

Dated the _____day of _____ 20_____.

_____	_____
Name of Claimant's Attorney (If known)	Name of Employer's Attorney
_____	_____
Address	Address

NOTE: No Petition to Review shall be accepted by the Department, **unless** it is accompanied by adequate proof of service **(Pursuant to §2347)** that a copy of the Petition to Review has been served upon the other party to the agreement or award.

OWC Case File No. _____

STATE OF DELAWARE

WORKERS COMPENSATION FUND

ELIGIBILITY CERTIFICATION FORM

The Office of Workers' Compensation has received a petition for a hearing before the Industrial Accident Board with regard to an injury that you sustained. The purpose of the petition is to request the Board to order the termination of the disability benefits currently being paid to you. Having filed this petition, your employer/the insurance carrier will cease paying your disability benefits until the case is heard by the Board or otherwise settled between the parties. The Office of Workers' Compensation may be obliged to continue paying your present disability benefits until the case is heard by the Board or settled. In order for your benefits to be reinstated, you must complete this form and return it to the Office of Workers' Compensation immediately.

Name_____

Address_____

City _____ **State** _____ **Zip Code** _____

Phone number_____

Social Security #_____

Employer (at the time of injury) _____

Check one of the statements below regarding your employment status:

☐ I have **not** been gainfully employed due to my industrial accident.

☐ I have been gainfully employed effective ____/_____/20_____.

Hours per week _____ **Hourly rate**_____ **Average weekly gross wages**_____

I affirm that the facts stated above are true and accurate to the best of my knowledge and belief. I also acknowledge my responsibility to notify the Office of Workers' Compensation immediately if I return to gainful employment, change my employment status, change my mailing address, or receive money from a third-party action related to this injury. I am aware that failure to notify the Office of Workers' Compensation of a change in employment status while receiving Workers' Compensation Fund checks may constitute fraud and result in criminal and/or civil prosecution.

_____ _____

Claimant signature **Date**

Please return completed form to:

Office of Workers' Compensation
Attn: Workers' Compensation Fund Accountant
4425 N. Market Street, 3rd Fl
Wilmington, DE 19802
Telephone number: (302) 761-8200
Fax number: (302) 622-4103

Revised: 10/01/2022

STATE OF DELAWARE REQUEST FOR COPY OF DOCUMENT

Department of Labor
Office of Workers' Compensation (OWC)
4425 N. Market Street
Wilmington, DE 19802
Telephone: 302-761-8200
Fax: 302-736-9170

NAME OF REQUESTOR: _____ DATE: _____

BUSINESS OF REQUESTOR: _____

ADDRESS: _____

TELEPHONE NUMBER: _____ FAX: _____

EMAIL ADDRESS: _____

PARTY REQUESTOR REPRESENTS: _____

CLAIMANT'S NAME: _____

INDUSTRIAL ACCIDENT BOARD (CASE FILE) NUMBER: _____

SOCIAL SECURITY NUMBER: _____

DATE OF ACCIDENT: _____

☐ ALL DOCUMENTS ☐ OTHER (SPECIFY):

DELIVERY METHOD:

☐ VIA USPS
☐ PICK UP
☐ VIA EMAIL

I authorize the Office of Workers Compensation to send my request via email to: _____

SIGNATURE OF REQUESTOR: _____

FOR DEPARTMENT OF LABOR USE ONLY

NUMBER OF PAGES COPIED _____ @ 0.25 PER PAGE = $_____

MAILING COSTS: $ _____ TOTAL AMOUNT DUE $ _____

PROCESSED BY: _____ DATE PROCESSED: _____ APROVED BY: _____

*The entire form must be completed, incomplete forms will delay your request

III.

STATE OF DELAWARE
DEPARTMENT OF LABOR
DIVISION OF INDUSTRIAL AFFAIRS
OFFICE OF WORKERS' COMPENSATION

4425 North Market Street
Wilmington, DE 19802
Telephone (302) 761-8200
Fax (302) 736-9170

655 S. Bay Road
Suite 2H
Dover, DE 19901
Telephone (302) 422-1392
Fax (302) 422-1137

Good Morning Members of the Bar:

As the Office of Workers' Compensation streamlines its' processes and procedures, I wanted to share some information with you.

COMMUNICATIONS/FILINGS

The OWC asks that you **ONLY** submit documents in ONE method. Duplicate submissions create unnecessary work.

First Report of Injury (FRI)

Submission via portal*
USPS or Courier
NEW: submit to email address: DOL_DIA_WC_FRI@delaware.gov

Agreement/Receipts:

USPS, if you a requesting an approved copy, please provide a self-address stamped envelope.
Submit to: OWC.agreements.receipts@delaware.gov, if you are requesting an approved copy, please indicate in the body of the email.
Courier

Petitions:

Submission via portal*
USPS or Courier
Via Fax: 302-736-9170
For Non-portal Users: Petition for Review ONLY:
submit to: Allison.Stein@delaware.gov and Jean.Watkins@delaware.gov.

*Please note, if you sign up using our portal, please click on all requested access. For example: If you only request E-petitions, you do not automatically have access to electronic copy requests.

Eligibility Certification Form: (ECF):

USPS
Submission to fax # 302-622-4103
Email: Sharon.Sharpe@delaware.gov

WC Specialist: (Fox Valley: Erin or Sylvia; Dover: Lorell):

This includes: Legal Requests, Petition withdraws, Entry of Appearance, Term Stips, Commutations, etc.

General Correspondences:

This includes: Pre-Trial Memo (PTM), subpoenas, entry of appearance, deposition notices, amendments, etc..
Via Fax: 302-736-9170
USPS or Courier
Email to Office Manager (Jean Watkins)

As always, you may reach out to me directly at Allison.stein@delawre.gov OR 302-761-8215

STATS

The OWC is current on all filings, processing, and entry of documents

From 1/1/2021 - 9/10/2021, documents processed:

FRI: 8873

Petitions Filed: 2405

Awards Processed: 2392

Awards Mailed: 1855

Agreements: 2366

Receipts: 6098

GENERAL INFORMATION

The OWC has recently digitized all our archived files. 336 boxes.

The OWC has closed old files 25 years or older with no activity and digitized them.

The OWC will be updating, as well as creating, new informational pamphlets.

Management:
Dr. Michael Boone, Director
Allison Stein, Administrator
Rob Rotenberry, Supervisor
Jean Watkins, Office Manger

UPCOMING:

The OWC will be revamping all forms, including Petition forms. **Only** the revised forms, along with supporting required documentation, will be accepted by this office. Advance notice will be given to the Bar. One of the reasons for this change is (recently), the OWC has received forms the OWC did not create nor authorize. I do welcome input from the Bar on revisions. You may email me directly.

The State of Delaware is changing its banking system. This includes the checks issued by the WC Fund. For this transition from PNC to M&T to be seamless, the check run dates will change; and continue from that date forward every two weeks. I will advise the Bar on this change when the new banking has been set up. I anticipate this change to be late October/early November.

For example: **Currently**: Pay period 7/30/2021 thru and including the 8/12/2021

Check date: 8/9/2021. (Monday)

Change: Pay period 7/30/2021 thru and including the 8/12/2021

Check date: 8/16/2021. (Monday)

The new banking will also allow the "stale" date of a check to be extended. Currently, the "stale" date is 60 days from issuance. The new date will be 90 days. There are also improvements behind the scenes to allow for less fraud.

FUTURE

The OWC will be exploring the option for external electronic filings to include the uploading of FRI's in our portal (not just the data entry). This project is at least a year out.

The OWC is also exploring the option of issuing Fund benefits via ACH. This will require a statute change per 19 Del. C. 2344(b)(2). I am hoping to introduce this change to the General Assembly in FY 22.

That is all I have for now.

Allison

Allison Stein
Administrator
Delaware Department of Labor
Division of Industrial Affairs/Office of Workers' Compensation
4425 N. Market Street, 3rd Floor
Wilmington, DE 19802
Phone: 302-761-8215
Allison.Stein@Delaware.gov

IV.

DELAWARE DEPARTMENT OF LABOR

INDUSTRIAL ACCIDENT BOARD

PRETRIAL MEMORANDUM

CLAIMANT _____ I.A.B. NO. _____

EMPLOYER _____ CARRIER/TPA _____

1. PETITIONER: Claimant _____ Employer _____ Carrier/TPA _____
2. BASIS FOR PETITION AND/OR BENEFITS SOUGHT:

   a. Acknowledgment of accident / injury / condition..... _____
   b. Acknowledgment of new body part / injury / condition..... _____
   c. Deficiency related to Agreement and/or Final Receipt (specify in #13 / #14)..... _____
   d. Payment of past medical expenses..... _____
   e. Authorization / approval of ongoing and/or proposed future medical treatment..... _____
   f. Total disability..... _____
   g. Partial disability..... _____
   h. Permanent impairment..... _____
   i. Disfigurement..... _____
   j. Utilization Review appeal..... _____
   k. Review and modification of Agreement and/or benefit(s) (specify in #13 / #14)..... _____
   l. Commutation of compensation..... _____
   m. Second injury compensation from the Workers' Compensation Fund..... _____
   n. Compensation for dependents of deceased employee..... _____
   o. Any other relief subject to the jurisdiction of the Board (specify in #13 / #14)..... _____
3. CLAIMANT ALSO SEEKS:
   a. Transportation expenses / mileage..... _____
   b. Medical witness fees..... _____
   c. Attorney's fees..... _____
4. CLAIMANT ALLEGES THE FOLLOWING:
   a. Claimant was involved in an industrial accident resulting in injury..... _____
      i. Date of accident:_____
      ii. List all body parts and, to extent known, nature of injuries and diagnoses related to accident:
      _____
   b. Claimant sustained a cumulative detrimental effect injury..... _____
      i. Manifestation date:
      ii. Date Claimant knew of potential relationship to employment:
      iii. List all body parts / injuries / diagnoses related to CDE injury:
      _____
   c. Claimant contracted an occupational disease _____
      i. Manifestation date:
      ii. Date Claimant knew of potential relationship to employment:
      iii. List all body parts / injuries / diagnoses related to disease:
      _____

5. Employer has acknowledged the following work-related injuries / conditions / illnesses:

6. Average Weekly Wage at time of accident: _____
   a. Compensation Rate for benefits now sought: _____
   b. If average weekly wage is allegedly calculated based on contracted hours or salary, please identify herein: _____
7. TOTAL DISABILITY: Identify all periods for which total disability is sought under Section 2324 (Please specify beginning and, where appropriate, end dates for claimed periods of disability):

8. PARTIAL DISABILITY: Identify all periods for which partial disability is sought under Section 2325 (Please specify beginning and, where appropriate, end dates for claimed periods of disability):

   a. Partial disability rate sought: _____
   b. Basis for partial rate sought: _____
      i. Current employment ___
      ii. Labor Market Survey ___
      iii. Other (specify): _____
9. PERMANENT DISABILITY: If petition is to evaluate permanency under Section 2326, complete the following:
   a. Doctor who evaluated permanent impairment: _____
      i. Part of body evaluated: _____ Impairment %: _____
      ii. Part of body evaluated: _____ Impairment %: _____
      iii. Part of body evaluated: _____ Impairment %: _____
   b. Doctor who evaluated permanent impairment: _____
      i. Part of body evaluated: _____ Impairment %: _____
      ii. Part of body evaluated: _____ Impairment %: _____
      iii. Part of body evaluated: _____ Impairment %: _____
   c. If body part is not a scheduled loss, then identify the alleged maximum number of weeks sought: _____
10. DISFIGUREMENT: If petition seeks compensation for disfigurement, provide description of such, to include location, type (e.g., scarring), significant features of alleged disfigurement, and number of weeks sought:

11. Employer: Check any of the following that may apply with respect to the pending petition:
    a. Claimant was not involved in an industrial accident..... ____
    b. Alleged accident did not arise "out of" and / or "in the course of" claimant's employment... ____
    c. Claimant or someone on Claimant's behalf failed to give notice to the Employer of the injury within 90 days after the accident..... ____
    d. Claimant's injuries and / or treatment are not causally related to the accident..... ____
    e. Some or all of the work related injuries, if any, have resolved and returned to pre-accident baseline..... ____

f. Forfeiture..... ____
g. Claimant refused to submit to an examination required by Section 2343(a)..... ____
h. Claimant has not sustained a compensable disease within the meaning of the Workers' Compensation Law..... ____
i. The claim is barred by the statute of limitations..... ____
j. Claimant has a pre-existing condition..... ____
k. Claimant has a new / subsequent accident and / or injury..... ____
l. Displaced Worker Doctrine does not apply..... ____
m. Compensation Rate is disputed..... ____
n. Claimant has not sustained any cumulative detrimental effect which is compensable within the meaning of the Workers' Compensation Law..... ____
o. Another employer and / or carrier is liable for some or all of the benefits now alleged..... ____

12. Workers' Compensation Fund is entitled to reimbursement pursuant to 19 *Del. C.* § 2347..... ____

13. Employer / Carrier / TPA: State any other contentions not as yet set forth:

14. Claimant: State any other contentions not as yet set forth:

15. Workers' Compensation Fund: State any other contentions not as yet set forth:

16. Expected witnesses:

CLAIMANT

_____

_____

_____

_____

_____

Intent to use any movie, video or still picture: **YES** ☐ **NO**☐

Party agrees available for viewing upon request:

Pursuant to § 2301B(a)(4) Party consents to a Hearing Officer: **YES** ☐ **NO**☐

Anticipated time to present party's case:

_____

Party needs interpreter for following language(s):

_____

Asks interpreter be provided: ☐ **YES** ☐ **NO**

_____

ATTORNEY FOR CLAIMANT

EMPLOYER / CARRIER / TPA

_____

_____

_____

_____

_____

Intent to use any movie, video or still picture: **YES** ☐ **NO**☐

Party agrees available for viewing upon request:

Pursuant to § 2301B(a)(4) Party consents to a Hearing Officer: ☐ **YES** ☐ **NO**

Anticipated time to present party's case:

_____

Party needs interpreter for following language(s):

_____

Asks interpreter be provided: ☐ **YES** ☐ **NO**

_____

ATTORNEY FOR EMPLOYER / CARRIER / TPA

WCF

_____

_____

_____

_____

Pursuant to § 2301B(a)(4) Party consents to a Hearing Officer: ☐ **YES** ☐ **NO**

Anticipated time to present party's case:

_____

_____

ATTORNEY FOR THE FUND

Date and time for Hearing: _____

DATED:

Any party anticipate all-day Hearing: _____

INDUSTRIAL ACCIDENT BOARD:

Submit to: DOL_DIA_WC_PTM@delaware.gov

REVISED 1/5/2023

Procedure for filing of the PTM for the parties:

The Department of Labor will notify the parties of the pre-trial scheduling conference. Within this communication, the link for the PTM form will be provided. Forms may be found on our website Division of Industrial Affairs - Delaware Department of Labor, Workers' Compensation tile, forms & documents tile, Pre-Trial Memorandum.

Party A (moving party) will complete the form no more than 15 days of receipt of notice of pre-trial and submit to opposing parties (party B), as well as provide notice of submission to DOL_DIA_WC_PTM@delaware.gov

If only two parties: The opposing party will submit the complete form from party "A" to the email box: DOL_DIA_WC_PTM@delaware.gov; as well as opposing party. This must be done no later than 15 days after receipt from a party.

If there are 3 parties: The opposing party will forward the PTM form filled out by Party A & Party B to Party C and that party will submit to the email box: DOL_DIA_WC_PTM@delaware.gov, with a copy to other parties. This must be done no later than 15 days after receipt from a party.

Note: /s/ signature is accepted

Regulatory Flexibility Act Form (26%20DE%20Reg%20538RFA%2001-01-23.pdf)

Authenticated PDF Version (26%20DE%20Reg%20538%2001-01-23.pdf)

DEPARTMENT OF LABOR

Division of Industrial Affairs

Industrial Accident Board

Statutory Authority: 19 Delaware Code, Sections 105 and 2301A (19 **Del.C.** §§105 & 2301A)
19 **DE Admin. Code** 1331

PROPOSED

PUBLIC NOTICE

1331 Industrial Accident Board Regulations

In compliance with the State's Administrative Procedures Act (Title 29, Chapter 101 of the Delaware Code) and under the authority of 19 **Del.C.** §§105 and 2301A, the Delaware Department of Labor, Industrial Accident Board ("Board") proposes to modify 19 **DE Admin. Code** 1331, Section 9.0 regarding Pre-Trial Memorandums. The Industrial Accident Board administers and enforces the Workers Compensation Act ("Act") and related rules.

In accordance with 29 **Del.C.** §10116, persons wishing to submit written comments, suggestions, briefs, and compilations of data or other written materials concerning the proposed modifications to Rule No. 9 should direct them to the following address:

Allison Stein

Delaware Department of Labor

Division of Industrial Affairs / Office of Workers' Compensation

4425 North Market Street, 3rd Floor

Wilmington, DE 19802

Comments may also be directed via electronic mail to Allison.stein@Delaware.gov (mailto:Allison.stein@Delaware.gov). Any written submission in response to this notice and relevant to the proposed rules must be received by the above contact at the Delaware

Department of Labor no later than 4 p.m. EST, January 31, 2023.

The action concerning determination of whether to adopt the proposed changes to this rule will be based upon the Board's consideration of the written comments and any other written materials filed by the public.

Background

The Delaware Department of Labor, Industrial Accident Board ("Board") is authorized by the General Assembly of the State of Delaware, to promulgate its own rules of procedure for carrying out its duties consistent with Part II of Title 19 and the provisions of the Administrative Procedures Act. Such rules shall be for the purpose of securing the just, speedy and inexpensive determination of every petition pursuant to Part II of Title 19. The rules shall not abridge, enlarge or modify any substantive right of any party and they shall preserve the rights of parties as declared by Part II of Title 19. The Delaware Department of Labor ("Department") is further authorized to adopt and promulgate rules and regulations not inconsistent with Title 19 or of any other law of the state; provided, however that no such rule or regulation shall extend, modify or conflict with any law of this state or the reasonable implications thereof; and provided further, however, that such rules and regulations, as established by the Department, shall focus primarily on the Act, its related rules, and the Board.

Summary of Proposal

Recently, the Department underwent modernization of its procedures to allow electronic submissions, which enhanced its process and forms. Pre-Trial Memorandums are an existing part of the Board's Hearing process regarding workers' compensation insurance benefits and have been filled out and filed in paper form. The proposed change will allow Pre-Trial Memorandums to be received electronically to a central location. Because Pre-Trial Memorandums now will be in electronic format through an online process of completion, it is necessary to update the existing provisions at 19 **DE Admin. Code** 1331, Section 9.0.

The proposed changes to Section 9.0 of this regulation set forth the new electronic format and process to fill out and file the Pre-Trial Memorandum. Specifically, when the Department notifies parties of the date and time of the Pre-Trial Scheduling Conference, the Department will also electronically send a link of the online Pre-Trial Memorandum form to petitioner's counsel and notice to opposing party or parties. Petitioner's counsel must fill out petitioner's portion of the memorandum and provide notice of completion to opposing party or parties 15 days after counsel's receipt of the link. The opposing party or parties must fill out their portion of the memorandum and provide notice of completion 15 days after receiving petitioner's notice that petitioner completed the form. Electronic signatures are accepted. Should a Pre-Trial Memorandum not be timely filed, the other party may move to compel its completion. Should any party not complete the memorandum, the Board may remove witnesses, reschedule the Hearing, strike issues and defenses, and take any other actions deemed appropriate to remedy prejudice to an opposing party and to facilitate the fair and orderly presentation of issues.

Statutory Authority 19 Del.C. §105

19 **Del.C.** §105 enables the Delaware Department of Labor to adopt and promulgate rules and regulations not inconsistent with Title 19 of the Delaware Code; provided, that no such rule or regulation shall extend, modify or conflict with any law of the State of Delaware or the reasonable implications thereof.

19 Del.C. §2301A

19 **Del.C.** §2301A enables the Industrial Accident Board to promulgate its own rules of procedure for carrying out its duties consistent with Part II of Title 19 and the provisions of the Administrative Procedures Act. Such rules shall be for the purpose of securing the just, speedy and inexpensive determination of every petition pursuant to Part II of Title 19.

1331 Industrial Accident Board Regulations

1.0 Address of the Board: Office Hours

Unless otherwise notified, the Board's address is 4425 N. Market Street, Wilmington, Delaware, 19802. The office is open daily from 8:00 a.m. to 4:30 p.m. except Saturdays, Sundays and Legal Holidays.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

2.0 Sessions

2.1 Hearings on petitions will be held during the normal work week at such locations and at such times as may be set upon notice by the Department of Labor.

2.2 Special sessions of the Board for the transaction of business may be held at any time and place in the State of Delaware as may be scheduled by the Board with notice as provided by law.

1 DE Reg. 938 (01/01/98)

3.0 Filing of Papers

3.1 The Administrator of the Office of Workers' Compensation shall have custody of the Board's seal and official records, and shall be responsible for the maintenance and custody of the docket, files and records of the Board, including the transcripts of the testimony and exhibits with all papers and requests filed in proceedings, the minutes of all action taken by the Board, and of its findings, determinations, reports, opinions, orders, rules, regulations, and approved forms.

3.2 All orders and other actions of the Board or a Hearing Officer shall be signed by the Board member or Hearing Officer issuing the order and authenticated by the Administrator of the Office of Workers' Compensation.

3.3 All pleadings or papers required to be filed with the Board shall be filed in the Department of Labor's offices in Wilmington or other location designated by the Department for that purpose, within the time limit, if any, fixed by law or Board Rule for such filing. All written communication shall contain the assigned case file number.

3.4 Written communications addressed to the Board and all petitions and other pleadings, all reports, exhibits, depositions, transcripts, orders, and other papers or documents, received or filed with the Department of Labor and retained by the Administrator of the Office of Workers' Compensation shall be stamped showing the date of the receipt of filing thereof.

3.5 All requests for information, copies of official records or the opportunity to inspect public records shall be made in writing to the Administrator of the Office of Workers' Compensation, or his or her designee.

3.6 All sections of the petition must be completed. The Department in its discretion, may reject a filing for incompleteness.

3.7 When a Petition is filed and the petitioner is aware that the respondent is represented by counsel, the petitioner shall provide the respondent's counsel with a copy of the Petition and all attachments thereto at the time it is filed with the Board.

3.8 Any party challenging a Utilization Review Determination shall attach a copy of the determination in dispute when filing the petition. If such Utilization Review Determination is not so attached, it shall be produced by the petitioner within 15 days of a request by a party or the Board.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)
25 DE Reg. 1143 (06/01/22)

4.0 Repealed

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

5.0 Forms Provided by the Department

5.1 In all cases in which forms are approved by the Department, all papers filed with the Board shall be on such approved forms, and all applicable sections shall be completed.

5.2 Petitions shall be signed by a non-corporate party or an attorney who is a member of the Bar of the Supreme Court of Delaware.

5.3 Forms are approved by and adopted by the Department.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

6.0 Formal Pleadings Not Required

6.1 No formal pleading or formal statement of claim or formal answer shall be required of any party to any action before the Board. However, each person making written request for a hearing shall file with the Department, on forms to be promulgated by the Department, as referenced in Rule 5, a statement giving substantially information requested on said forms.

6.2 If any time after the filing of a petition, including during the progress of any hearing, it shall appear to the Board that persons other than those named or referred to in the petition are, or may be entitled to receive or may be liable to pay compensation, the Board may inquire into and ascertain the rights and liabilities of such parties upon notice to all such parties in interest. The Board may require additional information from any party appearing before the Board to assist in adequately ascertaining the rights and liabilities of such parties. In determining the rights of all such parties, the Board may amend the title of the petition in such a manner as may be right and proper. Either party may, upon motion to the Board pursuant to Rule 8, join other entities to include, but not limited to, other employers or insurance carriers.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

7.0 Mediation

At any time prior to thirty (30) days after the pre-trial hearing, any party to a proceeding before the Board may request mediation. A request for mediation shall be filed in accordance with Board Rule No. 3(C). Mediation shall be conducted within thirty (30) days of the proper filing of the request.

15 DE Reg. 854 (12/01/11)

8.0 Motions Concerning Legal Issues

8.1 When a motion is filed with the Board, the motion shall contain a brief statement of the legal and factual basis for the motion and the relief sought. It shall have attached a proposed form of order, unless it is an evidentiary hearing. A copy of said motion shall be served on opposing party in the same manner and on the same day as it is filed with the Board.

8.2 If the motion is opposed, the matter will be scheduled for the next available motion day at which both parties may be heard. If the responding party chooses to respond to the motion in writing, such response shall state, in brief, the factual and legal basis for opposing the motion, and request the motion be denied or request an alternative proposed order. The response shall be sent not less than 4 days before the date of the motion is scheduled to be heard, to the opposing party by regular mail and by hand delivery or by fax or email at the same time as

it is filed with the Department. The lack of a written response shall not be a waiver of the right to oppose the motion of the hearing. The hearing, unless there is a contrary agreement of the parties, shall take place at the same location that the hearing on the pending petition is to be heard.

8.3 No order involving a matter submitted under this Rule shall be issued by the Board against the non-moving party until the non-moving party has been given an opportunity to be heard on the issue.

8.4 Parties may submit a stipulation and proposed order for agreed upon matters. An unopposed motion stating the position of the opposing party known to the filing counsel shall be an acceptable substitute. If the Board rejects the proposed order, notice to the parties shall be given and include the reason for the rejection. The parties may re-submit a stipulation and proposed order which satisfies the Board's objection.

8.5 All motions filed with the Board by an unrepresented party shall be promptly scheduled for hearing on motion day with adequate notice of the date, time, and location of the hearing. The Department shall send a copy of the motion to all parties when there is an unrepresented party filing the motion.

8.6 Corporate entities may not appear for motions without counsel. If no attorney for the carrier or corporate self-insured employer has entered an appearance, the Board shall schedule a hearing on any motion filed by a party, with notice to the carrier or self-insured corporate employer that it must obtain counsel. If the unrepresented corporate entity appears without counsel, the Board shall enter an order granting appropriate relief.

8.7 If an unreported or memorandum opinion, whether of the Board or of any court, is cited or relied upon by any party, whether in a written submission or during any oral presentation, a copy thereof shall be provided to the Board and the opposing party. If, during an oral presentation, the party relying on the unreported case does not have a copy of such case immediately available, copies will be provided promptly after the hearing but in no case later than the end of the next business day following the hearing.

1 DE Reg. 938 (01/01/98)
1 DE Reg. 1621 (04/01/98)
15 DE Reg. 854 (12/01/11)

9.0 Pre-Trial Scheduling Conference and Pre-Trial Memorandum

9.1 Pre-Trial Scheduling Conference

9.1.1 In any action, including remands, a pre-trial scheduling conference shall be held. The Department shall designate an employee to arrange the time and date for the pre-trial conference. The designated employee will have discretionary power to re-schedule the pre-trial scheduling conference, if necessary. The employee designated by the Department in accord with this Rule shall be responsible for noticing such pre-trial scheduling conference.

9.1.2 The pre-trial scheduling conference shall be held on a date not later than 30 days after the date of the issuance of proper notice of a pre-trial scheduling conference regarding the petition at issue. The designated employee of the Department may grant a continuance of the pre-trial scheduling conference.

9.1.3 Such pre-trial scheduling conference may be held telephonically or by email, unless a party is unrepresented by counsel, in which case, the pre-trial scheduling conference shall be held at the Department of Labor offices servicing the county where the accident occurred.

9.1.4 The Department shall set a date and time for the hearing on the issues that are the subject of the petition, subject to the provisions of 19 **Del.C.** §2348.

9.2 Pre-Trial Memorandum

9.2.1 In any action, including remands, a ~~joint~~ Pre-Trial Memorandum shall be completed by the parties and filed with the Department. The Department will issue notice of the pre-trial scheduling conference. Along with this notice the Department will electronically send a link to the online Pre-Trial Memorandum form to counsel for the moving party (petitioner), with notice to the opposing parties.

9.2.2 ~~At the time the Department issues the notice of pre-trial scheduling conference, the Department will send an original Pre-Trial Memorandum form with the notice of the pre-trial scheduling conference to counsel for petitioner. Petitioner's counsel shall complete the form and send it to respondent's counsel. Respondent's counsel shall complete respondent's portion and return it to petitioner's counsel who shall file it with the Department and send a copy to respondent's counsel.~~ Fifteen days after receipt of the link counsel for the moving party shall complete the online Pre-trial Memorandum form and provide notice of its submission to the opposing parties. The opposing or non-moving parties shall complete their forms with notice of completion to petitioner's counsel 15 days after receiving notice that the petitioner has submitted their portion of the form. Electronic signature is acceptable for submission of the form. Should any party be unrepresented, the Pre-Trial Memorandum shall be completed by that party.

9.2.3 In the event the Pre-Trial Memorandum has not been filed with the Department ~~before the pre-trial scheduling conference or within the time specified in the notice provided by the Department~~ in the time specified in subsection 9.2.2, either party may file a motion pursuant to ~~Rule 8~~ Section 8.0 seeking an Order from the Board to compel the opposing party to complete and/or file a completed Pre-Trial Memorandum by a date ~~certain.~~ certain providing notice of the filing to the moving party. Should any party fail to complete a Pre-Trial Memorandum the Board may remedy the deficiency by removing witnesses, rescheduling the Hearing, striking issues and/or defenses, and/or taking any other actions deemed appropriate to remedy prejudice to an opposing party and to facilitate the fair and orderly presentation of issues.

9.2.4 Any party may object to any matter in the Pre-Trial Memorandum. If the parties cannot agree to resolve the objection, any party may file a motion in accordance with ~~Rule 8~~ Section 8.0. The basis for an objection may include, but is not limited to, that an item in the Pre-Trial

Memorandum is not permitted, or that a matter stated in the Pre-Trial Memorandum should be dismissed, altered, supplemented or filed as another petition under ~~Rule 26~~ Section 26.0.

9.3 The Pre-Trial Memorandum shall contain:

9.3.1 ~~names~~ Names (and, if requested, the addresses) of prospective medical and lay witnesses;

9.3.2 ~~a~~ A complete statement of what the petitioner seeks and alleges. When a claimant seeks an order for payment of medical expenses either by petition or when raised as an issue at the pre-trial hearing or in the Pre-Trial Memorandum on the employer's petition, copies of the bills shall be provided to counsel with the petition or at least 30 days before the hearing;

9.3.3 ~~a~~ A complete statement of defenses to be used by the opposing party;

9.3.4 ~~a~~ A copy of the medical report upon which a petition for benefits under 19 **Del.C.** §2326 is based shall be provided;

9.3.5 ~~a~~ A clear statement of the basis for a petition under 19 **Del.C.** §2347;

9.3.6 ~~notice~~ Notice of the intent to use any movie, video or still picture and either a copy of the same or information as to where the same may be viewed;

9.3.7 ~~an~~ An accurate estimate of the time necessary for hearing. This requirement includes an ongoing responsibility to update to Board as to any changes in the estimated trial time that may arise before hearing.

9.4 Amendments:

9.4.1 Either party may modify a Pre-Trial Memorandum at any time prior to ~~thirty (30)~~ 30 days before the hearing. Amending the Pre-Trial Memorandum by written notice to the opposing party and the designated employee of the Department of Labor may be made in accord with this ~~Rule~~ regulation. If a party objects to an amendment, the party requesting relief shall file a motion in accord with ~~Rule 8~~ Section 8.0.

9.4.2 If the thirtieth day prior to a hearing falls on a weekend or legal holiday, the last day to amend the Pre-Trial Memorandum shall be the next business day following that date.

9.4.3 Should a party wish to amend the Pre-Trial Memorandum to list additional witnesses, the party shall provide the names (and, if requested, the addresses) of such witnesses.

9.4.4 Notice of any modification to the Pre-Trial Memorandum shall be sent to the opposing counsel or unrepresented party in the same manner and on the same day as it is submitted to the Department.

9.4.5 The ~~thirty-day~~ 30-day notice requirement regarding amendments to the Pre-Trial Memorandum may be waived or modified by consent of the parties upon written stipulation, or by the Board upon written motion pursuant to ~~Rule 8~~ Section 8.0.

9.5 The designated employee of the Department of Labor will review the Pre-Trial Memorandum, note a time and date for the hearing, sign the form and send copies of the completed Pre-Trial Memorandum to the Parties. Such Pre-Trial Memorandum controls the subsequent course of the action unless amended by the Board to prevent manifest injustice.

9.6 Parties are responsible for arranging the appearance of noticed witnesses including the issuance of any subpoenas and the sending of notices of date and place of the hearing as well as the scheduled time of that witness' testimony.

1 DE Reg. 938 (01/01/98)
1 DE Reg. 1621 (04/01/98)
15 DE Reg. 854 (12/01/11)

10.0 Depositions Upon Oral Examination

10.1 After a petition has been filed with the Department, any party to a proceeding before the Board may obtain testimony by oral deposition of a expert witness, or a healthcare provider listed as a party pursuant to 19 **Del.C.** §2346, for use in a hearing before the Board, in lieu of personal appearance before the Board.

10.2 The date, time and location of oral deposition shall be agreed upon by the parties with notice of date and time served by the party taking the oral deposition.

10.3 The procedure for obtaining such testimony shall conform to the Rules of Civil Procedure of the Superior Court of the State of Delaware insofar as may be practicable, and not inconsistent with this Rule.

10.4 Any party to a proceeding objecting to obtaining such testimony by oral deposition for use in such proceeding shall object by motion, presented upon notice, showing good cause for the objection.

10.5 The taking of fact witness depositions may not proceed without Board approval.

10.6 The deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

10.7 The party placing a deposition into evidence during a Board hearing, must supply the Board with the original and three copies of the deposition transcript at the time of the hearing. If the parties have agreed to allow a Hearing Officer to conduct the hearing, the party placing the deposition into evidence must supply the Hearing Officer with the original and one copy of the deposition transcript at the time of the hearing. The party placing the deposition into evidence may provide the Board or Hearing Officer a disc or other electronic format of the deposition in addition to providing the copies above.

10.8 Medical witness fees pursuant to 19 **Del.C.** §2322(e) shall include the costs of depositions taken pursuant to this rule. Costs shall also include the taking of videotape depositions. The amount of such fees and costs shall be consistent with guidelines established pursuant to 19 **Del.C.** §2322B(m).

10.9 All videotape depositions must be accompanied by written transcripts.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

11.0 Request for the Production and Inspection of Documents And Other Evidence; Healthcare Authorizations And Copying or Photocopying

11.1 After a petition has been filed, a claim for workers' compensation benefits has been made, or workers' compensation benefits are being paid, any party may serve on any other party a written request for the production and/or inspection of any designated documents or other items which contain or constitute evidence relevant to the claim or petition and which are not otherwise privileged and which are in the possession, custody or control of the party upon whom the request is served.

11.2 The request shall set forth the items to be inspected or produced either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner for compliance with the request.

11.3 The party upon whom the request is served shall serve a written response within 15 day after the service of the request. The response shall state, with respect to each item or category, that the production and/or inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to a part of an item or category, the objected part shall be specified. The party submitting the request may move for an order from the Board compelling discovery with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

11.4 Any claimant receiving or seeking workers' compensation benefits under the Delaware Workers' Compensation Act shall sign a healthcare records authorization for use in Delaware Workers' Compensation cases. Healthcare records authorization must be signed and returned, or objected to in writing within fifteen (15) calendar days of its receipt.

11.5 If a claimant is represented by legal counsel, the employer, employer's insurance carrier or legal counsel for the employer or insurance carrier must obtain the required healthcare records authorization through the claimant's legal counsel. The employer, employer's insurance carrier or legal counsel for the employer or insurance carrier shall provide copies of all claimant's healthcare records obtained through the use of the healthcare records authorization or which are otherwise in their possession to the claimant's legal counsel upon written request. Claimant's legal counsel shall provide to the employer, carrier or the employer or carrier's legal counsel all claimant's healthcare records in their possession or control upon written request.

11.6 If a claimant is represented by legal counsel, legal counsel for the employer, the employer's insurance carrier or the employer may have direct contact with the claimant's healthcare provider only with the written or oral consent of the claimant's legal counsel. Legal

counsel for the employer or the employer's insurance carrier may submit the healthcare records authorization to any healthcare provider for the production of existing healthcare records with notice to claimant's legal counsel.

11.7 Video surveillance recordings that are submitted by the parties for viewing by the Board at the time of the hearing should be limited to a total of one-half (1/2) hour of viewing time unless the Board approves an extension for valid reasons. Requests for an extension shall be made before the video is shown at the time of the hearing.

11.8 In the event the Board permits a video surveillance recording lasting longer than one-half (1/2) hour, the Board requires a written index to accompany the submission of such video. Said index shall specify the segments of the video which are believed to have probative value.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

12.0 Continuances

12.1 A request for continuance shall be in writing, include a proposed form of order, and provide notice that a copy was sent to the opposing party. A request for a continuance may be granted upon a showing of cause under 19 **Del.C.** §2348.

Should a party object to the decision, it may by motion seek re-argument. Upon such motion, the Department shall then set the matter for a legal hearing as expeditiously as possible before the Board or a Hearing Officer who heard the original request.

Once a hearing on the merits has begun, a continuance may only be granted should it become necessary to continue the case in order to prevent a miscarriage of justice.

12.2 For the purposes of determining whether a requesting party has made the required showing of "good cause" or "extraordinary circumstances" under 19 **Del.C.** §2348, the Board shall use the following definitions of those terms:

12.2.1 "Good Cause" shall include:

12.2.1.1 the unavailability of a previously scheduled medical or other material witness;

12.2.1.2 the unavailability of an attorney for a party due to a conflicting court appearance;

12.2.1.3 the illness of a party, a party's attorney, or a material witness (including, if appropriate, illness which affects the ability of necessary person to participate in the deposition of a medical or other material witness);

12.2.1.4 a justifiable absence from the State of a party, a party's attorney or material witness;

12.2.1.5 a justifiable substitution of counsel for one party (this shall not include a transfer of files within a law firm);

12.2.1.6 the unavailability of a medical witness whose deposition cannot be scheduled despite due and prompt diligence on the part of the requesting party;

12.2.1.7 inadequate notice from the Department and/or the Board which would justifiably prevent a party from having a full and fair opportunity to be heard; and

12.2.1.8 any other unforeseen circumstance beyond the control of the party seeking the continuance which would prevent the party from having a full and fair hearing.

12.2.2 "Extraordinary Circumstances" shall include:

12.2.2.1 the sudden unavailability of a previously scheduled medical or other material witness;

12.2.2.2 an emergency mandatory court appearance which precludes the appearance of a party's attorney at the hearing;

12.2.2.3 a serious personal or medical emergency on the part of a party or a party's attorney; and

12.2.2.4 any other unforeseen circumstance beyond the control of the party seeking the continuance which would prevent the party from having a full and fair hearing.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

13.0 Opening Statements and Closing Statements

13.1 Either party or their attorney, if represented, may make an opening statement. The petitioner or the petitioner's attorney may make an opening statement prior to any testimony being presented. The respondent or the respondent's attorney may make an opening statement either before any testimony is presented on behalf of the petitioner or at the close of the petitioner's testimony and before any testimony is offered on behalf of the respondent.

13.2 Opening statements shall be limited to five (5) minutes unless an extension of this time limit has been approved by the Board for a valid reason.

13.3 Regarding closing statements, the petitioner, or the petitioner's attorney, shall be permitted to present a closing statement and a rebuttal closing statement. The respondent, or the respondent's attorney, shall be permitted a closing statement in response to petitioner's closing statement. Both the petitioner's and the respondent's closing statements shall be limited to ten (10) minutes each unless an extension of this time limit has been approved by the Board; such approval shall not be withheld without cause. Petitioner's rebuttal closing statement shall be limited to five (5) minutes, unless an extension of this time limit has been approved by the Board; such approval shall not be withheld without cause.

15 DE Reg. 854 (12/01/11)

14.0 Evidence

14.1 Stipulation of Facts. At all hearings on the merits, the parties, when represented by counsel, shall submit a written stipulation of facts to the Board. The document shall be signed by the parties' counsel. An original and three (3) copies shall be submitted to the Board at the

beginning of such hearing and shall become part of the record in the matter.

14.2 All witnesses shall be sworn in for all proceedings before the Board.

14.3 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 persons 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.

15 DE Reg. 854 (12/01/11)

15.0 Leading Questions

In accordance with Rule 14, leading questions of expert witnesses are permissible by any party.

15 DE Reg. 854 (12/01/11)

16.0 Attorneys

16.1 The Department shall be notified of representation by an attorney for any party on any matter pending before the Board. An attorney's appearance may be withdrawn without obtaining the Board's permission when another member of the Delaware Bar has entered an appearance as attorney of record for the party or when there is no petition pending before the Board. Such notification of withdrawal shall be in writing to the Department stating the last known address of the client, with a copy sent to the client and to the opposing parties. Otherwise, no appearance shall be withdrawn except by Order of the Board after motion by the attorney with notice to the client and to the opposing parties.

16.2 When any party is represented by an attorney in a matter before the Board, only that attorney can examine or cross examine witnesses at the hearing on behalf of that party. That attorney must either be a member of the Bar of the State of Delaware and duly licensed to practice in the Courts of this State or an attorney properly admitted pro hac vice and accompanied by an attorney who is a member of the Delaware Bar.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

17.0 Exhibits

Exhibits submitted at Board hearings are to be kept by the Department until final disposition of all appeals and/or pending petitions. After the expiration of all appeals and/or pending petitions, it is the duty of the party, or the party's attorney, who submitted the exhibits to retrieve their exhibits from the Department. The Department will dispose of all exhibits not retrieved in accordance with State of Delaware record retention policies.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

18.0 Copies of Evidence Available to Applicants

18.1 A transcript of the evidence before the Board shall not be furnished to the parties, but parties may purchase a copy of the transcript from the person who transcribed the evidence.

18.2 When a case is appealed to the Superior Court, a transcript of the evidence shall be furnished as provided by statue.

15 DE Reg. 854 (12/01/11)

19.0 Filing of Agreement After Awards

19.1 In the case of an award by the Board which is not appealed or if the appeal is sustained by the Court of last appeal, the insurance carrier or self-insurer shall make payments in compliance with the provisions of said award. An award of the Board shall be considered as self-executing. For the Department to maintain accurate record keeping, the parties to an award shall file an agreement reciting the provisions of the award within 14 days. A Receipt for Compensation shall be filed with the Department when the award is paid in full.

19.2 In absence of the Receipt for Compensation mentioned in 21.1 above, payments of compensation shall not be ended except on an award made according to the provisions of 19 **Del.C.** §2347, as amended. A Receipt for Compensation signed by the injured employee will be accepted by the Board as prima facie evidence that the disability of such injured employee has ceased.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

20.0 Time for Payment in Uncontested Awards

20.1 When an award has been made by the Board and an appeal of that award has been taken by the employer or its insurance carrier, no compensation shall be paid during the pendency of the appeal for those portions of the award that are appealed. If the final disposition of the case is adverse to the employer or its insurance carrier, first payment of compensation shall be made to the claimant not later than fourteen (14) days after the Board's award becomes final and binding, irrespective of whether an agreement has at that time been entered into between the parties pursuant to Rule No. 19.1.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

21.0 Post Hearing Motions

21.1 The Board may permit additional testimony or argument after the close of a hearing. This may occur before the Board renders a decision or after the Board renders a decision. A party requesting that the Board permit additional testimony or argument shall do so by written motion.

21.2 If a party's motion requests additional testimony or argument after the close of a hearing and before the Board renders a decision, the nature and purpose of the evidence shall be stated. Such evidence shall not be merely cumulative. Such motion shall be filed not later than ten days after the date of the last testimony, oral argument or the filing of any brief requested by the Board. The first day shall commence on the day following such testimony, oral argument or the filing of such brief. The date of last testimony, oral argument or the filing of any brief requested by the Board shall be stated in the motion. Such motion shall be served upon the attorney for each party and upon each unrepresented party in accordance with Rule 8.

21.3 If the motion requests additional testimony or argument after the close of a hearing and after the Board renders a decision, the matter claimed to have been erroneously decided must be specified and the alleged errors stated. Such motion must be filed with the Board not later than ten days after receipt of the Board's decision. The first day shall commence on the day following receipt of the Board's decision. The date the party received the Board's decision shall be set forth in the motion. Such motion, properly filed, will toll the period for perfecting appeals under 19 **Del.C.** §2349 and the time under §2349 will begin anew after the subsequent decision is received by the parties. Such motion shall be served upon the attorney for each party and upon each unrepresented party in accordance with Rule 8.

21.4 When a motion is filed under Section (B) or (C) of this Rule, the non-moving party may file an answer not later than ten days after receipt of the motion and serve a copy of the answer upon the attorney for each party and upon each unrepresented party in accordance with Rule 8. The first day shall commence on the day following receipt of the motion. The date of receipt of the motion shall be set forth in the answer.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

22.0 Commutation of Compensation

22.1 Commutation of compensation pursuant to 19 **Del.C.** §2358 is to be favorably considered by the Board where there are sound and convincing reasons substantiated by evidence and such commutation will be in the best interests of the injured employee or the dependents of a deceased employee.

22.2 The Board may set guidelines and impose such conditions as it may deem advisable for the disbursement of all funds commuted.

22.3 The Board or a Hearing Officer may approve a commutation by a hearing with live testimony, by teleconference or by consideration of an appropriate stipulation and order, with an accompanying affidavit in support of request for commutation, at the discretion of the

Board or Hearing Officer.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

23.0 Attorney's Fees

23.1 The claimant's attorney shall file with the Board and serve upon the other party in the same manner and at the same time as filing with the Board, a completed affidavit regarding attorney's fees, with a copy of the attorney's fee agreement attached. Said affidavit and fee agreement shall be reviewed by the Board, so as to assist in awarding a reasonable attorney's fee in those cases when an attorney's fee may be awarded to the claimant. Objections, if any, to the contents of the affidavit shall be heard by the Board during closing arguments.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

24.0 Reimbursement From the Workers' Compensation Fund

24.1 No petition of an employer or its insurance carrier for reimbursement from the Workers' Compensation Fund as provided in 19 **Del.C.** §2327 will be accepted by the Department unless the employer or its insurance carrier first notified by certified mail the Deputy Attorney General assigned to defend said fund, of its intention to seek reimbursement from said Fund, and supply the Department with proof of compliance when its petition is filed. Any application for reimbursement from said Fund shall be by petition with supporting medical documentation attached. The petition shall identify with specificity, by dates of injury and part(s) of the body affected, all prior and subsequent injuries for which reimbursement under 19 **Del.C.** §2327 is claimed.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

25.0 Expedited Hearings Pursuant to 19 Del.C. §2348(g)

25.1 If a claimant who is receiving no wages or benefits, or is out of work without income or substantial income, desires to have his/her petition heard at the earliest possible time he/she may file with the petition which, in addition to the benefits being sought also requests an expedited hearing, and shall be accompanied by the following:

25.1.1 A copy of the Department standard Pre-Trial Memorandum, filled out as completely as possible with regard to the Claimant's case.

25.1.2 A copy of a medical report, hospital record, or similar documentation, which fairly describes the nature of claimant's injury and disability and the cause thereof; if such documentation is unavailable, or incomplete, claimant shall submit a supplementary statement

describing, to the best of his/her knowledge and understanding, the nature of his/her injury and disability and the cause thereof.

25.1.3 A statement identifying: (a) the name and address of employer's insurer, if known; and (b) the name of the person, if known, who denied the claimant and his/her office address and telephone number.

25.2 Upon filing of a petition requesting an expedited hearing, it shall be reviewed for completeness by the Department. Unless substantially lacking in compliance with the requirements of 25.1, a copy of the Request and supporting papers shall promptly be sent by certified mail, return receipt requested, to the employer and its insurance carrier, if known, together with a copy of this Rule (or a summary of its requirements) and a notice as to the name and telephone number of the Department.

If the filed petition does not fully comply with the requirements of 25.1, the Department may direct the claimant to submit further information or documentation before the petition will be sent to employer or its insurer, or the Department personnel may direct Claimant to submit the additional material directly to the employer, its insurer, and the Department.

25.3 Within five (5) business days after receipt of a petition requesting an expedited hearing, the employer or its insurer shall notify the Department writing delivered within the allowed time, the following:

25.3.1 Whether the request for expedited hearing is opposed and, if so, the reasons therefore:

25.3.2 The name and address of the lawyer who will represent it.

25.3.3 The name and address of each physician or other expert being engaged to examine or test claimant and the dates of appointments. If additional time for scheduling appointments is requested, the Department may, for good cause, allow up to ten (10) additional days for submission of this information, and shall notify claimant if this is done.

25.3.4 Whether a formal pre-trial conference is requested.

25.4 If a formal pre-trial conference is requested, it shall be scheduled as promptly as practicable. Otherwise, the Pre-Trial Memorandum shall be completed, served on claimant, and filed with the Department within ten (10) business days after the deadline for the response under section 25.3.1.

25.5 As soon as it is determined that a case will have an Expedited Hearing, the Department shall confer with the parties to set a date and time for hearing. Should it appear to the Department that undue delay is threatened, due to difficulty in securing pertinent records or a timely appointment for examination or other cause, the Department may endeavor to resolve the cause for delay by direct communication with any person responsible, and both parties shall cooperate in supporting efforts to secure an early hearing date. As soon as the Department is satisfied that all responsible efforts to secure an early date have been completed, the Department shall schedule a hearing and notify both parties.

15 DE Reg. 854 (12/01/11)

26.0 Additional Issues

26.1 When a petition is pending before the Board, either party may assert an additional issue or file an additional petition for consideration by the Board. The following issues shall be added to a pending petition through a letter request, timely filed with the Department and sent to opposing counsel in the same manner as service is made upon the Department:

26.1.1 A request for the payment of medical expenses.

26.1.2 A request for reimbursement of travel expenses; or

26.1.3 A request for partial disability benefits if the pending petition is claimant's petition for an ongoing period of total disability benefits or the employer's request for the review of an open agreement as to compensation.

26.2 When a petition is pending before the Board, either party may assert an additional issue but a party wishing to assert one or more of the following issues must file a formal petition and serve the same in accordance with the statute unless otherwise permitted by the Board pursuant to Rule 8.

26.2.1 A request to review an open compensation agreement.

26.2.2 A claim for permanent impairment benefits.

26.2.3 A claim for a recurrence of temporary, total and/or partial disability.

26.2.4 A claim for disfigurement benefits; or

26.2.5 a forfeiture of the right to compensation pursuant to 19 Del.C. §2353.

26.3 A subsequently filed petition may be consolidated with a pending petition only upon:

26.4.1 The agreement of the parties; or

26.4.2 A motion by the party seeking to consolidate the petitions approved by the Board after due notice to opposing counsel and the opportunity for counsel to be heard under Rule 8.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

27.0 Form of Orders

Any party seeking relief from the Industrial Accident Board shall present the Board or Hearing Officer with a proposed form of Order, suitable for immediate signature.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

28.0 Time

The Department of Labor and the Industrial Accident Board shall follow the provisions of Superior Court Civil Rule 6 unless otherwise specified in the statute, 19 **Del.C.** §2301 et. seq. or the Administrative Procedures Act, 29 **Del.C.** §10001 et. seq.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

29.0 Legal Hearings/Motion Day

29.1 The Board shall hold Motion Day at each location where the Board hears matters. The Board may hear testimony and make rulings upon miscellaneous matters including, but not limited to, legal hearings, motions, uncontested matters, commutations, and other matters contemplated by these Rules.

29.2 Any matter brought before the Board at Motion Day shall comply with the provisions of Rule No. 8, although the Department and Board shall give due consideration to requests for expedited relief which will affect a hearing close in time to the request. In such event, the Department or Board shall make reasonable effort to schedule the matter at the next available Motion Day.

1 DE Reg. 938 (01/01/98)
15 DE Reg. 854 (12/01/11)

30.0 Interpreters

In any proceeding before the Board where the claimant, or the claimant's witness(es), require the services of an interpreter, the claimant shall request a list of Department approved court interpreters or approved telephonic interpretation services to provide interpretation services for the claimant. The claimant shall be responsible for arranging all service of the court interpreter or telephonic interpretation service. The Department will be responsible for the payment of all reasonable fees for usage of its approved interpreters.

1 DE Reg. 1621 (04/01/98)
15 DE Reg. 854 (12/01/11)

31.0 Timely Notification of Settlement

Attorneys for all parties shall appear on the date and at the time of the hearing scheduled before the Board unless notification of settlement has been received by the Office of Workers' Compensation from the petitioning attorney by 12:00 p.m. on the last work day preceding the hearing date. Failure to provide timely notification of settlement shall require the appearance

of the attorneys for all parties as scheduled unless excused by the Board. Timely notification of settlement will automatically excuse the appearance of the attorneys and the cases will be removed from the calendar.

1 DE Reg. 938 (01/01/98)
1 DE Reg. 1621 (04/01/98)
15 DE Reg. 854 (12/01/11)
25 DE Reg. 1143 (06/01/22)
26 DE Reg. 538 (01/01/23) (Prop.)

Presentation and Preservation Of Evidence

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Matt Fogg represents plaintiffs in the areas of personal injury and workers' compensation. He focuses his practice on the representation of individuals injured due to the negligence of other individuals or companies and to those injured at work. Matt takes great pride in representing individuals to see that they are justly compensated, while always treating his clients with compassion, dignity, and respect.

Matt is licensed to practice before all of the state courts in Delaware, the US District Court for the District of Delaware and the US Supreme Court. Matt regularly handles matters through all stages of litigation before the Delaware state courts as well as the Industrial Accident Board.

Prior to joining Morris James, Matt represented individuals in personal injury and worker's compensation matters for 17 years in New Castle County. Matt has been a frequent speaker on worker's compensation and personal injury matters in the State of Delaware.

Matt has been selected as a Delaware Today magazine Top Lawyer since 2017.

Professional Affiliations

Randy J. Holland Delaware Workers' Compensation American Inn of Court, Past President

Delaware State Bar Association

- Workers' Compensation Section, Past Chair
- Tort's Section, Member

Delaware Trial Lawyers Association, 2003-Present

"You only get one chance to seek damages against the adversaries. I value my clients and have dedicated my professional life helping them recover and prosper after being injured."

Practice Areas

Injury Law

FiberCel Bone Graft Injury

Boating and Jet Ski Accidents

Motorcycle Accidents

Wrongful Death

Serious Injuries

Product Liability

Car Accidents

Dog Bites / Attacks

Slip and Fall

Truck Accidents

Workers' Compensation

Camp Lejeune Water Contamination Litigation

Similac Infant Formula Recall Litigation

Blog(s)

Delaware Personal Injury Law

Honors

Best Lawyers, 2021-Present

Delaware Today Top Lawyers,

Matthew R. Fogg (Continued)

Representative Matters

- Currently representing a number of plaintiff's in the Aziyo Biologics Fibercel bone graft injury litigation
- Negotiated a settlement in a catastrophic maritime boating accident case for a total value of $1,100,000
- Successfully negotiated a resolution of a motor vehicle collision victim with 2 leg fractures requiring surgery for $750,000.00
- Successfully negotiated a permanency and disfigurement of a worker's compensation claim for a severe hand injury for $197,000
- Successfully negotiated a case for a woman that sustained leg fracture in a slip and fall on ice in a commercial parking lot for $144,000
- Successfully negotiated settlement of a dog bite injury to a woman's hand for $95,000
- Successfully negotiated settlement of a client who sustained a low back injury in a motor vehicle collision requiring surgery for $300,000
- Successfully negotiated the resolution of a worker's compensation case following a back injury after claimant had returned to work for $150,000
- Successfully negotiated the resolution of a permanency and disfigurement claim for a severe foot injury for $255,513
- Successfully negotiated settlement of a man who injured both knees, requiring surgery to one after his vehicle was struck by a dump truck for $300,000
- Successfully negotiated settlement of a woman sustaining post-concussive injuries after being struck on the head by an object while shelves were being stocked for $85,000

Workers' Compensation for Employee, 2017 - Present

Admissions

Delaware
New Jersey
U.S. Supreme Court
U.S. District Court for the District of Delaware

Education

Widener University Delaware Law School, JD, 2002
Mansfield University, BS, cum laude, 1999

PRESENTATION AND PRESERVATION OF EVIDENCE

Matthew R. Fogg, Kerri L. Morris-Johnston & Jonathan B. O'Neill

1- What are your issues?
2- Request For Production?
    a. Timely & complete responses from opposing
    b. Timely & complete responses from you
        i. Document what you've produced
        ii. Have that in your pocket beyond your word as an officer of the Court
3- Medical expert
    a. Curriculum Vitae
    b. Publications/Studies
    c. Medical records
    d. Disability notes
4- Preservation of evidence
    a. Social Media
    b. Video
    c. DME doctor's notes, records reviewed, etc. for depo
5- Fact witnesses
    a. Can I talk to them?
    b. What do I want from them?
    c. Any evidence that comes in through them
6- Other experts & issues:
    a. Private investigator
    b. Vocational expert

Novel Evidentiary Issues & Cases"

Spoliation
Daubert

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

ESTATE OF HERBERT MITCHELL,	)	
	)	
Claimant,	)	
	)	
v.	)	Hearing No. 1322082
	)	
ALLEN,[1]	)	
	)	
Respondent.	)	

Does claimant's estate have the right to subpoena for autopsy and NOT Notify their opponent?

ORDER

Background: Herbert Mitchell ("Claimant") died on June 4, 2008, when he was trapped inside a grain bin when soy bean meal poured into the bin, ultimately burying him and causing his death. The official Certificate of Death listed the cause of death as asphyxia due to (or as a consequence of) "occlusion of the nose and mouth and immobilization of the chest and abdomen by external pressure."

On May 16, 2011, Claimant's Estate filed a Petition to Determine Additional Compensation Due seeking compensation for permanent impairment, namely 100% permanent impairment to the right lung and 100% permanent impairment to the left lung. Allen sought to dismiss this petition, but that motion was denied. The Board held that, in light of the Supreme Court's decision in *Estate of Watts v. Blue Hen Insulation*, 902 A.2d 1079 (Del. 2006), where a claimant dies from the work accident, nothing in the Workers' Compensation Act expressly abrogates a claim for permanency benefits. "Since there is no express restriction on a post-death claim for permanent injuries by the estate of a worker who dies from his injuries, we hold that

[1] There is an issue before Superior Court as to whether Claimant's employer at the time of the work accident was Allen Family Foods or Allen's Hatchery. There is no need to summarize the facts in that dispute. As the Board understands it, Superior Court has not yet made a determination on that issue. Accordingly, the Board continues to take no position on who the proper employer is. Thus, the respondent in this motion is simply listed as Allen.

the worker's statutory right of action survives." *Estate of Watts*, 902 A.2d at 1083. Allen argued that, under the circumstances of this case, where Claimant died virtually immediately at the time of the accident, Claimant could not factually have sustained a permanent impairment prior to death. The Board determined that this was a factual question. It was possible that Claimant sustained a physical injury to his lungs that would have qualified as a permanent impairment to the lungs had Claimant survived.

> If the effect of the accident was only to block oxygen from reaching Claimant, such that he suffocated, then the lungs themselves were not physically damaged in the accident and no award of permanent impairment to the lungs would be possible. The lungs, in that case, ceased to function because Claimant died of a lack of oxygen, not from any physical damage (or "impairment") to the structure of the lungs themselves. On the other hand, if Claimant's Estate can provide persuasive evidence that the weight of the grain on Claimant's chest and abdomen or the presence of the grain in Claimant's airways actually resulted in physical damage to the lungs that would have been permanent in nature had Claimant somehow survived, then a valid claim for benefits could be presented and the degree of impairment to the physical structure of the lungs could be assessed.

Estate of Herbert Mitchell v. Allen, Del. IAB, Hearing No. 1322082, at 9 (August 8, 2011)(ORDER). Accordingly, Allen's motion was denied. Claimant, however, would have the burden of establishing that his lungs sustained an anatomical permanent impairment prior to death, not because of death.

Following this decision, Claimant's Estate had Claimant's body exhumed and an autopsy performed by Dr. Richard Callery on October 10, 2011, over two years after the death of Claimant. No notice of this was given to Allen's counsel and no opportunity was presented to allow Allen to arrange to have its own medical expert present at the time.[2] Experts have

[2] In fact, on October 10, counsel for Claimant's Estate contacted Allen's counsel requesting a continuance of the hearing in this case. No mention of the autopsy was made despite the fact that it was happening that same day.

informed Allen that the fact of the autopsy itself destroyed any ability for Allen to conduct a meaningful second autopsy on its own behalf.

Following this autopsy, Claimant's Estate filed an additional petition seeking "100% permanent impairment" to the heart, liver, left kidney, right kidney, brain and "entire digestive system." Allen first learned of the autopsy when provided a copy of Dr. Callery's permanency opinion on December 12, 2011, two months after the autopsy was performed. Photos from the autopsy were not provided to Allen until just a day prior to this motion hearing.

Allen argues that conducting the autopsy without notice to opposing counsel both results in an unfair advantage to Claimant's Estate and obstructed Allen's own access to the evidence because a second autopsy cannot be performed. Allen requests that all evidence from the autopsy be excluded from the hearing or, in the alternative, that the Board order that an adverse inference by applied so that all reasonable doubts concerning the evidence shall be resolved in Allen's favor by the factfinder. Claimant's Estate argues that it was not compelled under any rule or law to notify Allen of the planned autopsy by its medical expert.[3]

Analysis: At the motion hearing, there was some discussion about whether the Board had the authority to order an autopsy. This question is moot because Allen is not seeking to re-exhume Claimant and perform a second autopsy. Because of the length of time that Claimant has been deceased and the fact that the one autopsy was done, a second autopsy could not generate any useful information. The question presented to the Board concerns the admissibility of evidence concerning the autopsy that was performed at the request of Claimant's Estate without notice to Allen.

[3] Claimant's Estate's counsel notes that Dr. Callery is the State Medical Examiner and refers to him as a "State official." However, for purposes of this litigation, Dr. Callery is not functioning in his capacity as a State official, but as Claimant's Estate's medical expert.

Case law on this specific subject is scarce. Allen cites *Holm-Waddle v. William D. Hawley, M.D., Inc.*, 967 P.2d 1180 (Okla. 1998). That was a medical malpractice action. The action had been pending for two years and four months before the decedent died. An autopsy was performed by a medical expert hired by plaintiff's counsel. The autopsy was limited to the organs concerned in the malpractice action. The decedent's body was then cremated. No notice was given to the defendant of decedent's death, the autopsy or the cremation. The defendant learned of the autopsy two months later. *Holm-Waddle*, 967 P.2d at 1182. The defendant moved to dismiss the entire malpractice action, citing a party's duty to supplement discovery and a lawyer's ethical duty not to obstruct another party's access to evidence. Instead, the trial court simply prohibited the use of most of the evidence from the autopsy. *Holm-Waddle*, 967 P.2d at 1182. On appeal, the plaintiff argued that the trial court abused its discretion.

The Oklahoma Supreme Court upheld the trial court's decision as not being an abuse of discretion. It cited, with favor, a Federal Rules Decision commenting on an undisclosed autopsy performed while a wrongful death action was pending.[4] The federal court stated:

> When an expert employed by a party or his attorney conducts an examination reasonably foreseeably destructive without notice to opposing counsel and such examination results in either negligent or intentional destruction of evidence, thereby rendering it impossible for an opposing party to obtain a fair trial, it appears that the Court would not only be empowered, but required to take appropriate action, either to dismiss the suit altogether, or to ameliorate the ill-gotten advantage.

[4] The Oklahoma Supreme Court distinguished the situation when an autopsy was performed prior to any claim of compensation being made. In *Western States Construction Co. v. Stailey*, 461 P.2d 940 (Okla. 1969), an autopsy was done prior to the making of a workers' compensation claim. The court held that there was no duty to give notice of an autopsy to a person with only an "indirect interest" in the outcome. *Western States Construction*, 461 P.2d at 944. The *Holm-Waddle* court observed that a defendant in pending litigation cannot be said to have an "indirect interest" in the outcome of the autopsy. *Holm-Waddle*, 967 P.2d at 1182.

Barker v. Bledsoe, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979). In light of this, the *Holm-Waddle* court agreed that suppressing most of the evidence of the autopsy was appropriate. *Holm-Waddle*, 967 P.2d at 1183.

Outside of the context of autopsies, there is plentiful Delaware law on the subject of spoliation of evidence. Usually, the issue comes up in the context of seeking an "adverse inference instruction" to a jury to the effect that, if a party has wilfully destroyed evidence, the jury should "adopt a view of the facts as unfavorable to the wrongdoer as the known circumstances will reasonably admit." *Equitable Trust Co. v. Gallagher*, 102 A.2d 538, 541 (Del. 1954). However, such an instruction is not appropriate for accidental or negligent destruction of evidence. "An adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item." *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006). In other words, the standard "requires a showing that a party acted with a mental state indicative of spoliation." *Midcap*, 893 A.2d at 548. There must be wrongful conduct indicative of a desire to suppress the truth. *Nationwide Mutual Fire Ins. Co. v. Delmarva Power & Light Co.*, Del. Super., C.A. No. 06C-10-225, Cooch, J., 2009 WL 684565 at *10 (March 16, 2009). It is enough if the conduct is "reckless," indicating a conscious indifference to the rights of others such that there was a foreseeability of harm to the other resulting from the act that the actor perceived or should have perceived. *Nationwide Mutual*, 2009 WL 684565 at *11.

In the current case, the autopsy of Claimant was not done with the intent to destroy the evidence. On the contrary, Claimant's Estate was doing it in an effort to gain evidence. However, it was foreseeable that the act of the autopsy would prevent the other party from doing

the same thing and gaining evidence for itself. This gets to the nub of the problem. The autopsy itself was not wrongful, but was Claimant's Estate wrongful in not notifying Allen that it was to be conducted and thus depriving Allen of the chance to be present and gain its own evidence rather than to be completely dependent on whatever photographs or notes Claimant's medical expert chose to take?

Claimant is, of course, correct, that there is no specific statute or Board rule that states that the opposing side must be notified of autopsies conducted during the pendency of litigation. It seems unlikely that the need for such a specific provision would have occurred to the General Assembly or the Board. However, there are provisions in the Workers' Compensation Act that reinforce the basic concept that parties should deal fairly and openly with each other.

For example, while a claimant has the statutory right to employ "a physician, surgeon, dentist, optometrist or chiropractor of the employee's own choosing," it is specifically provided that "[n]otice of the employee's *intention* to employ medical aid as aforesaid shall be given to the employee's employer or its insurance carrier or to the Board." DEL. CODE ANN. tit. 19, § 2323 (emphasis added). In addition, "[n]otice that medical aid *was employed* as aforesaid shall be given within 30 days thereafter to the employer or its insurance carrier in writing." DEL. CODE ANN. tit. 19, § 2323 (emphasis added). Thus, a claimant is to give an employer (or its insurance carrier) both notice of the claimant's intent to use a doctor of the claimant's choice as well as notice (within 30 days) of the fact that such medical aid was in fact used. Such notification allows an employer the opportunity to make its own arrangements to examine the claimant at or near the same time that the claimant is being examined by the claimant's own doctor. Similarly, an employer has the right to have an injured employee examined by a doctor of the employer's choosing, but by statute "the employee shall be entitled to have a physician . . . of the employee's

own selection . . . present to participate in such examination." DEL. CODE ANN. tit. 19, § 2343(a).

Of course, an autopsy cannot reasonably be described as "medical aid" as that term is used in Section 2323 but, using that section as an analogy, the Board recognizes that, in the current case, Allen had no notice of the autopsy prior to it being done and was not notified that it had been done until two months later. It has no way to examine Claimant for itself. The fact that the autopsy was not mentioned to Allen's counsel despite counsel for Claimant's Estate being in communication with Allen's counsel on the very day of the autopsy leads to the obvious inference that not telling Allen was a deliberate and intentional litigation tactic by Claimant's Estate.

However, if we are considering analogous situations, it should also be recognized that there are analogies that point in the other direction. Frequently, if an injured employee has surgery, the operative report from the surgeon becomes important evidence. The surgeon is the one who was present and got to see the actual situation while all other medical witnesses are limited to relying on the operative report. That situation does not seem all that much different from the situation presented here: Claimant's medical expert doing the autopsy did a report that Allen's medical witnesses will have to rely on. There is a slight--but meaningful--difference though. In a surgical situation, the employer can review objective diagnostic testing done prior to the surgery and can have additional testing done after the surgery. The employee might have been examined by the employer's medical expert prior to the surgery and could certainly be examined again after the surgery. Thus, there would be ways for the employer to gain independent evidence to verify the findings on the operative report. In the case of the current autopsy, Allen does not have any means to verify the findings by means of any other testing.

Under the circumstances of this case, Allen is limited to what Claimant's expert noted in his report and the photographs Claimant's expert chose to take.

It is also true that, normally, an administrative board should hear all evidence that could conceivably throw light on the controversy. *Ridings v. Unemployment Insurance Appeal Board*, 407 A.2d 238, 240 (Del. Super. 1979). The Board should normally consider evidence that contains probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. *See Rules of the Industrial Accident Board* ("*Board Rules*"), Rule 14(C). In furtherance of this goal, it has been established that "[t]he 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 discretion." *Board Rules*, Rule 14(C). It is undeniable that the autopsy findings would likely constitute evidence of probative value. However, the Board is also charged with ensuring that it makes a just determination in every proceeding, *see* DEL. CODE ANN. tit. 19, § 2301A(i), and fundamental principles of justice need to be observed. *See General Chemical Div., Allied Chemical & Dye Corp. v. Fasano*, 94 A.2d 600, 601 (Del. Super. 1953).

Taking all these competing factors into consideration, the Board finds that the actions of Claimant's Estate in performing an autopsy of Claimant without notice to Allen had the effect of putting Allen at an unfair disadvantage in this litigation. As mentioned earlier, the Board is satisfied that the lack of communication was a deliberate choice by Claimant's Estate. However, the Board also finds that the disadvantage does not outweigh the importance of the probative value of the autopsy findings. Phrased another way, the prejudice to Allen is not so great as to merit the complete exclusion of all evidence from the autopsy.

Having said this, the Board recognizes that, because of the lack of notification from Claimant's Estate concerning the autopsy, Allen has been deprived of all opportunity to

investigate the facts for themselves. Some remedial measure is appropriate "to ameliorate the ill-gotten advantage." *See Barker*, 85 F.R.D. at 547-48. Under the circumstances, the Board finds that it is appropriate to order that an adverse inference be applied so that all reasonable doubts concerning the autopsy evidence are to be resolved in Allen's favor by the factfinder. Because Allen was deprived of all opportunity to find facts for itself from the autopsy, it is only fair to assume that any doubts concerning the evidence would have favored Allen's position.

IT IS SO ORDERED THIS 20th DAY OF FEBRUARY, 2012.

INDUSTRIAL ACCIDENT BOARD

Lowell L. Groundland
LOWELL L. GROUNDLAND

Terrence M. Shannon
TERRENCE M. SHANNON

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Christopher F. Baum

Mailed Date: 2-20-12

bc
OWC Staff

Gary S. Nitsche, Esquire, for Claimant
Anthony M. Frabizzio, Esquire, for Allen

2012 WL 6846555
Only the Westlaw citation
is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
Sussex County.

Re: The ESTATE OF Herbert MITCHELL
v.
ALLEN.

C.A. No. S12A–05–001 RFS.
|
Submitted: Oct. 17, 2012.
|
Decided: Nov. 28, 2012.

Appeal of a Decision of the Industrial Accident Board. *Decision Affirmed. Appeal Denied.*

Attorneys and Law Firms

Gary S. Nitsche, Esquire, Michael B. Galbraith, Esquire, Wilmington, DE.

Anthony M. Frabizzio, Esquire John J. Ellis, Esquire, Heckler & Frabizzio, Wilmington DE.

Opinion

RICHARD F. STOKES, JUDGE.

***1** Dear Counsel:
This is my decision denying the appeal of a petition filed by the Estate of Herbert Mitchell ("Estate") for permanency benefits. The death of Herbert Mitchell ("Mr. Mitchell" or "Decedent") occurred June 4, 2008 as the result of a compensable work accident. The Estate, consisting of Mr. Mitchell's three daughters after his wife died, receives statutory death benefits. The Board denied the petition for permanency benefits, and the Court affirms.

Facts and posture. While Mr. Mitchell was working inside an empty grain bin, 20 tons of soybean meal poured over him into the bin, killing Mr. Mitchell within several minutes. An agreement for death benefits pursuant to 19 *Del.C.* § 2330 was reached by Employer Allen[1] and Decedent's Estate on January 19, 2009. On May 6, 2011 the Estate filed a petition for a 100 percent permanent impairment award for each lung based on the opinion of Stephen J. Rodgers, MD. Employer filed a motion to dismiss the petition, which the Board denied, finding that the issue was a fact question requiring a full hearing.

After having an unnoticed autopsy performed October 10, 2011, the Estate filed a second petition seeking 100 percent permanency awards for the kidneys, brain, heart and digestive systems. Employer motioned to exclude the autopsy results based on the unfair advantage to the Estate.

A hearing was held on Employer's motion to exclude January 4, 2012. The Board found that the prejudice to Employer by lack of notice of the autopsy was not so great as to bar the autopsy results from the hearing. However, the Board ordered that an adverse inference would be applied so that reasonable doubts about the autopsy evidence would be resolved in Employer's favor. Employer filed a motion for reargument.

Hearing on the merits. On March 14, 2012, the Board convened a hearing on the permanency petitions and the motion for reargument on exclusion of the autopsy results.

Stephen J. Rodgers, MD, testified for the Estate. He was hired to provide a permanency evaluation on the Estate's behalf. He is board certified in disability evaluation and occupational medicine. He generally uses the American Medical Association ("AMA") Guidelines to determine permanency ratings, but the Guidelines do not address cases where the individual dies within minutes of the accident or event. Dr. Rodgers assigned a 100 percent permanency rating to each of Decedent's lungs based on compression of the lungs, which also caused small lacerations on the lungs and lung collapse.

Richard Callery, MD, testified by deposition on behalf of the Estate. He is the State's Chief Medical Examiner, who performed the autopsy acting in his personal capacity. He agreed that the cause of death was suffocation, and stated that Decedent's lungs were irreparably damaged by the accident prior to death and that the lung damage would have caused permanent impairment to the heart, kidneys, brain and digestive system. The lungs were collapsed and a tear was found in each lung consistent with a compression injury. The tears were not consistent with the hole that results from a standard embalming tool called a trocar sword, which drains blood and fluids from the body. Crushed soy meal was present in Decedent's mouth, throat, trachea and bronchi.

***2** Dr. Callery's opinion was that torn, collapsed lungs which are full of grain will never work again, assuming the individual survives the accident. He also stated that without oxygenation, other bodily systems are in turn 100 percent permanently impaired.

Judith Tobin, MD, a forensic pathologist, was acting assistant medical examiner when Mr. Mitchell died. Dr. Tobin examined Decedent's body and completed the death certificate June 5, 2008. She did not perform an autopsy because it was clear that the death was accidental. She found no evidence of crushing of the body by the weight of the grain.

Dr. Tobin testified that Mr. Mitchell died within several minutes of being fully submerged in the grain and that a more specific answer would be speculative. As to the autopsy, she stated that a second medical examiner would be at a disadvantage because of the unnatural state of the organs. Dr. Tobin concluded that the cause of death was asphyxia due to an occlusion of the nose and mouth. That is, the grain blocked the air passage, causing suffocation, and there was no evidence of other injury.

Michael Walkerstein, MD, is board certified in internal medicine, pulmonary medicine and critical care medicine. He testified on Employer's behalf. Dr. Walkerstein agreed that the death was due to suffocation because oxygen could not reach Mr. Mitchell's lungs. Suffocation causes all other bodily organs to fail, and no evidence showed that either the weight of the grain or the presence of grain in the airways caused physical injury to the lungs. In fact, before his head was covered with grain, Mr. Mitchell was speaking to co-workers, showing that he was able to breathe.

The Board's decision. On April 13, 2012, the Board denied the permanency petition, finding that the Estate failed to show by a preponderance of the evidence that, with or without any adverse inference, Claimant's lungs or other organs were permanently injured apart from failure due to lack of oxygen. The Board found all four expert medical witnesses to be credible and accepted the opinions of Dr. Tobin, the medical examiner who certified Claimant's death, and Dr. Walkerstein, the pulmonologist who testified on Employer's behalf.

Standard of review. On appeal of a decision of the Board, the Court is bound by the Board's findings if they are supported by substantial evidence and absent abuse of discretion or error of law.[2] Substantial evidence is relevant evident that a reasonable mind might accept as adequate to support a conclusion.[3] The Court does not weigh the evidence, determine questions of credibility, or make factual findings.[4] As the trier of fact, the Board is responsible for resolving conflicts in the testimony[5] and is entitled to accept the testimony of one expert and reject the testimony of another expert.[6]

Discussion. An employee may claim compensation for certain permanent injuries, pursuant to 19 *Del. C.* § 2326. The Board may award compensation based on the loss or loss of use of any part of the claimant's body.[7] The claimant bears the burden of proof to show the percentage of permanent impairment.[8]

***3** A decedent's estate which is receiving statutory death benefits may petition for and receive permanency awards pursuant to 19 *Del. C.* § 2332 and 10 *Del. C.* § 3707.[9] In *Estate of Watts,* the Delaware Supreme Court found that when read in light of the purpose of workers' compensation laws, these two statutes permit permanent impairment awards to a claimant's estate.[10] The *Watts* Court was not presented with the question of the burden of proof on a permanency petition. This Court applies the substantial evidence standard to permanent impairment petitions.[11]

The Estate argues first that the Board found that permanency awards could not be made if an employee dies as a result of a work accident. In fact, the Board correctly stated that such permanency petitions are viable if there is evidence of injury distinct from suffocation, which was without dispute the cause of death. The Estate submits that the Board did not use the correct burden of proof but does not identify an alternative to the preponderance of the evidence standard, which the Board applied.

The Estate also argues that there is substantial evidence to show that the Board erred as a matter of law in finding that the Estate failed to meet its burden of proof. This is an incorrect statement of the standard of review on appeal of an administrative decision. If there is substantial evidence to support the Board's findings, this Court will not disturb those findings on appeal. The Board hears the evidence and is free to accept the opinion of one expert witness over that of another without explanation.[12] This Court does not determine the credibility of experts or other witnesses or make factual findings of its own.

Despite this recognized standard, the Estate argues that Dr. Callery's testimony provided substantial evidence to support a finding in the Estate's favor. This fact, if so it be, is irrelevant. The Board accepted the testimony of Dr. Tobin and Dr. Walkerstein over that of Dr. Rodgers and Dr. Callery. The Board explained its reasoning in full.

The Estate argues that the Board cannot make credibility determinations based on differences presented by deposition testimony as there is no basis to judge the manner and demeanor of the witnesses. Although a credibility determination as to deposition testimony is not given the deference generally ascribed to live testimony because the deponent is not physically present at the hearing and cannot be "sized up" against appearing witnesses,[13] deposition testimony can still be persuasive and carry weight. The Estate's principal expert Dr. Callery testified via deposition. Employer's principal expert, Dr. Walkerstein, testified in like manner. Other experts appeared at the hearing, including Dr. Tobin for Employer and Dr. Rodgers for the Estate. The Board found Drs. Tobin and Walkerstein to be more persuasive and explained its rationale. Dr. Walkerstein is a pulmonologist, and the Board could give weight to his credentials and the live testimony of Dr. Tobin over Dr. Rodgers who testified in person and over the deposition testimony of Dr. Callery.

***4** If the Estate's position were accepted, then the Board will always be constricted to prefer live over deposition testimony. It is central to the Board's function to resolve conflicts in the medical testimony.[14] In this case, the Board performed this function and made clear findings on a wealth of conflicting medical evidence.

Finally, the Estate argues that the Board erroneously ruled that an adverse inference would be applied to any questions about the autopsy results. In its decision, the Board found that with or without an adverse inference, the Estate had not carried its burden of proof. That is, the Board did not use the adverse inference, so questions of its applicability are moot.

The Board's decision is based on substantial evidence and free from legal error. The Board acted well within its discretion in accepting the opinions of Dr. Tobin and Dr. Walkerstein that suffocation that caused the death and that no evidence existed to show permanent impairment distinct from suffocation.

Conclusion. The Board's decision denying the Estate's petition for permanency awards is **AFFIRMED,** and the Estate's appeal is **DENIED.**

IT IS ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

All Citations

Not Reported in A.3d, 2012 WL 6846555

Footnotes

1 Although the caption names the employer as "Allen" the record shows that the name is "Allen Family Foods."

2 *Ohrt v. Kentmore Home,* 1996 WL 527213 (Del.Super.).

3 *Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892 (Del.1994).

4 *Johnson v. Chrysler Corp.,* 213 A.2d 64 (1965).

5 *General Motors Corp. v. McNemar,* 202 A.2d 803 (Del.1964).

6 *Standard Distributing Co. v. Nally,* 630 A.2d 640 (1993).

7 *Wilmington Fibre Specialty Co. v. Rynders,* 316 A.2d 229 (Del.Super.), *aff'd* 336 A.2d 580 (Del.1975).

8 *Hildebrandt v. Daimler Chrysler,* 2006 WL 3393588 (Del.Super.).

9 902 A.2d 1079 (Del.2006).

10 *Id.*

11 *See, e.g., Elliott v. State,* 2012 WL 2553327 (Del.Super.); *Lopez v. Parkview Nursing Home,* 2011 WL 900647 (Del.Super.); *Bromwell v. Chrysler, LLC,* 2010 WL 4513086 (Del.Super.).

12 *Di Sabatino Bros., Inc., supra.*

13 *Lindsey v. Chrysler Corporation,* 1994 WL 750345 (Del.Super.) (cited with approval, *Rhinehardt–Meredith v. State,* 2008 WL 5308388 (Del.)).

14 *Id.* (citing *Anchor Motor Franchise v. Unemployment Insurance Appeal Bd.,* 325 A.2d 374 (Del.1974) and *GMC v. McNemar,* 202 A.2d 803 (Del.1964).

End of Document

BEFORE THE INDUSTRIAL ACCIDENT BOARD
OF THE STATE OF DELAWARE

JOSUE POLANCO,	)	
	)	
Employee,	)	
	)	
v.	)	Hearing No. 1431892
	)	
PORT TO PORT INTERNATIONAL,	)	
	)	
Employer.	)	

ORDER

This matter came before the Board on February 4, 2016. Josue Polanco ("Claimant") filed an initial Petition to Determine Compensation Due on September 11, 2015, alleging that he was injured in a compensable work accident on August 24, 2015.

Claimant now comes with a motion seeking (a) to preclude the assertion of the forfeiture defense by Port to Port International ("Employer") or, in the alternative, to preclude or limit the testimony of Dr. Dennis Andrews; (b) to preclude any testimony alleging that Claimant had driven recklessly prior to the date of the alleged work accident; and (c) for a continuance of the hearing on the merits of his petition, scheduled for February 25, 2016. The order granting the continuance was previously issued. *See Polanco v. Port to Port International*, Del. IAB, Hearing No. 1431892 (February 4, 2016)(ORDER). This is the Board's decision as to the remainder of the motion.

Background: Claimant alleges that, on August 24, 2015, he was driving a "jockey truck" with an attached container when it overturned or flipped while on the premises of Employer. Employer does not dispute that the truck overturned, but it alleges forfeiture on the basis of Claimant's reckless driving in violation of specific warnings from Employer. The Workers' Compensation Act has a specific statutory provision concerning the "limited circumstances"

under which a forfeiture of benefits may be invoked. *Johnson Controls, Inc. v. Fields*, 758 A.2d 506, 509 (Del. 2000). Title 19, section 2353 of the Delaware Code sets forth the grounds for forfeiture. The present case does not involve a refusal of reasonable medical services offered by the employer. *See* DEL. CODE ANN. tit. 19, § 2353(a). It does not concern an employee's refusal of suitable employment. *See* DEL. CODE ANN. tit. 19, § 2353(c). It does not involve the incarceration of an employee. *See* DEL. CODE ANN. tit. 19, § 2353(d). As the Board understands it, it also does not involve a claim of an employee's intoxication; Claimant's "willful intention to bring about the injury or death" of himself or another employee; or a "willful failure or refusal to use a reasonable safety appliance provided for the employee or to perform a duty required by statute." DEL. CODE ANN. tit. 19, § 2353(b). The only remaining forfeiture category would be if Claimant's actions could be classified as a "deliberate and reckless indifference to danger." DEL. CODE ANN. tit. 19, § 2353(b). "Deliberate and reckless" actions are considerably more egregious than mere negligence. Negligence is not a defense to a workers' compensation claim. DEL. CODE ANN. tit. 19, § 2314.

Issues:

Preclude Defense: Claimant asserts first that Employer should be precluded from asserting the forfeiture defense as a matter of law. Claimant observes that a respected treatise on workers' compensation law treats "deliberate and reckless indifference to danger" as the equivalent of "willful misconduct." *See* 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation, Desk Edition*, § 34.01 (Matthew Bender, Rev. Ed.)("*Larson*"). An act is considered "wilful" if it is "done intentionally, knowingly, purposely, and without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently." *Stewart v. Oliver B. Cannon & Son, Inc.*, 551 A.2d 818, 823 (Del. Super. 1988)(citing *Lohdell*

Car Wheel Co. v. Subielski, 125 A. 462 (Del. Super. 1924)). The "magnified statutory phrase 'wilful intention' suggests more than a simple act of volition." *Delaware Tire Center v. Fox*, 411 A.2d 606, 607 (Del. 1980). Claimant argues that, even if one accepts all of Employer's allegations as true, Employer cannot prove that Claimant deliberately or wilfully intended to have an accident. *See Hill v. Kroeger's Salvage Inc.*, Del. IAB, Hearing No. 1304723, at 10 (November 7, 2007).

Employer argues that Claimant has stated no basis that would justify prohibiting the forfeiture defense as a matter of law. Employer will have the burden of proof at the hearing to establish the necessary factors to establish forfeiture, but it cannot be said *as a matter of law* that it is impossible for an employer to prove forfeiture. Employer also argues that, the commentary in *Larson* notwithstanding, the Delaware statute has grounds for forfeiture that expressly require "wilful" conduct, but the provision that Employer is relying on uses the phrasing "deliberate and reckless indifference" rather than "wilful indifference." Presumably, Employer argues, the General Assembly used different language intentionally.

The Board agrees that there is no basis to preclude the assertion of the defense. Whether Employer will be able to establish the factual support for the defense is a factual issue for the hearing on the merits. The Board disagrees with Claimant's suggestion that Employer must show that Claimant deliberately intended to cause an accident or to be injured.[1] The standard is whether Claimant had a "deliberate and reckless indifference to danger." That does not require him to have intended to have an accident. Rather, under this standard, Employer must establish (a) that Claimant's actions show he was indifferent to a danger; (b) that that indifference was a deliberate choice on Claimant's part; and (c) that that deliberate choice was reckless. All three

[1] This standard is more appropriate for another basis for forfeiture under the Act, namely a "wilful intention to bring about the injury or death of the employee or of another." DEL. CODE ANN. tit. 19, § 232353(b). Employer is not alleging that Claimant intended to bring about anybody's injury or death.

factors must be shown. A claimant violating an employer's order may be deemed to have acted "deliberately" but that does not necessarily mean that the actions taken were reckless or indifferent to the danger. *See Irwin v. Layaou Landscaping*, Del. IAB, Hearing No. 1412131, at 13 (December 23, 2014). On the other hand, willfully disobeying an order can amount to a deliberate and reckless indifference to danger. *See Murphy v. UE&C Catalytic, Inc.*, Del. Super., C.A. No. 95A-01-006, Herlihy, J., 1995 WL 465194 at *2 (July 11, 1995). In *Murphy*, a doctor recommended in 1990 that the employee avoid heavy manual labor. In 1993, the employee alleged that he was hurt at work while placing "manway plugs weighing approximately 250 pounds." *Murphy*, 1995 WL 465194 at *1. The Court stated that the threshold issue was whether the employee "knowingly and wilfully disobeyed his doctor's orders not to engage in heavy manual labor thereby manifesting a deliberate and reckless indifference to danger." *Murphy*, 1995 WL 465194 at *2. The Court noted that this determination required an assessment as to whether the doctor's recommendation amounted to an "order" or was only "advice," because that distinction might implicate whether the employee's actions were "wilful" or just "careless." *Murphy*, 1995 WL 465194 at *3 & n.3. Similarly, in this case, one of the issues for the Board to consider will be whether Employer's directions to Claimant amounted to an order or just advice.

Preclude or Limit Witness Testimony: Claimant seeks to limit or exclude the testimony of Dr. Dennis Andrews, an accident and safety consultant, on the basis of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Employer argues that Claimant has asserted no scientific basis to challenge Dr. Andrews' scientific conclusions concerning accident reconstruction.

The purpose of a *Daubert* scrutiny is to ensure that the reasoning or methodology of an expert's proposed testimony is scientifically valid and can properly be applied to the facts in issue. *See Daubert*, 509 U.S. at 592-93 ("This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.").[2] The questions to be considered are:

> (1) Is the reasoning or methodology underlying the opinion scientifically valid?
> (2) Can that reasoning or methodology be properly applied to the facts at issue?
> (3) Has the theory or technique been tested, subject to peer review and publication?
> (4) Is it generally accepted?

Bolden v. Kraft Foods, Del. Supr., No. 363, 2005, at ¶ 11 (December 21, 2005)(ORDER).

As Employer points out, Claimant offers no specific objections to Dr. Andrews' scientific qualifications to determine the speed of the vehicle at the time of the accident or the likely physical causes of the accident (such as making too sharp a turn at speed or the effect of cargo shifting). The Board finds that Dr. Andrews can testify as to such thing within the accepted science for accident reconstruction.

Claimant's objections, however, seem more directed to other parts of Dr. Andrews' report. Specifically, Claimant points out that Dr. Andrews, in his report, references alleged prior warnings Claimant was given concerning his driving. Claimant argues that such prior warnings are not valid evidence that Claimant was speeding at the time of the work accident. While the Board will discuss the general admissibility of such evidence below, with respect to the opinions of Dr. Andrews the Board agrees that, scientifically, Claimant's driving record does not provide

[2] *Daubert* focuses on the basic threshold issue of the scientific foundation for a witness' opinion. It should not be confused with consideration of the appropriate weight to be given that testimony. *Daubert* goes to the *admissibility* of the testimony, not the weight admissible evidence should be given.

evidence concerning the speed or physical causes of the accident on August 24, 2015. It would be inappropriate for Dr. Andrews to reference such driving record with respect to his scientific conclusions.

Even more to the point, Claimant objects to the fact that, multiple times in the report, Dr. Andrews classifies Claimant's actions as "reckless" or stating that the accident happened because the vehicle was being operated "recklessly."[3] As mentioned above, the question for the Board under the statute is whether the accident was the result of Claimant's "deliberate and reckless indifference to danger." That is a legal conclusion for the Board to make based on the facts presented at the hearing. It is beyond the scope of a truly scientific opinion to render such a value judgment as to Claimant's actions.

Accordingly, the Board finds that Dr. Andrews may offer a scientific opinion concerning the physical details of the August 24th accident, including the speed of the vehicle and the effect of other physical factors in causing the accident. Dr. Andrews is prohibited from opining on whether Claimant's actions or conduct were reckless in nature.

Preclude Prior Acts Evidence: Claimant seeks an order precluding at the hearing evidence of prior citations or warnings given to Claimant for speeding or engaging in reckless driving in Employer's yard. Claimant argues that under the Delaware Rules of Evidence, Rule 404(b), prior bad acts are not admissible to prove the character of Claimant in order to show that he acted in conformity therewith. For example, the mere fact that Claimant may have driven at an excessive speed in the past is not admissible to show that he drove at an excessive speed on this occasion.

[3] These were not just stray remarks. In a report that is less than three pages in length, Dr. Andrews managed to use the words "reckless" or "recklessly" nine times.

Employer states that it is not seeking to admit the evidence for that purpose. Rather, it is necessary evidence to show the "deliberate" nature of Claimant's acts. If Claimant has been warned multiple times before not to drive at a high rate of speed in the yard and the scientific evidence shows that, at the time of the accident, he was driving at a high rate of speed, the fact that he did not comply with the earlier warnings is evidence suggesting that his speeding was done with "deliberate and reckless indifference." Phrased another way, the evidence of prior acts is not to show that Claimant *was* speeding but that he knew he was not supposed to be travelling at such speed.

The Board agrees with Employer that the evidence of prior warnings and citations is relevant for the purpose stated. While the prior warnings and citations do not establish or permit the inference that Claimant was speeding on August 24, those warnings and citations can be used to show that Claimant was aware of what behavior was expected of him in the yard. This is relevant evidence to the determination of whether Claimant's actions on August 24 were done with deliberate and reckless indifference.

Economics: Finally, Claimant objects that, unlike Employer, he cannot afford to hire an accident reconstructionist to provide testimony contrary to Dr. Andrews, particularly as such expert fees may not be reimbursable even if Claimant wins.[4] However, the Board simply cannot

[4] The Workers' Compensation Act expressly provides that a successful claimant is to be awarded the fees of *medical* witnesses, taxed as a cost to the employer. DEL. CODE ANN. tit. 19, § 2322(e). The fees of a non-medical expert witness cannot be awarded under this section. The Act does provide that "[c]osts legally incurred may be taxed against either party or apportioned between parties at the sound discretion of the Board, as the justice of the case may require." DEL. CODE ANN. tit. 19, § 2320(8). While this language is broad enough to allow awarding the costs of a non-medical expert, under the so-called "American Rule" in litigation parties are normally expected to bear their own costs. As such, in the absence of a specific statutory provision such as section 2322(e), the award of costs generally only happens when there has been egregious conduct on the part of the losing party or there is evidence of bad faith by a party resulting in increased costs in the litigation. *See Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997)(citing *Barrows v. Bowen*, Del. Ch., No. 1454-S, Allen, C., 1994 WL 514868 (September 7, 1994)), *aff'd sub nom. Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542 (Del. 1998).

rule that Employer is prohibited from mounting a defense simply because Claimant's finances are bad.

Conclusion: For the reasons stated, the Board finds that Employer may assert a forfeiture defense to Claimant's claim based on deliberate and reckless indifference to danger. Dr. Andrews may offer a scientific opinion concerning the physical details of the August 24th accident, but he is prohibited from opining as to whether Claimant's actions or conduct were reckless in nature. Employer may present evidence concerning Claimant's prior citations and warnings concerning his driving to try to establish that Claimant was aware of what behavior was expected of him in the yard and to argue that acting contrary to those warnings evidence his deliberate and reckless indifference.

IT IS SO ORDERED this 8th day of March, 2016.

INDUSTRIAL ACCIDENT BOARD

LOWELL L. GROUNDLAND

Marilyn J. Dotts for John D. Daniello

JOHN D. DANIELLO

I, Christopher F. Baum, Hearing Officer, hereby certify that the foregoing is a true and correct decision of the Industrial Accident Board.

Mailed Date: 3-10-16

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Vicki FOUNTAIN, Claimant Below–Appellant,
v.
MCDONALD'S, Employer Below–Appellee.

C.A. No. S15A–07–005 MJB
|
Submitted: March 7, 2016
|
Decided: June 30, 2016

Upon Appellants' Appeal from the Industrial Accident Board's Decision, **AFFIRMED.**

Attorneys and Law Firms

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OPINION

BRADY, J.

I. INTRODUCTION AND PROCEDURAL HISTORY

***1** This is an appeal from a decision of the Industrial Accident Board ("Board") dated July 1, 2015. [1] On August 12, 2001, Victoria Fountain ("Appellant") injured her back when she slipped and fell on ice while working for McDonalds ("Appellee"). Following the August 12, 2001 accident, Appellant received a substantial amount of medical treatment, a large portion of which was paid for by Appellee's **workers' compensation** carrier. [2]

On October 12, 2005, Appellant filed a Petition to Determine Additional Compensation Due (the "2006 Petition"), seeking payment of outstanding medical expenses for treatment to her lower back provided by Dr. Ganesh R. Balu ("Dr. Balu") and Dr. Uday S. Uthaman ("Dr. Uthaman"). [3] On August 1, 2006, the Board granted the 2006 Petition and awarded Appellant attorney and witness fees. [4]

On December 17, 2014, Appellant filed a Petition to Determine Additional Compensation Due (the "2014 Petition") against Appellee, seeking compensation for a surgery she had on September 25, 2014, and related medical treatment. [5] Appellant alleged that the surgery and related treatment, as well as work restrictions issued following the surgery, were reasonable, necessary, and causally related to her August 12, 2001 work accident. [6] A hearing on the merits took place before the Board on June 19, 2015. [7]

On July 1, 2015, the Board denied the 2014 Petition, holding that Appellant had failed to meet her burden to prove that her 2014 surgery and related treatment was necessary, reasonable, and casually related to the August 12, 2001 work accident. [8] On July 22, 2015, Appellant filed a timely appeal of the Board's decision. [9] On September 3, 2015, Appellant filed her Opening Brief, and on October 26, 2015, Appellee filed an Answering Brief. [10] On November 9, 2015, Appellant filed a Reply Brief. [11] On March 7, 2016, the Court held oral arguments and advised the parties that the matter was taken under advisement. [12]

For the reasons outlined below, the Board's decision is **AFFIRMED.**

II. *THE 2006 PETITION* [13]

On March 27, 2006, the Board conducted a hearing on Appellant's Petition to Determine Additional Compensation Due. Dr. Balu, a board certified pain management and physical medicine and rehabilitation specialist, testified on behalf of Appellant. Dr. Balu summarized Appellant' relevant medical history, including that in the early 1970s, Appellant had surgery for developmental scoliosis. He noted Appellant had intermittent back pain over the years, but never to the extent that she had to go through a lot of treatment. Dr. Balu testified that Appellant "did very well for a long time." He concluded that Appellant was suffering from lumbar facet syndrome, lumbar radiculopathy, and post-traumatic

spondylolisthesis. Dr. Balu characterized Appellant's back symptoms and treatment prior to the 2001 work accident as infrequent and intermittent, and opined that all three of Appellant's then present conditions were casually related to the August 2001 work accident.

***2** Appellant testified at the hearing. Appellant stated that she had back pain prior to the 2001 work accident, that she had surgery for scoliosis when she was fifteen years old, and that her life was fairly normal after the surgery. Appellant acknowledged that in June of 2001 she saw Dr. Richard Sternberg ("Dr. Sternberg"), an orthopedic surgeon, and reported back pain at a level of 7 out of 10, that her pain had been getting worse, and that therapy had increased her pain. Appellant further testified that she saw Dr. Luis Cabral, ("Dr. Cabral") a rheumatologist, on August 9, 2001, and had an injection after reporting "killing type" pain.

Dr. David Sopa ("Dr. Sopa"), an orthopedic surgeon, testified on behalf of Appellee. Dr. Sopa examined Appellant on July 21, 2003 and February 15, 2006. Dr. Sopa opined that Appellant's treatment had been reasonable and necessary, but not all of the treatment was related to the August 2001 work accident. Specifically, Dr. Sopa opined that Appellant reached her Maximum Medical Improvement ("MMI") sometime before their July 2003 examination. Dr. Sopa further opined that any injections Appellant had relating to her facet arthropathy were not related to her work accident, but were instead related to her scoliosis and degenerative condition.

The Board was not convinced by Dr. Sopa's testimony. Rather, the Board summarized his opinion by stating, "[e]ssentially, Dr. Sopa opines that it is coincidental that the severity of [Appellant's] symptoms from her pre-existing degenerative condition became significantly worse in the years following her work accident." The Board held that Appellant's work accident aggravated or accelerated Appellant's condition. The Board further held that Appellant's August 12, 2001 work accident caused Appellant's lumbar facet syndrome, lumbar radiculopathy, and post-traumatic spondylolisthesis. The Board concluded that Appellant had met her burden of proving that the treatment to Appellant's back provided by Dr. Balu and Dr. Uthaman was reasonable, necessary and causally related to the August 12, 2001 work accident.

III. *THE 2015 PETITION*

On June 19, 2015, the Board conducted a hearing on Appellant's Petition to Determine Additional Compensation Due.[14] The issues before the Board were whether compensation for the September 25, 2014 surgery and related medical treatment was reasonable, necessary, and casually related to the August 12, 2001 work accident and whether the testimony of Dr. Stephens should be excluded.

A. Medical Treatment

The transcript of the deposition of Dr. Kennedy Yalamanchili ("Dr. Yalamanchili"), a neurosurgeon, was read into the record at the hearing.[15] Dr. Yalamanchili stated that because Appellant had failed to respond to conservative treatment she was a candidate for surgery, specifically an extension of her decompression and spinal fusion to incorporate two discs—L4–5 and L5–S1.[16] On September 25, 2014, Dr. Yalamanchili performed surgery and found substantial disc problems at both the LA–5 and L5–S1 levels including severe nerve impingement.[17] Dr. Yalamanchili testified that the surgery was reasonable, necessary, and causally related to the 2001 work accident.[18] Specifically, he stated that Appellant had a "diagnosis of the spondylolisthesis in 2002, which I'm proposing *probably* stemmed from this injury."[19] Dr. Yalamanchili further testified that "it's possible she may have required this surgery at some time in the future; maybe never would, I think, *probably* be the accurate answer."[20] Indeed, Dr. Yalamanchili concurred with Dr. Stephens that, "from a degenerative perspective, adjacent level disc problems can occur."[21]

***3** Appellant testified at the hearing.[22] She indicated that prior to the work accident her pain levels were approximately a 7 or 8 out of 10 and that her pain levels at the time of the hearing were about 8 out of 10, but some days were better and some days were worse.[23]

The transcript of the testimony of Dr. David Stephens ("Dr. Stephens"), an orthopedic surgeon, was also read into the record at the hearing.[24] Dr. Stephens testified that he had reviewed medical records from Dr. Uthaman (from the Delaware Pain and Spine Center), Dr. Swaminathan, Dr. Antony (from the Delaware Open MRI), Nanticoke Health Services and Rehabilitation Services, Dr. Sternberg, Dr. Sopa, Dr. Cabral, Dr. Balu, and Dr. Mehdi.[25] Dr. Stephens was

also provided an operative note by Dr. Yalamanchili.[26] Dr. Stephens opined that Appellant's lumbar complaints were not causally related to the work accident and that Appellant most likely would have needed the spinal fusion regardless of whether the work accident had occurred.[27] Dr. Stephens opined that had the 2014 surgery been causally related to the 2001 work accident, it would have occurred closer in time to the work accident and not thirteen years later.[28] Dr. Stephens further testified that there were convincing and consistent records of the problems Appellant was experiencing arising in patients who had "scoliosis surgery performed of this exact type at these exact levels" forty years prior.[29] Dr. Stephens noted that Appellant was evaluated in 2003 by Dr. Sopa who concluded that Appellant's lumber symptoms were most likely the result of arthritic changes, which occurred over time at L5–S1 following her thoracolumbar spine fusion.[30] Dr. Stephens concluded that the treatment Appellant received was reasonable and necessary as a follow up to her 2014 spinal surgery, but that the surgery was not causally related to the work accident, but, rather to arthritic changes, which were directly caused by the 1975 scoliosis surgery.[31]

The Board found that the evidence showed that Appellant suffered from the same lumbar complaints prior to the work accident that she did following the work accident, which supported Dr. Stephens' conclusion that Appellant's 2014 surgery and related treatment was causally related to her scoliosis surgery and degenerative arthritic changes and not to the work accident.[32] The Board noted that even Dr. Yalamanchili agreed that Appellant's pre-existing condition that led to her spinal deterioration could have necessitated the surgery.[33] The Board further noted that Dr. Sopa, in 2003, determined that Appellant's 2001 work accident had not produced any long term problems.[34] Based on this evidence, the Board found Dr. Stephens opinions to be more persuasive than Dr. Yalamanchili because "they correspond with the evidence and testimony more accurately."[35] As a result, the Board held that Appellant had failed to met her burden of proving that her 2014 surgery and related treatment was necessary, reasonable, and causally related to the August 12, 2001 work accident.[36] The Board noted that most of the evidence suggested that the 2014 surgery and related treatment was causally related to the Appellant's scoliosis surgery and subsequent spinal deterioration.[37]

B. Motion to Strike

***4** At the June 19, 2015 hearing, Appellant argued that the testimony of Dr. Stephens should be excluded and the Appellee should be precluded from presenting any defense at the hearing, because Appellee failed to timely file a **Pre–Trial Memorandum** and forward a copy to Appellant's counsel, and produced Dr. Stephens expert report past the deadline set by the Board.[38] The Board noted that Appellant received the defense's medical examination report on June 5, 2015, two days prior to the defense expert's deposition.[39] The Board further noted that Appellant received the **Pre–Trial Memorandum** on June 14, 2016, before Appellant's own medical expert's deposition, but after the deposition of the defense's medical expert.[40]

The Board held that because the expert report was produced within thirty days of the date of the hearing Appellee did not violate the Board's rules and the circumstances did not justify the exclusion of the doctor's testimony.[41] The Board noted that because the then pending petition did not involve a claim of permanent impairment, Board Rule 9 did not require that a medical report be produced.[42] The Board further found that, because the expert report was provided to Appellant twelve days prior to the deposition of Appellant's expert, and because Appellee's defense of lack of causal relationship was not unique or uncommon, there was no unfair surprise or prejudice that warranted the exclusion of Appellee's medical expert.[43] The Board denied Appellant's Motion to Strike Dr. Stephens' Testimony.[44]

IV. THE PARTIES CONTENTIONS

A. Appellant's Arguments

Appellant raises three issues on appeal: (1) the doctrine of collateral estoppel and *res judicata* precluded the Board from relying on Dr. Sopa's prior medical opinion; (2) the Board erred in permitting Appellee to present expert medical testimony and to present a defense to the petition; and (3) the Board's decision was not supported by substantial evidence.[45]

i. Collateral Estoppel and Res Judicata

Appellant argues that Dr. Stephens' opinions were in agreement with, and largely reliant on, Dr. Sopa's 2003 opinion that Appellant's lumbar symptoms were the result of arthritic changes unrelated to the work accident, as well as Dr. Sopa's 2006 opinion that the treatment from 2004 to 2006 for degenerative disk diseases and spondylolisthesis were unrelated to the work accident. [46] Appellant contends that the Board was presented with Dr. Sopa's opinion when it made its 2006 ruling and specifically rejected Dr. Sopa's opinion, finding that "the August 12, 2001 work accident caused [Appellant's] lumbar facet syndrome, lumbar radiculopathy and post-traumatic spondylolisthesis." [47] Appellant argues that the Board is bound by its prior factual determinations and that the doctrine of *res judicata* prevents the Board from reviewing the correctness of its prior ruling. [48] Appellant further contends that she is not asking the Court to find the doctrine of collateral estoppel prevents the Board from deciding two different issues—the compensability of medical expenses for treatment to Appellant's back provided by Dr. Balu and Dr. Uthaman (the issue at the 2006 hearing) and the compensability of the 2014 surgery (the issue at the 2015 hearing). [49] Instead, Appellant argues that collateral estoppel prevents the Board from reconsidering the findings of fact made by the Board in its 2006 decision. [50]

ii. Expert Testimony and Presentation of a Defense

***5** Appellant notes that she received the defense's medical examination report on June 5, 2015, two business days prior to the defense expert's deposition, and received the **Pre–Trial Memorandum** on June 14, 2016, after the deposition of the defenses' medical expert but before the deposition of her medical expert. [51] Appellant argues that the late submission of the **Pre–Trial Memoranda** violated Board Rule 9, which states, in pertinent part, "[e]ither party may modify a **Pre–Trial Memorandum** at any time prior to thirty (30) days before the hearing. Amending the **Pre–Trial Memorandum** by written notice to the opposing party and the designated employee of the Department of Labor may be made in accord with this Rule..." [52]

Appellant argues that she was placed at a significant disadvantage in preparing and presenting her claims because she had no information as to what witnesses Appellee intended to call and what defenses those witnesses' testimony would support. [53] Specifically, Appellant contends that because she received the defenses' medical report two business days before the deposition of the expert, she was deprived of a sufficient opportunity to fully evaluate the report, to consult with her medical witness regarding the opinions, did not know what defense Appellee would present, and could not adequately prepare to defend the deposition. [54]

Appellant argues that the fact that there was no continuance requested is irrelevant because it was not Appellant's responsibility to cure procedural issues caused by Appellee. [55] Appellant further argues that the fact that the parties complied with a ruling that they submit a Stipulation of Facts immediately prior to the hearing is also irrelevant and does not excuse Appellee's failure to comply with Board Rule 9. [56]

iii. Substantial Evidence

Appellant argues that Dr. Stephens' testimony and conclusions lack the necessary foundation and therefore the Board's reliance on his testimony resulted in a decision that was not supported by substantial evidence. [57] Specifically, Appellant notes that Dr. Stephens conceded that he lacked a substantial amount of medical records in the case, having not received the family doctor or other providers' medical records. [58]

Appellant argues that Dr. Stephens' opinion was unsupported by the evidence presented at the hearing. Specifically, Appellant argues that Dr. Sopa's opinions should have been "strip[ped] away" from Dr. Stephens' opinions because the Board had rejected Dr. Sopa's opinion in its 2006 decision. [59] Appellant argues that Dr. Stephens' opinions have a lack of foundation and do not establish substantial evidence if Dr. Sopa's opinion is not considered. [60] Appellant contends that "Dr. Stephens' opinions rely almost entirely on the previously discredited opinions of Dr. Sopa." [61]

B. Appellee's Arguments

i. Collateral Estoppel and Res Judicata

Appellee argues that the Board's 2015 finding was based on different facts and was on a different issue than addressed in the Board's 2006 decision and therefore the doctrines of *res judicata* and collateral estoppel are not applicable. [62] Specifically, Appellee notes that the Board's 2006 opinion was for compensability of medical treatment by Dr. Balu and the Board's 2015 decision was to determine the

compensability of a surgery by Dr. Yalamanchili. [63] Appellee further argues that the facts are different as emphasized by Appellant's inconsistent testimony at both hearings. [64]

ii. Expert Testimony and Presentation of a Defense

***6** Appellee argues that because the claim was not for permanent impairment, the Board rules in general and Board Rule 9 specifically do not require production of a medical report and that the real issue is whether the late submission of Dr. Stephens' report and the **Pre–Trial Memorandum** constituted unfair surprise to Appellant. [65] Appellee further argues that there was no unfair surprise because Appellant had the report two business days before Dr. Stephens' deposition was taken and twelve days before the deposition of Appellant's expert. [66] Appellee contends that there was no surprise because lack of causal relationship is a common defense. [67] Appellee further notes that Appellant did not request a continuance of the hearing due to the timing of the receipt of the submissions and that Appellant's counsel is an experienced practitioner of **Workers Compensation** and was able to adequately cross-examine Dr. Stephens. [68]

iii. Substantial Evidence

Appellee argues that this Court cannot review the Board's credibility determination. Specifically, Appellee contends that under Delaware law when the Board finds one witness more credible than another no more clarification is needed. [69] Appellee argues that even if this Court can review the Board's finding, Appellant failed to argue below that Dr. Stephens' opinion lacked a proper foundation and such an argument was therefore waived by Appellant. [70] Appellee further argues that Appellant is impermissibly requesting the Court to evaluate the facts submitted at the hearing and ultimately conclude that Dr. Yalamanchili's opinion is more persuasive.

V. STANDARD OF REVIEW

The Court has a limited role when reviewing a decision by the Board. If the decision is supported by substantial evidence and free from legal error, [71] the decision will be affirmed. [72] Substantial evidence is evidence that a reasonable person might find adequate to support a conclusion. [73] The Board determines credibility, weighs evidence, and makes factual findings. [74] This Court does not sit as the trier of fact, nor should the Court substitute its judgment for that rendered by the Board. [75] The Court must affirm the decision of the Board even if the Court might have, in the first instance, reached the opposite conclusion. [76] The Board has the discretion to accept the testimony of one expert over that of another expert when evidence is in conflict and the opinion relied upon is supported by substantial evidence. [77] When reviewing an appeal from the Board, this Court must consider the record in a light most favorable to the party prevailing below. [78] When factual determinations are at issue, the Court must take due account of the experience and specialized competence of the Board and the purpose of the **Worker's Compensation** Act. [79] Questions of law are reviewed *de novo*. [80]

VI. ANALYSIS

A. Expert Testimony and Presentation of a Defense

***7** "Delaware courts defer to an agency's interpretation of statutes it is empowered to enforce if such interpretation is not 'clearly erroneous.' " [81] The Court's review is limited to determine whether the agency "exercised its power arbitrarily or committed an error of law, or made findings of fact unsupportable by substantial evidence." [82] "The Board's rules of procedure are promulgated for the 'more efficient administration of justice.' " [83] Enforcement of the Board's rules "serves the interests of order and efficiency in Board proceedings as well as the prevention of unfair surprise." [84]

Appellant's argument that late production of Appellee's medical examination report violated Board Rule 9 is without merit. Board Rule 9(B)(5)(d) only requires a party to produce a medical expert report when the claim is for compensation for permanent injuries under 19 *Del.* C. § 2326. [85] In the instant matter, Appellant seeks compensation for a surgery and related treatment, not for a permanent injury. Appellant's claim is not based on 19 Del. C. § 2326, and Board Rule 9(B)(5)(d) does not require Appellee to provide a medical report in their **Pre–Trial Memorandum**. No other Board rule requires disclosure of a medical report. The Board found the postponed production of the report did not violate Board Rule 9 because it was not a claim for permanent impairment and therefore did not necessarily justify the exclusion of Dr. Stephens' testimony. Based on a review of the Board's rules, the Court is satisfied that this finding was not clearly erroneous.

Appellant next argues that the Board's ruling with regard to the late production of the **Pre–Trial Memorandum** was reversible error. That claim is similarly without merit. The Delaware Supreme Court has emphasized that enforcement of the Board's rules serves the interests of order and efficiency in Board proceedings as well as the prevention of unfair surprise. [86]

The Board weighed the impact of the late submission of the **Pre–Trial Memorandum** on the parties' ability to have a fair hearing on the merits and on the Board's ability to make a just determination of the petition. [87] The Board noted that Appellant had a right to know what the opinion of Appellee's expert witness was in a timely fashion so that she could prepare to cross-examine the expert. [88] The Board further noted that the "real question" was whether the late submission constituted unfair surprise to Appellant. [89] In weighing the impact of the late submission, the Board found that there was no unfair surprise because Appellee's defense was not a unique or uncommon defense and Appellant had a fair opportunity to review and comment on Dr. Stephens' report prior to her expert's testimony. [90] The Board further noted that the exclusion of Dr. Stephens' testimony would be extremely prejudicial to Appellee and in the absence of unfair surprise denied Appellant's motion. [91]

***8** The Court is satisfied that the Board properly applied the law, weighed the impact of the late submission and determined that there was no unfair surprise to Appellant. Appellee's defense is common in the industry, Appellant had the disclosures in time for the expert's deposition, and the record reflects that Appellant rigorously cross examined Appellee's expert. The Court finds that the Board's interpretation and application of its rules was not clearly erroneous.

B. Substantial Evidence

The Board found Dr. Stephens' opinion to be more credible than Dr. Yalamanchili's opinion. [92] Dr. Stephens evaluated Appellant who reported that she had undergone a lumbar spine fusion with Dr. Yalamanchili in September of 2014. [93] Prior to examining Appellant, Dr. Stephens was provided with medical records from Dr. Uthaman (from the Delaware Pain and Spine Center), Dr. Swaminathan, Dr. Antony (from the Delaware Open MRI), Nanticoke Health Services and Rehabilitation Services, Dr. Sternberg, Dr. Sopa, Dr. Cabral, Dr. Balu, and Dr. Mehdi. [94] Dr. Stephens was also provided an operative note by Dr. Yalamanchili. [95] Based on a review of Appellant's medical records and his physical evaluation of Appellant, Dr. Stephens opined that the 2014 surgery was reasonable and necessary, but not casually related to the 2001 work accident. [96] Clearly, Dr. Stephens had sufficient information on which to base an opinion.

Dr. Stephens testified that had the 2014 surgery been causally related to the 2001 work accident, it would have occurred closer in time to the work accident and not thirteen years later. [97] Dr. Stephens further testified that there was convincing and consistent documentation of patients who had Appellant's exact spinal fusions forty years prior experienced medical conditions similar to those Appellant was experiencing. [98] Dr. Stephens opined that, as a result of her surgery in 1975, Appellant would have most likely needed the spinal fusion regardless of whether or not the work accident had occurred. [99] Dr. Stephens therefore concluded that the 2014 surgery and related treatment was reasonable and necessary to address Appellant's medical condition, but that condition was not casually related to the 2001 work accident, but was directly caused by the 1975 scoliosis surgery. [100]

Dr. Yalamanchili testified that he believed the surgery was related to the lumbar facet syndrome, lumbar radiculopathy, post-traumatic spondylolisthesis, spondylosis without myelopathy, and stenosis, which included the conditions the Board previously found Appellant suffered as a result of the work accident. However, Dr. Yalamanchili conceded that Appellant would have probably needed the surgery had the work accident not occurred because the type of surgery that Appellant had in 1975 can cause strain of adjacent discs. [101] Dr. Yalamanchili, however, indicated that the surgery may not have been required within the same time frame, absent the work accident. [102]

***9** In the instant matter, the Board found the testimony of one medical expert more credible than the other, based in part on Dr. Yalamanchili's testimony that Appellant probably would have needed the surgery regardless of the work accident. The Court may overturn the Board's decision about expert witness credibility only if the Court finds that the Board's credibility determination is not supported

by evidence.[103] The Board did not find the surgery was related to the work injury. Appellee's medical expert said so unequivocally. Appellant's medical expert also said Appellant would have probably needed the surgery due to medical conditions apart from the work related injury.[104] There certainly was substantial evidence to support the Board's conclusion.

Appellee claims that because there is reference to Dr. Sopa's findings in Dr. Stephens testimony and the Board in its opinion, there is a violation of the doctrine of *res judicata,* collateral estoppel, or both. Appellant's argument that Dr. Stephens' testimony was "largely reliant" on Dr. Sopa's opinions is misplaced. Nowhere in Dr. Stephens' testimony does he state that he relied on Dr. Sopa's opinions, rather he stated that he reviewed Dr. Sopa's opinions, and acknowledged they were "similar" to his.[105] Dr. Stephen's testimony makes it clear that he came to an independent opinion after evaluating Appellant in person and reviewing extensive medical records.[106] While it is accurate that the Board noted that Dr. Stephens' opinion was more persuasive because it was consistent with Dr. Sopa's prior opinion, the question before the Board was not the issue regarding which the Board previously found Dr. Sopa's testimony was outweighed by contradictory medical expert testimony.[107] Rather, the issue was whether the surgery to address the conditions existing thirteen years later was causally related. The Court is satisfied that there is substantial evidence to support the Board's decision that the 2014 surgery and related treatment, although reasonable and necessary, were not causally related to the 2001 work accident.

The Board's finding was not inconsistent with, or contradictory of, the prior decision in 2006. The Board did not, in the 2015 opinion find that the Defendant's conditions, which it previously found were the result of the work injury, were not casually related to the accident. Rather, the Board found that the 2014 surgery was not related to these conditions but was, instead, necessitated by the degenerative conditions resulting from the scoliosis surgery.

There is, therefore, no violation of either doctrine alleged.

VII. CONCLUSION

The Court is satisfied that the Board's creditability determinations of the expert witnesses were supported by substantial evidence and that the Board's interpretation of Board Rule 9 was not clearly erroneous. For these reasons, the decision below is hereby **AFFIRMED.**

***10 IT IS SO ORDERED.**

All Citations

Not Reported in Atl. Rptr., 2016 WL 3742773

Footnotes

1 *See* Notice of Appeal–Industrial Accident Board, Item 1 (July 22, 2015).

2 Stipulation of Facts, Ex. G to Appellant's Opening Br., Item 8 (Sept. 29, 2015).

3 *See Fountain v. McDonalds,* IAB Hearing No. 1211735 (July 1, 2015).

4 *Id.*

5 *Id.*

6 Id at 2.

7 *Id.*

8 *See id.*

9 Appellant's Opening Br., Item 8 (Sept. 29, 2015).

113 Appellee's Answering Br., Item 11 (Oct. 26, 2015).

11 Appellant's Reply Br., Item 12 (Nov. 9, 2015).

12 *See* Judicial Action Form, Item 14 (March 7, 2016).

13 Unless otherwise noted, the following facts are taken from the Board's Opinion. *See Fountain v. McDonalds,* IAB Hearing No. 1211735 (Aug. 1, 2006).

14 *See* Hearing Tr., Ex. B to Appellant's Opening Br., Item 8 (Sept. 29,2015).

15 *See Id.*

16 Hearing Tr., Ex. B to Appellant's Opening Br., Item 8, at B17–18 (Sept. 29, 2015).

17 Dep. of Dr. Yalamanchili, Ex. D to Appellant's Opening Br., Item 8, at D8 (Sept. 29, 2015).

18 *Id* at D16.

19 *Id.* at D30 (emphasis added).

20 *Id.* at D31 (emphasis added).

21 *Id.*

> Q. Is it possible, without this work incident occurring, that Ms. Fountain would have ultimately needed this surgery to the L4–5 and L4–S1 due to the deterioration of her spine?
>
> A. So the answer is it is possible. You know, the truth is, from a degenerative perspective, adjacent level disc problems can occur. The question is: Did this injury progress or result in its own injury? And the answer is most likely, it's medically most probable that there was some clinical progression, radiographic progression that occurred during that time span that she describes this injury.
>
> So the answer is it's possible she may have required this surgery at some time in the future, probably not within the same time frame; maybe never would, I think, probably be the accurate answer.

Id. at D31.

22 Test. of Appellant, Ex. B to Appellant's Opening Br., Item 8, at B33–49 (Sept. 29, 2015).

23 *Id.* at B46–47.

24 *See* Hearing Tr. Ex. B to Appellant's Opening Br., Item 8, at B49–61 (Sept. 29,2015).

25 Dep. of Dr. Stephens, Ex. E to Appellant's Opening Br., Item 8, at E5 (Sept. 29, 2015).

26 *Id.*

27 *Id.* at E16–17.

28 *Id.* at E18.

29 *Id.* at E16–17.

30 *Id.* at E9–10.

31 *Id.* at E16–17.

32 Board's Op., Ex. A to Notice of Appeal, Item 1, at A13 (July 22,2015).

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at A14.

37 *Id.*

38 Hr'g Tr., Ex. B to Appellant's Opening Br., Item 8, at B4–6 (Sept. 29,2015).

39 Board's Op., Ex. A to Notice of Appeal, Item 1, at A9 (July 22, 2015).

40 *Id.*

41 *Id.* at A10.

42 *Id.*

43 *Id.* at A10–11.

44 *Id.* at All.

45 *See* Opening Br., Item 8 (Sept. 29,2015).

46 *Id*. at 13.

47 *Id*. at 13–14.

48 *Id*. at 14.

49 Reply Br., Item 12, at 1–2 (Nov. 9,2015).

50 *Id.* at 2.

51 Opening Br., Item 8, at 18 (Sept. 29,2015).

52 *Id*. at 17–18.

53 Id. at 18.

54 Id. at 18–19.

55 Reply Br., Item 12, at 6–7 (Nov. 9,2015).

56 *Id.* at 7–8.

57 Id. at 21.

58 *Id.* At Dr. Stephens' deposition Appellant questioned Dr. Stephens "about his lack of the records of Dr. Granada, Dr. Yalamanchili, Christiana Care Health Services, Delaware Spine Institute/Dr. Lieberman, Dr. Sopa's 2006 DME report, Dr. Jason Brokaw's 2007 DME report, Dr. Rosas, Dr. Quinn, Tidewater Physical Therapy and Dr. Somori." Reply Br., Item 12, at 9 (Nov. 9, 2015). Appellant further notes that this argument was presented to the Board during closing argument. *Id.*

59 Reply Br., Item 12, at 8–11 (Nov. 9,2015).

60 *Id* at 10.

61 *Id*.

62 Answering Br., Item 11, at 12 (Oct. 26,2015).

63 *Id*

64 *Id.* at 13–14. Specifically Appellee notes that in 2006 Appellant testified that prior to the work accident she was experiencing pain levels of 3 out of 10, but at the 2015 hearing she said they were at least a 7 or 8 out of 10. *Id.*

65 Answering Br., Item 11, at 16 (Oct. 26,2015).

66 *Id*

67 *Id*. at 17.

68 *Id*. at 17–18.

69 *Id. at* 18–19 (citing *Arrants v. Home Depot,* 65 A.3d 601, 606 (Del.2013) (citing *DiSabatino Bros., Inc. v. Wortman,* 453 A.2d 102, 106 (Del.1982))).

70 *Id*. at 19.

71 *General Motors Corp. v. Freeman,* 164 A.2d 686, 688 (Del.1960).

72 *Sirkin and Levine v. Timmons,* 652 A.2d 1079 (Del.Super.Ct.1994).

73 *Oceanport Indus. Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del.1994).

74 *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66–67 (Del.1965).

75 *Id.* at 66.

76 *Brogan v. Value City Furniture,* 2002 WL 499721, at *2 (Del.Super.Ct. March 27, 2002).

77 *Conley v. Capitol Homes, Inc.,* 2006 WL 2997535, at *5 (Del.Super.Ct. Aug. 31, 2006) (internal citations omitted).

78 *General Motors Corp. v. Guy,* 1991 WL 190491 (Del.Super.Ct. Aug. 16, 1991) (internal citations omitted).

79 *Mangle v. Grotto Pizza, Inc.,* 1997 WL 358671, at *4 (Del.Super.Ct. May 13, 1997).

80 *Christiana Care Health Serv. v. Palomino,* 74 A.3d 627, 629 (Del.2013).

81 *Johnson,* 728 A.2d at 1188 (internal citations omitted).

82 *Olney v. Cooch,* 425 A.2d 610, 613 (Del.1981) (quoting *Kreshtool v. Delmarava Power and Light Co.,* 310 A.2d 649 (Del.Super.Ct.1973)); *see also* *29 Del. C. §* 10142(d).

83 *Conley,* 2006 WL 2997535, at *5 (quoting *Cole v. Department of Corrections,* 1984 WL 547838 (Del.Super.Ct. Feb. 27, 1984)). *See also* 19 *Del. C. §* 2301A(i) ("[The Board's] rules shall be for the purpose of securing the just, speedy and inexpensive determination of every petition pursuant to Part II of this title.").

84 *Id*. (citing *Haveg Industries, Inc. v. Humphrey,* 456 A.2d 1220, 1222 (Del.1983)).

85 *See* Industrial Accident Board Rule 9(B)(5)(d) (Dec. 12, 2011).

86 *Conley,* 2006 WL 2997535, at *5 (citing *Haveg Industries, Inc,* 456 A.2d at 1222).

87 *See* Board's Op., Ex. A to Notice of Appeal, Item 1, at A13–15 (July 22, 2015).

88 *See id.* at A9–11.

89 *Id* at A10.

90 *Id*. at All.

91 *Id*.

92 Board's Op., Ex. A to Notice of Appeal, Item 1, at A13 (July 22,2015).

93 Dep. of Dr. Stephens, Ex. E to Appellant's Opening Br., Item 8, at E5 (Sept. 29, 2015).

94 *Id.*

95 *Id*

96 *Id.* at E17.

97 *Id.* at E18–19.

98 *Id.* at E16–17.

99 *Id.*

100 *Id.*

101 Dep. of Dr. Yalamanchili, Ex. D to Appellant's Opening Br., Item 8, at D31 (Sept. 29, 2015) ("So the answer is it's possible she may have required this surgery at some time in the future, probably not within the same time frame; maybe never would, I think, probably be the accurate answer.").

102 *Id.* at D31.

103 *Coleman v. Dep't of Labor,* 288 A.2d 285, 287 (Del.Super.1972).

104 Dep. of Dr. Yalamanchili, Ex. D to Appellant's Opening Br., Item 8, at D31 (Sept. 29, 2015).

105 *See* Dep. of Dr. Stephens, Ex. E to Appellant's Opening Br., Item 1, ay E15–16 (Sept. 29,2015).

106 *See id.* Dr. Stephens never indicated that he was adopting Dr. Sopa's opinion and was continuously asked if the opinions he was giving where his own. *See id.*

107 The Board found Dr. Stephens' testimony to be more pressuasive because it "corresponded with the evidence and testimony more accurately." Board's Opinion, Ex, A to Notice of Appeal, Item 1, at A13 (July 22, 2015). Specifically, the Board noted that "[i]n 2003, Dr. Sopa concluded that [Appellant's] lumbar symptoms were a result of arthritic changes, which had occurred over time following her thoracolumbar spine fusion. At that time, Dr. Sopa determined that [Appellant's] 2001 work injury had not produced any long term problems." *Id.*

2011 WL 51736
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.

Janet GOLDSBOROUGH, Employee–Appellant,
v.
NEW CASTLE COUNTY, Employer–Appellee.

C.A. N10A–01–013 JRJ.
|
Submitted: Dec. 10, 2010.
|
Decided: Jan. 5, 2011.

Upon Appeal from the Industrial Accident Board: **AFFIRMED.**

Attorneys and Law Firms

Michael R. Ippoliti, Esquire, Wilmington, Delaware, Attorney for Appellant.

Wilson B. Davis, Esquire, Assistant County Attorney, New Castle, Delaware, Attorney for Appellee.

OPINION

JURDEN, J.

INTRODUCTION

***1** Appellant, Janet Goldsborough (hereinafter "Claimant"), files this appeal from the Industrial Accident Board's (the "Board") decision to deny her Petition for Additional Compensation. For the reasons explained below, the Court finds that the Board's decision is supported by substantial evidence and is free from legal error. Accordingly, the Board's decision is **AFFIRMED.**

FACTS AND PROCEDURAL HISTORY

Claimant worked for New Castle County (hereinafter "Employer" or the "County") as a mailroom clerk from 1966 until 1984. Claimant's job entailed lifting heavy boxes, sorting and stamping bills, walking and lifting, and sometimes driving the mail truck. On February 16, 1983, Claimant sustained a compensable industrial injury to her neck and low back. In 1986 she was awarded total disability from August 23, 1985. The Board awarded her an additional 5% permanency in January 1988 and an additional 5% permanency in 1991. Claimant filed a Petition for Additional Compensation in July of 1997, seeking payment for medical expenses. The Board found Claimant had reached maximum medical improvement as of September 21, 1995, and that further treatment was unnecessary. However, the Board awarded Claimant medical expenses for costs incurred *prior* to September 21, 1995. In 1999, the Superior Court and Supreme Court affirmed the 1997 Board decision. [1]

In 2003, Claimant again petitioned for additional compensation. At the Hearing, Claimant's experts opined that her worsening injuries were related to the 1983 accident, while Employer's expert claimed the deteriorating condition was related to degenerative arthritis. The Board found Employer's expert more persuasive and denied Claimant's Petition.

On September 15, 2008, Claimant filed a Petition to Determine Additional Compensation, alleging a recurrence of total disability following neck surgery performed by Dr. Reginald Davis. [2] A **Pretrial** Conference was held on November 6, 2008, and the Petition was scheduled for a Hearing on February 19, 2009. On November 14, 2008, James Robb, Esq. (hereinafter "Robb"), entered his appearance on Employer's behalf. On December 24, 2008, New Castle County Assistant Attorney Wilson Davis, Esq. (hereinafter "Davis"), was formally substituted as Counsel of Record. Robb became the County's "Acting Risk Manager." [3]

The Parties agreed to reschedule the Hearing for April 14, 2009. On March 11, 2009, Employer completed and filed its portion of the **Pretrial Memorandum**. Robb prepared the Employer's portion and signed it as "Attorney for the Employer/Carrier". In the **Pretrial Memorandum**, Employer named two witnesses: "Dr. Steven Friedman" and "Dr. Alan Fink." Employer listed several defenses including, *inter alia,* statute of limitations and estoppel worded as: "[p]rior decisions have decided these issues and are Law of the Case." [4]

On March 13, 2009, Employer filed a Motion to Dismiss, arguing the Petition was time barred pursuant to 19 *Del. C.* § 2361(b), the applicable Statute of Limitations. On March 17, 2009, Davis wrote a letter to Claimant,[5] informing her of the statute of limitations defense, and submitted an 11 page payment log ("First Payment Log"), which documented the County's history of payments in relation to Claimant.[6] Included in the First Payment Log, was an invoice relating to a payment made near the expiration of the limitations period. The invoice established that the payment was made for the deposition of Dr. Alan Fink, Employer's expert medical witness.[7]

***2** Robb, on behalf of the Employer, requested a legal hearing before the Board to consider Employer's Motion to Dismiss, and the hearing was held on March 24, 2009. At the hearing, Robb testified that he was the Acting Risk Manager for Employer, and confirmed the payment log was a County business record that listed payments related to Claimant's work injury. After argument, the Board reserved its decision on the Employer's Motion to Dismiss, and ordered the parties to brief the Statute of Limitations issue.

On April 8, 2009, Robb requested another continuance of the Hearing date, claiming Employer had not been able to procure the deposition of its medical expert, Dr. Friedman. The next day a Hearing was held before the Board where Employer moved to continue the Hearing on the merits and requested reimbursement of cancellation fees regarding Dr. Friedman's deposition. Claimant cross-moved to preclude the testimony of Dr. Friedman and to "freeze the record." The Board entered an Order dated April 9, 2009, which: (1) granted the Employer's motion for continuance; (2) denied the County's motion for cancellation fees; (3) denied Claimant's motion to preclude Dr. Friedman's testimony; and (4) limited both parties "to calling those witnesses identified on the **Pretrial Memorandum**."[8] The Hearing was rescheduled for June 13, 2009.

On April 24, 2009, the Board issued its order on the Employer's Motion to Dismiss. The Board held that "the statute of limitations issue has not been adequately developed to permit a fair decision at this time," and therefore, the Motion to Dismiss was denied. The Board held that the parties should engage in more complete discovery because Employer did not produce the First Payment Log (which established that the statute had run) until a few days prior to the hearing and did not identify a witness who could lay a proper foundation for the log's admittance until the day of the hearing. The Board held that Employer was permitted to raise the statute of limitations defense at the full hearing.

On May 8, 2009, Employer wrote a letter to the Board, copying Claimant, informing the Board of Employer's intention to re-raise the limitations defense. The letter went on to state that Employer intended to have Robb testify regarding the payment log.[9] Enclosed with that letter was an 11 page payment log ("Second Payment Log")[10] and all invoices documenting entries made after the start of the limitations period. Robb certified these payment documents as being "compiled on May 7, 2009 under his direction by the Department of Risk Management of New Castle County; and ... kept in the course or regularly conducted activity of the Department of Risk Management."[11] Claimant took no action in response to the County's May 8th letter and never moved to exclude Robb's testimony.

The July 13, 2009 Board Hearing

At the Hearing, Employer moved to re-raise its Motion to Dismiss based on the statute of limitations defense. Claimant objected, arguing the record had been frozen as of April 9, 2009, thereby precluding either side from offering testimony of witnesses not identified as of April 9th, including Robb.[12] Furthermore, Claimant argued that it would be inappropriate for Robb to testify because he had regularly acted as Employer's counsel even after Davis was substituted for Robb.[13] The Board allowed Robb's testimony and permitted introduction of payment logs submitted by the County in its May 8th letter to the Board.[14] The Board ruled that its April 9th Order, precluding either side from calling additional witnesses, addressed only matters related to medical testimony and not Robb's testimony regarding the statute of limitations defense.[15] The Board also stated that Employer had in effect modified its **Pretrial Memorandum** and identified Robb as a witness at the March 24th Hearing.[16]

***3** Robb testified he was the County's Acting Risk Manager, and his office processed **worker's compensation** claims, payments and payments made in relation to claims.[17] The Risk Management Office ("RMO") "regularly keeps receipt of the documentation evidencing payments made on a **worker's compensation** case as well as electronic computer based records."[18] Robb identified the Second Payment Log

as reflecting payments and receipts made by the County on Claimant's behalf. Robb indicated that the payment logs were created from the County's records and were kept in the regular and ordinary course of business.[19] The Second Payment log was submitted into evidence as Employer's Exhibit # 1.[20]

Following opening statements, Claimant called Dr. Pierre LeRoy as her expert medical witness, the same expert who testified on her behalf in 2003. Dr. LeRoy testified that he is a Board Certified Delaware neurosurgeon and was Claimant's primary care physician for her neck and back injuries for more than 20 years.[21] Dr. LeRoy opined that Claimant's neck condition was caused by the 1983 work accident.[22] On February 29, 2008, Claimant underwent a cervical discectomy and fusion by Dr. Reginald Davis.[23] Claimant reported significant relief of her neck and arm pain following the surgery.[24] Dr. LeRoy testified that the surgery was not designed to address non-work related arthritis and the surgery was reasonable and necessary to treat the neck condition caused by the 1983 accident.[25] On cross, Dr. LeRoy acknowledged that his opinion as to the cause of Claimant's condition had not changed since 2003.[26]

The County offered the deposition testimony of Dr. Friedman in its case-in-chief. Dr. Friedman opined that Claimant suffered from "spondylothesis," which was related to "an idiopathic degenerative or developmental condition."[27] Dr. Friedman did not examine the Claimant's neck and expressed no opinion about her neck, other than to state that Claimant told him her neck felt much better after surgery.[28] The County rested, and both parties presented their summations.

Board's Ruling

The Board held that "(1) the five year statute of limitations began to run by the end of 2002 with the last payment to Claimant's treating medical provider, and (2) the receipt signed by Claimant in December, 1999 provided her with adequate notice of the applicable limitations period."[29] The Board concluded that since Claimant's petition was filed on September 12, 2008, it was outside the limitations period.

Additionally, the Board concluded that even absent the statute of limitations, the claim was barred by the doctrine of collateral estoppel.[30] The Board reasoned that "the causation issue underlying Claimant's petition for additional benefits was already addressed and decided by a Hearing Officer in the August 27, 2003, IAB decision denying an increase in permanency."[31] "Claimant had a full and fair opportunity to litigate the causation issue in 2003, but did not prevail."[32] The Board found that "the evidence and opinions regarding causation for the spondylolisthesis in Claimant's cervical spine have not changed since 2003."[33] Therefore, the requirements for collateral estoppel were satisfied and Claimant's petition was denied.

***4** Claimant requested and was granted oral argument, which was heard on December 10, 2010.

STANDARD OF REVIEW

On appeal, this Court determines whether the Board's decision is supported by substantial evidence and is free from legal error.[34] Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion.[35] This Court does not act as the trier of fact, nor does it have authority to weigh the evidence, decide issues of credibility, or make factual conclusions.[36] The Court's review of conclusions of law is *de novo.*[37] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[38]

THE PARTIES' CONTENTIONS

Claimant's Arguments

On appeal, Claimant argues the Board denied her due process by allowing Robb's testimony, the only non-hearsay evidence which would substantiate Employer's statute of limitations defense.[39] Claimant asserts that because Robb was not identified in Employer's portion of the **Pretrial Memorandum**, permitting Robb to testify at the Hearing was legal error. Additionally, Claimant argues the Board committed legal error by allowing Robb to testify, allegedly in violation of the Board's April 9th Order.[40] Furthermore, Claimant contends Robb's testimony violates Delaware Rule of Professional Conduct 3.7.[41] Claimant argues that it was "inappropriate for Mr. Robb to act as a witness, since he had been the attorney of record and, notwithstanding the substitution of counsel, continued to act as the County's legal counsel."[42] Claimant contends the Board abused its discretion by permitting Robb's testimony because he was

not included as a witness on the **Pretrial Memorandum** as required by Industrial Accident Board (hereinafter "IAB") Rule 9. Claimant again attacks the propriety of Robb's testimony, arguing that the Board violated the Law of the Case Doctrine by allowing his testimony, allegedly in violation of the Board's April 9th Order, which precluded either party from offering the testimony of any witness not identified in the **Pretrial Memorandum**.

Claimant argues that by holding the petition barred under the doctrine of collateral estoppel, the Board denied Claimant due process by permitting an affirmative defense that was never asserted by the County. [43] Claimant argues that because Employer never asserted collateral estoppel in its **Pretrial Memorandum**, the Board should not have found the claim barred by collateral estoppel.

Finally, Claimant argues the Board abused its discretion by permitting the County to introduce the Second Payment Log because it was not timely produced as required by IAB Rule 11. [44]

Employer's Contentions

Employer asserts that allowing Robb to testify did not violate due process because Claimant received adequate notice, on at least three occasions, that Robb would testify at the July 13, 2009 Hearing. Employer argues that the Board's April 9, 2009 Order did not preclude Robb from testifying because Claimant cannot challenge the Board's determination that Employer modified the **Pretrial Memorandum** at the March 24, 2009 Hearing. Additionally, Employer contends, and the Board agrees, [45] that the April 9th Order was limited to issues related to the County's medical testimony, and not the statute of limitations defense.

***5** Employer argues the Board did not deny Claimant due process in holding the claim collaterally estopped because Employer asserted this defense in the **Pretrial Memorandum** and argued the defense at the Hearing. In the **Pretrial Memorandum** Employer included a defense of "[p]rior Board decisions have decided these issues and are the Law of the Case." [46] The Employer contends the aforementioned defense put Claimant on notice that Employer intended to raise collateral estoppel.

Employer maintains that Robb's testimony did not violate Delaware Rule of Professional Conduct 3.7 because the Rules of Professional Conduct are not binding on the IAB.

Finally, Employer argues that the Second Payment Log was timely produced because all documentation was submitted to Claimant well before the July 13, 2009 Hearing.

DISCUSSION

Due Process

Claimant was provided adequate notice of Employer's intention to call Robb so as to not offend due process. Parties must be granted meaningful notice before their rights are to be affected. [47] In *McGonigle,* the UCAB denied Claimant unemployment benefits. The UCAB then mailed "notice of appeal" to the wrong address and subsequently denied Claimant's appeal as untimely. The Superior Court reversed the UCAB denial, finding a violation of due process because the UCAB failed to give Claimant meaningful notice of his right to appeal. The instant case differs from *McGonigle* because on several occasions the Claimant was put on notice that Employer intended to call Robb as a fact witness. On March 24, 2009, Robb testified in his capacity as Risk Manager to substantiate Employer's statute of limitations defense. The Board's April 24, 2009 Order referenced Robb's testimony and permitted Employer to re-raise the statute of limitations defense. On May 8, 2009, Employer sent a letter to the Board Administrator, and copied Claimant, which explicitly stated that Employer intended to call Robb as a fact witness. Moreover, IAB Board Rule 9(e) allows any party to modify the **Pretrial Memorandum** any time prior to 30 days before the Hearing. In this case, the May 8th letter put Claimant on notice of Employer's intention to call Robb as a fact witness, in effect modifying the **Pretrial Memorandum**. Additionally, at the July 13th Hearing, the Board stated that "in effect the Employer did modify their **Pretrial Memorandum** at the March 24th Hearing and identified Robb as their witness." [48] Claimant was sufficiently on notice that Employer intended to call Robb.

The April 9th Order

Paragraph 3 of the April 9th Order states: "[a]t the hearing, both parties will be limited to calling those witnesses identified on the **Pretrial Memorandum**." Claimant argues allowing Robb to testify violated the Order. At the July 13th hearing, the Hearing Officer stated that the April 9th Order only concerned issues related to medical testimony and not the statute of limitations defense. [49] The Board reasoned that because there was not sufficient evidence presented at the

March 24th Hearing to determine the statute of limitations issue, it would allow Employer to re-raise the limitations defense at the full hearing.

***6** The Board's interpretation of its own rules and orders is within the Board's discretion, as long as the interpretation is reasonable.[50] The April 23rd Order denying Employer's Motion to Dismiss stated that the Board heard testimony from Robb regarding the statute of limitations issue and would allow Employer to re-raise the issue at the full hearing. Implicit in determining that Employer could re-raise the statute of limitations defense is the conclusion that someone would lay a foundation for entering the payment logs. It was not legal error for the Board to interpret the April 9th Order as only relating to medical testimony and not the limitations defense because the Board expressly stated that Employer could re-raise the statute of limitations defense.

"Law of the Case" with Respect to Robb's Testimony

"The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."[51] However, "[u]ntil the rendition of the final judgment, the interlocutory judgment remains within the control of the court."[52] Because it is within the Board's discretion to interpret its own rulings, the Board did not commit legal error in interpreting its Order as only applying to medical testimony, and not to Robb's testimony regarding the statute of limitations defense.

Robb's Testimony and IAB Rule 9

Robb's testimony did not violate IAB Rule 9 even though he was not named on the **Pretrial Memorandum**. IAB Rule 9(e), allows either party to modify the **Pretrial Memorandum** anytime 30 days before the full hearing.[53] At the latest, on May 8th, 35 days before the Hearing, Employer provided written notice of its intent to call Robb as a fact witness. This communication in effect modified the **Pretrial Memorandum**.

Board's Collateral Estoppel Holding

The Board did not commit legal error by holding that Claimant's petition was collaterally estopped. Claimant alleges Employer failed to assert collateral estoppel as a defense in the **Pretrial Memorandum**, and thus, the Board was prohibited from holding the claim barred pursuant to collateral estoppel. "It is settled in Delaware that before the Board can consider an issue, the issue must be raised sufficiently in advance of the hearing to provide the parties notice and an opportunity to be heard."[54] "The trial judge's focus should be on whether the issue could have been, but was not, raised **pre-trial** in some form...."[55] Collateral estoppel was raised by Employer. The defense of "[p]rior Board decisions have decided these issues and are law of the case" was included in the **Pretrial Memorandum**.[56] The Court is satisfied that the defense asserted by Employer adequately put Claimant on notice that Employer intended to rely on a collateral estoppel defense.

The Second Payment Log

The Board did not commit an error of law by admitting the Second Payment Log into evidence. Claimant argues that because the log was not timely produced, the Board committed an error of law by allowing the County to introduce the Second Payment Log. Employer provided the First Payment Log on March 17th and the Second Payment Log on May 8th. The two payment logs are substantively the same and the most noteworthy difference is that the Second Payment Log is in chronological order and identifies payments made to medical providers with regard to the litigation between March 17, 2009 and May 8, 2009. The Claimant was on actual and/or constructive notice of payments to her providers. Moreover, the Claimant had clear notice of the Employer's statute of limitations defense and was given at the least 35 days to review the Second Payment Log. The Board complied with IAB Rule 11.[57]

CONCLUSION

***7** For the aforementioned reasons, the decision of the Industrial Accident Board is **AFFIRMED.**

IT IS SO ORDEDED.

All Citations

Not Reported in A.3d, 2011 WL 51736

Footnotes

1 *Goldsborough v. New Castle County,* 1999 WL 464002, at *1 (Del.Super. May 28, 1999), *aff'd,* 1999 WL 1193045 (Del. Nov. 29, 1999).

2 Claimant originally filed a Petition to Determine Additional Compensation on June 2, 2008, but withdrew the petition and re-filed on September 15, 2008.

3 It appears as though Robb continued as assistant counsel on behalf of the County. He signed the **Pretrial Memorandum** and initiated legal hearings before the Board.

4 *See* Appellant's Opening Brief at Ex. 3.

5 *Id.* at Ex. 5.

6 *Id.* at Ex. 6.

7 Appellee's Answering Brief at Ex. C.

8 Appellant's Opening Brief at Ex. 6.

9 *Id.* at Ex. 9.

10 The first and second payment logs are substantively the same. The Second Payment Log is in chronological order and includes additional payments made between March 17, 2009 and May 8, 2009.

11 Appellant's Opening Brief at Ex. 10.

12 Transcript—3 (hereinafter “T—___”).

13 T—4.

14 T—10.

15 T—11.

16 T—12–13.

17 T—15.

18 T—16.

19 T—17.

20 *Id.*

21 T—30–31.

22 T—43.

23 T—44–45.

24 T—45.

25 T—47–48.

26 T—50–51.

27 T—90.

28 T—91, 94.

29 Industrial Accident Board Decision at 9, December 30, 2009 (hereinafter IAB Decision").

30 *Id.*

31 *Id.*

32 *Id.* at 12.

33 *Id.*

34 *General Motors v. McNemar,* 202 A.2d 803, 805 (Del.Super.1964); *General Motors Corp. v. Freeman,* 164 A.2d 686, 688 (Del.Super.1960).

35 *Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892, 899 (Del.Super.1994).

36 *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del.Super.1965).

37 *Reese v. Home Budget Center,* 619 A.2d 907 (Del.Super.1992).

38 *Dellachiesa v. General Motors Corp.,* 140 A.2d 137 (Del.Super.1958).

39 Robb's testimony was the only non-hearsay evidence offered by the Employer to substantiate its statute of limitations defense. Without a foundation to offer payment logs into evidence, the Board could not have found the claim time-barred. *See Mullin v. W.L. Gore & Assocs.,* 2004 WL 1965879, at *1 (Del.Super.Aug.4, 2003) ("By relying on the Payment Log without sworn testimony establishing a proper evidentiary foundation for that evidence, the Board abused its discretion.").

40 The April 9, 2009 Order stated: "At the hearing, both parties will be limited to calling those witnesses identified on the **Pretrial Memorandum** on file with respect to this petition.").

41 The Court will not address allegations of professional misconduct which are within the purview of the Office of Disciplinary Counsel.

42 Appellant's Opening Brief at 24.

43 *Id.* at 22, 26.

44 Industrial Accident Board Rule 11, titled "Discovery And Production of Documents And Things For Inspection, Copying, Or Photographing," provides:

> (A) After a petition has been filed, any party may serve on any other party a request to produce and permit the party making the request, or someone acting in his/her behalf, to inspect and copy or photograph, any designated documents which constitute or contain evidence relating to any matter which is relevant to the subject matter involved in the pending hearing and not otherwise privileged and which are in the possession, custody or control of the party upon whom the request is served.

(B) The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(C) The party upon whom the request is served shall serve a written request within 15 days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order from the Board compelling discovery with respect to any obligations to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. The Board shall rule upon any such motion after notice and argument.

45 T.—11.

46 Claimant's Opening Brief, Ex. 3 at 3.

47 *See* *McGonigle v. George H. Burns, Inc.,* 2001 WL 1079036 (Del.Super.Sept.4, 2001).

48 T—5.

49 T—11.

50 *See* *Riley v. Chrysler Corp.,* 1987 WL 8273, at *1 (Del.Super.Mar.6, 1987) ("The Board's interpretation of its own rule is entitled to great weight and I find no justification for reversing the Board's ruling on this issue"), *aff'd,* 531 A.2d 1235 (Del.1987); *Smith v. Rodel, Inc.,* 2001 WL 755929, at *2 (Del.Super. June 19, 2001) ("The Board's interpretation and application of its own rules is entitled to great deference, and the Court will upset the Board's interpretation only when it determines that 'the Board exercised its power arbitrarily or committed an error of law ....' "), *aff'd,* 784 A.2d 1081 (Del.2001).

51 *Kenton v. Kenton,* 571 A.2d 778, 784 (Del.1990).

52 *Yerkes v. Dangle,* 33 A.2d 406, 408 (Del.Super. April 30, 1943).

53 *Muziol v. DaimlerChrysler Corp.,* 2002 WL 819139, at *4 (Del.Super. April 30, 2002).

54 *Murphy Steel, Inc. v. Brady,* 1989 WL 124934, at *2 (Del.Super.Oct.3, 1989).

55 *Alexander v. Cahill,* 829 A.2d 117, 128–29 (Del.2003).

56 Claimant's Opening Brief, Ex. 3 at 3.

57 *See* *Yellow Freight Sys., Inc. v. Berns,* 1999 WL 167780, at *4 (Del.Super.Mar.5, 1999) ("While the Board's procedural rules are promulgated for 'more efficient administration of justice,' this Court will not force the Board to impose a literal and hyper-technical interpretation of the rules where the Board itself has chosen not to do so.").

456 A.2d 1220
Supreme Court of Delaware.

HAVEG INDUSTRIES, INC.,
Employer-Appellant Below, Appellant,
v.
Samuel A. HUMPHREY, Employee-
Appellee Below, Appellee.

Submitted: Dec. 9, 1982.
|
Decided: Jan. 20, 1983.

Synopsis

Employer appealed from judgment of the Superior Court affirming decision of the Industrial Accident Board that employee was entitled to total disability benefits for period from November 10, 1978 until May 21, 1979. The Supreme Court, Quillen, J., held that: (1) Board did not abuse its discretion in enforcing procedural rule which requires that all witnesses be named in **pretrial memoranda**; (2) evidence supported finding of independent injury so that usual exertion test was appropriate; (3) Board's decision was not invalid on grounds it did not support its conclusion with adequate reasons; (4) superior court's affirmance was not based on rationale not asserted before Board; and (5) evidence supported duration of total disability period as found by Board.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (6)

[1] **Workers' Compensation** Production and Reception of Evidence

Industrial Accident Board did not abuse its discretion in enforcing procedural rule which requires names of all witnesses to be contained in **pretrial memorandum** by refusing to allow employer to introduce witnesses not named in the **memorandum**, where employer failed to notice omission of witnesses until hearing was actually underway.

8 Cases that cite this headnote

[2] **Workers' Compensation** Back injuries

Evidence before Industrial Accident Board, including testimony of employer physician that prior back surgery of employee did not have anything to do with employee's new back injury, supported Board's finding of independent injury so that usual exertion test was appropriate.

4 Cases that cite this headnote

[3] **Workers' Compensation** Reversal

Reversal of Industrial Accident Board's award is not always required because Board fails to make its finding in expansive terms, but rather, if appropriate, reviewing courts can look at subordinate facts underlying Board's conclusions when those facts can be determined, by implication, from ultimate conclusion.

10 Cases that cite this headnote

[4] **Workers' Compensation** Findings of fact as supporting conclusions of law

Although findings of Industrial Accident Board could have been more expansive and comprehensive, where findings reflected substantial record evidence that separate accident occurred in course of employment, Board's conclusion was not inadequate on grounds it was not supported with sufficient reasons.

4 Cases that cite this headnote

[5] **Workers' Compensation** Findings of fact as supporting conclusions of law

Where employer had argued that employee's current injury was result of preexisting injury, trial court's finding of gradual deterioration of employee's health and attendant discussion of cumulative detriment theory was merely part of complete response to employer's contention and not affirmance of Industrial Accident Board's award of total disability benefits on unproven rationale.

4 Cases that cite this headnote

[6] **Workers' Compensation** Particular cases

Workers' Compensation Particular cases

Evidence before Industrial Accident Board, including evidence establishing date of accident, date and duration of subsequent hospitalization of employee, fact that employee underwent inpatient physical therapy subsequent to hospitalization, that he received maximum of 20–week company paid health and accident insurance benefits, and that he suffered residual pain and limitation of movement upon his return to work, supported duration of total disability period as found by Board.

***1220** Upon appeal from Superior Court. Affirmed.

Attorneys and Law Firms

***1221** Daniel F. Lindley (argued) of Potter, Anderson & Corroon, Wilmington, for employer-appellant.

Sidney Balick (argued) of Aerenson & Balick, Wilmington, for employee-appellee.

Before QUILLEN, HORSEY and MOORE, JJ.

Opinion

QUILLEN, Justice:

This is an appeal from the Industrial Accident Board which determined that the claimant, Mr. Humphrey, was entitled to total disability benefits for the period from November 10, 1978 until May 21, 1979. On appeal to the Superior Court, the decision was affirmed. We also affirm.

The contested findings of the Board are contained in paragraphs 1 and 2 of its Conclusions of Fact and Rulings of Law. The Board said:

> 1. The claimant, Samuel A. Humphrey, was involved in a compensable industrial accident on October 13, 1978. He injured his back while putting in overhead pipe for his employer. As a result of this accident the claimant was hospitalized from November 10, 1978 to December 15, 1978. After his release from the hospital, the claimant was unable to return to work until May 21, 1979.
>
> 2. The claimant is entitled to compensation for total disability in accordance with 19 *Del.C.* § 2324 for the period November 10, 1978 to May 21, 1979.

...

The Superior Court affirmed these findings, holding that the record provided substantial and competent evidence to support the decision of the Board.

Haveg Industries, Inc. has appealed, contending that that decision of the Board was not based on substantial evidence and that the Board committed reversible error in precluding testimony from two of its witnesses. Further, it argues that the Superior Court acted beyond its appellate capacity in supplying findings of fact and theories of law to support a factually insufficient opinion rendered below. Finally, Haveg alleges that there is no substantial evidence to establish the period of Mr. Humphrey's total disability.

Mr. Humphrey has been employed by Haveg since 1963. The uncontradicted testimony was that he had no back pain, back problems, or back injuries before he entered into Haveg's employment and that the only prior injuries to his back were employment related. On October 13, 1978, he reported a back injury to his employer. On or about November 10, 1978, he entered the hospital for a month's treatment and subsequent to that hospitalization he received physical therapy. He received sick and accident benefits for twenty weeks under a company policy.

Mr. Humphrey was examined by a physician of Haveg's choice on June 1, 1979, ten days after his return to work. The physician, Dr. Cates, was Haveg's only witness before the Board. Dr. Cates found evidence of a back condition which predated the time of his examination in 1979. The Superior Court affirmed the Board decision, including in its opinion a refutation of Haveg's argument that reversal was required because evidence of Mr. Humphrey's prior back injuries mandated the use of the unusual exertion standard of legal causation.

Haveg does not dispute that Mr. Humphrey suffered an accident in October, 1978. Rather, it presents two alternative arguments regarding the sufficiency of the

evidence underlying the Board finding of a compensable industrial accident. First, it argues that the accident occurred in a non-employment setting. Aside from Haveg's counsel's allegations as to hypothetical sources of injury, there was no record support for this contention. In reference to this lack of record support, Haveg argues that the Board's action excluding testimony of two of its witnesses because of a violation of Industrial Accident Board procedural rule 9(D)(3), concerning disclosure of names of witnesses at the **pretrial** conference, was an "egregious" abuse of discretion and severely prejudiced its defense. Thus, it contends, that ruling should have been reversed by Superior Court.

***1222** Haveg cites Federal cases construing an analogous Federal rule; *Meyers v. Pennypack Woods Home Ownership Ass'n,* 3d Cir., 559 F.2d 894, 904 (1977) and *DeMarines v. KLM Royal Dutch Airlines,* 3d Cir., 580 F.2d 1193, 1202 (1978). It argues that these cases support its contention that in the absence of prejudice to the other party and/or when the evidence is of practical importance to the case, the Board should have allowed the evidence.

Under Rule 9(D)(3) the names of all witnesses "shall" be contained in the **pretrial memorandum** which can be amended up to five days before the hearing. Also, it appears that the Board has discretion to modify the **pretrial memorandum** at any time under rule 9(B). Haveg contends that the omission of its two witnesses' names was inadvertent and that Mr. Humphrey should have expected their testimony, based upon prior exchanges between counsel.

[1] We agree with the Superior Court. There was no abuse of discretion in enforcing a well-known procedural rule. Such an action serves the interests of order and efficiency in Board proceedings as well as the prevention of unfair surprise. Further, it is incumbent on counsel to peruse these documents for accuracy since they control the ensuing proceedings. *Bethlehem Shipbuilding Corp. v. Mullen,* Del.Super., 119 A. 314, 316–17 (1922). The Board, therefore, in its judgment, could properly exercise its discretion to exclude the testimony since Haveg failed to notice the omission until the hearing was actually underway.

Secondly, Haveg also argues that both the Board and the Superior Court applied an incorrect standard of law since Haveg's physician testified that the injury was the result of a pre-existing condition. Therefore, it argues, Mr. Humphrey should have been required to prove that the injury was the result of unusual exertion which rapidly accelerated that pre-existing condition. *See General Motors Corp. v. Veasey,* Del.Supr., 371 A.2d 1074, 1076 (1977), *Talmo v. New Castle County,* Del.Supr., 454 A.2d 758 (1982).

[2] However, there is no evidence in this record which requires a finding that Mr. Humphrey's injury was the result of a pre-existing condition. Haveg's physician did state that Mr. Humphrey, like many, if not most, people, was susceptible to back injury, and that Mr. Humphrey's general condition pre-existed the June 1, 1979 examination. But he also stated that the fact of prior back surgery in 1974, which resulted from a similar industrial accident, "would not have anything to do with" a new injury. Thus, the evidence supports the Board's finding of an independent injury on October 13, 1978 and the usual exertion test was appropriate. [1] *Barone v. McCormick Transportation Co.,* Del.Supr., 135 A.2d 140, 142 (1957); *Boulevard Electric Sales v. Webb,* Del.Supr., 428 A.2d 11, 13 (1981); *GMC v. Freeman,* Del.Supr., 157 A.2d 889, 894, aff'd, Del.Supr., 164 A.2d 686, 688–89 (1960).

[3] **[4]** Haveg further argues that the Board did not support its conclusion with adequate reasons. Reversal is not always required because the Board fails to make its findings in expansive terms. If appropriate, reviewing courts can look at subordinate facts underlying the Board's conclusions when those facts can be determined, by implication, from the ultimate conclusion. *Board of Public Education v. Rimlinger,* Del.Supr., 232 A.2d 98, 101 (1967); *Husband M v. Wife D,* Del.Supr., 399 A.2d 847, 848 (1979). In this case, although the findings could have been somewhat more expansive and comprehensive, they are minimally satisfactory as they reflect substantial record evidence that a separate accident occurred in the course of employment at a certain place and time. *Barone v. McCormick Transportation Co.,* 135 A.2d at 142. Rejection of the defense of pre-existing injury is implicit in these findings. *LeTourneau* ***1223** *v. Consolidated Fisheries Co.,* Del.Supr., 51 A.2d 862, 867 (1947); *Penn Del Salvage, Inc. v. Wills,* Del.Supr., 282 A.2d 613, 614 (1971).

[5] Haveg further objects to the Superior Court affirmance on a rationale not asserted before the Board. The language in the Superior Court opinion of "gradual deterioration [of an] employee's health" and the attendant discussion of the *Chicago Bridge and Iron Co. v. Walker* [2] cumulative detriment theory cannot be characterized as an affirmance

on an unproven rationale. Rather, such a discussion was the natural analysis of the facts of this case in light of Haveg's claim of pre-existing injury.

In *Chicago Bridge and Iron Co. v. Walker,* Del.Supr., 372 A.2d 185, 188 (1977), we noted that a disabling condition is compensable if the performance of employment duties and the existence of work habits contribute to or aggravate the development of the condition. Thus, while perhaps not raised frequently enough, the cumulative detrimental effect of employment can be the other side of the coin of a claim of pre-existing injury. This analysis must necessarily be made when there is a claim of pre-existing injury and the evidence shows, as here, repeated and similar injury only in the usual course of employment. The Superior Court discussion was merely a part of a complete response to Haveg's contention. That Court correctly determined that the Board's findings were based on substantial evidence and could not be disturbed on appeal. *Windsor v. Bell Shades and Floor Coverings,* Del.Supr., 403 A.2d 1127, 1129 (1979).

[6] The final contention made by Haveg is that the duration of the total disability period as found by the Board is not supported by substantial evidence. This claim is predicated on admittedly incomplete factual data on this issue. However, the record does provide information establishing the date of the accident, the date and duration of subsequent hospitalization, the fact that Mr. Humphrey underwent inpatient physical therapy subsequent to the hospitalization, that he received the maximum twenty-week company paid health and accident insurance benefits, and that he suffered residual pain and limitation of movement upon his return to work in May. We think that this evidence is sufficient to support the Board's finding as to the relatively short duration of total disability from November 10, 1978 to May 21, 1979.

Therefore, the decision of the Superior Court is affirmed.

All Citations

456 A.2d 1220

Footnotes

1 We make no finding as to whether the evidence could satisfy the unusual exertion test of *General Motors Corp. v. Veasey,* Del.Supr., 371 A.2d 1074 (1977). The Board here found a particular injury from a particular accident not causally-connected with a pre-existing injury.

2 Del.Supr., 372 A.2d 185, 188 (1977).

1993 WL 331184
Only the Westlaw citation is currently available.

Superior Court of Delaware, New Castle County.

K-MART, INC., Employer/Appellant,
v.
Angie BOWLES, Employee/Appellee.

Submitted: June 1, 1993.
|
Decided: Aug. 18, 1993.

On Appeal from a Decision of the Unemployment Insurance Appeal Board. Affirmed.

ORDER

COOCH, Judge.

***1** This 19th day of August, 1993, upon consideration of the briefs of the parties and of the record, it appears to the Court that:

1) This is an appeal by Employer, K-Mart, Inc. (K-Mart) from a decision of the Industrial Accident Board (the Board) denying K-Mart's petition to terminate Angie Bowles' (Employee) total disability status and granting, in part, Employee's petition for permanent partial disability.

2) On October 31, 1989, Employee was injured in a compensable industrial accident. She received temporary total disability benefits pursuant to an Agreement as to Compensation dated November 20, 1989 (hereinafter the "Agreement").

3) On August 12, 1991, K-Mart filed a Petition to Review Employee's temporary total disability status alleging that such status had terminated.

4) On November 11, 1991, Employee filed a Petition for Permanent Partial Disability under 19 *Del.C.* § 2326, alleging that Employee suffered from a permanent impairment of her neck, both upper extremities as well as certain disfigurements. Employee also requested reimbursement for certain medical bills. Pursuant to Employee's request, both K-Mart and Employee's Petitions were consolidated and a hearing was scheduled before the Board for April 27, 1992.

5) Litigants before the Board are required to follow certain **pretrial** rules of procedure. **Workers Compensation** Rule 9 (hereinafter "W.C. Rule _____") governs **pre-trial** procedure. Specifically, W.C. Rule 9(D)(2) requires each litigant to identify, in a **pretrial memorandum**, the names of all witnesses known at the time of the **pretrial** conference who are expected to be called at the time of the hearing. The rule further provides a procedure by which a litigant may add witnesses after the **pretrial** conference. [1] In the case at bar, Employee's **pretrial memorandum** listed Employee's treating physician, Dr. George Gumbert and Employee as witnesses, while K-Mart's **pretrial memorandum** listed no witnesses.

6) On March 12, 1992, counsel for Employee notified K-Mart of Dr. Gumbert's telephonic deposition scheduled for March 26, 1992. The telephonic deposition did in fact take place as scheduled and counsel for both K-Mart and Employee were present. Counsel for Employee questioned Dr. Gumbert regarding the issue of Employee's alleged permanent partial disability. On cross examination, K-Mart's counsel attempted to question Dr. Gumbert concerning the medical employability of Employee. These questions were objected to by counsel for Employee on the grounds that they went beyond the scope of direct examination.

7) On April 6, 1992, K-Mart's counsel hand delivered to the Board a letter of the same date. A copy of that letter was also sent to Employee's attorney who received it on April 8, 1992. The letter begins:

> The above captioned matter [Bowles v. K-Mart] is scheduled for a hearing on Monday, April 27, 1992 at 9:00 am.
>
> On behalf of the employer, my office has three substantial reasons for requesting a continuance of this matter.

***2** The letter then discusses the telephonic deposition of Dr. Gumbert and requests a "legal hearing" on the issue of whether Dr. Gumbert may testify to the "issues of capability of returning to work on behalf of the claimant." The letter goes on to state that an Independent Medical Examination (hereinafter "I.M.E.") was scheduled by K-Mart but that Employee refused to travel by car from Lexington, Kentucky to Wilmington, Delaware. The letter further states that K-Mart

was not willing to pay for Employee to fly to Wilmington, Delaware and that K-Mart was unable to schedule an I.M.E. with a doctor in Lexington, Kentucky prior to the scheduled hearing date. The letter concludes:

> In light of the fact that I have been able to schedule an independent medical examination in the home town of the claimant, being Lexington, Kentucky, the examination which is scheduled for June 30, 1992, for all of the above reasons I respectfully request a continuance of the scheduled hearing.

In a letter dated April 9, 1992, counsel for Employee opposed the continuance request. No action was apparently taken by the Board on this continuance request.

8) On April 24, 1992, a letter, signed by counsel for K-Mart, was hand-delivered to counsel for Employee, offering Employee a position with K-Mart.

9) At the April 27, 1992, hearing, K-Mart attempted to present Dr. Gumbert's testimony concerning the medical employability of Employee. Counsel for Employee renewed Employee's objection on the grounds that any such testimony was inadmissible as beyond the scope of direct examination. In response, K-Mart argued that its April 6, 1992, letter was an "amendment" to its **pretrial memorandum** pursuant to W.C. Rule 9(D)(2), naming Dr. Gumbert as K-Mart's witness. Accordingly, K-Mart argued, its examination of Dr. Gumbert concerning Employee's ability to return to work should be admissible as direct evidence in support of K-Mart's petition to terminate. Employee objected, arguing that the April 6, 1992, letter was not a proper "amendment" as it did not satisfy the requirements of W.C. Rule 9(D)(2). The Board ruled that K-Mart's April 6, 1992, letter did not constitute an "amendment" to the **pretrial memorandum** under W.C.Rule 9(D)(2) and held that Dr. Gumbert was not properly identified as a witness for K-Mart. [2]

10) In support of her petition for permanent partial disability, Employee presented Dr. Gumbert's deposition testimony. In addition, Employee herself testified as to the nature of her injuries.

11) The Board concluded its written decision as follows:

> On a Petition for Review of Compensation Agreement alleging that the claimant's disability has terminated, the carrier has the burden of proof. The carrier having failed to submit not only medical testimony, but any testimony or evidence at all, the Board accepts the testimony of the claimant as undisputed.
>
> For the reasons herein, the petition for Review of Compensation Agreement is *DENIED*. On the Petition to Determine Additional Compensation Due, the Board awards two weeks for the scar to the neck, which is serious. The scar on claimant's hip is not visible when she is normally clothed, and therefore, is not compensable.

***3** *Bowles v. K-Mart,* Indus. Accid. Bd., Hearing No. 890300, (April 27, 1992) (emphasis in original). This appeal followed.

12) On appeal, K-Mart argues that the Board committed reversible error by not admitting that portion of Dr. Gumbert's deposition testimony concerning Employee's medical employability. K-Mart further argues that the Board committed reversible error by not admitting the April 24, 1992, letter. [3] In response, Employee argues that the Board did not commit reversible error and that the Board's decision is otherwise supported by substantial evidence. [4]

13) On an appeal from the Board, this Court is limited to a determination of whether there is substantial evidence on the record to support the Board's factual findings and whether such findings are free from legal error. 29 *Del.C.* § 10142(d); *Chicago Bridge & Iron Co. v. Walker,* Del.Supr., 372 A.2d 185 (1977), *overruled on other grounds by, Duvall v. Charles Connell Roofing,* 564 A.2d 1132 (1989); *Johnson v. Chrysler Corporation,* Del.Supr., 213 A.2d 64 (1965). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Olney v. Cooch,* Del.Supr., 425 A.2d 610, 614 (1981). It is more than a scintilla but less than a preponderance of the evidence. *Id.* However, the appellate inquiry is limited. *Butler v. Speakman Company,* Del.Supr., No. 200, Walsh J. (Sept. 18, 1992) (ORDER), at 3 (citing *Breeding v. Contractors-One-Inc.,* Del.Supr., 549 A.2d 1102, 1104 (1988)). Weighing the evidence and determining questions of credibility which are implicit in factual findings are functions reserved exclusively for the Board. *See Id.* As

for any alleged errors of law, the Court's review is plenary. *See Brooks v. Johnson,* Del.Supr., 560 A.2d 1001, 1002 (1989).

14) To modify a voluntary compensation agreement based on total disability, the employer is required to offer proof of a diminution of the disability. *Downes v. State,* Del.Super., C.A. No. 92A-03-006, Graves, J., (Dec. 18, 1992) Let.Op. at 3. The Delaware Supreme Court has provided the analytical frame work for such determinations:

> In the ordinary total disability termination case the employer should initially be required to show that the employee is not completely incapacitated for work and, in demonstrating medical employability, will have, as a practical matter, the opportunity to show by the factors of physical impairment, mental capacity, training, age, etc., that the employee is not in the 'odd-lot' category. In response, the employee may present his evidence in support of total disability, his evidence that he is prima facie in the 'odd-lot' category and, if appropriate, his evidence of reasonable efforts to secure employment which have been unsuccessful because of the injury. In rebuttal, the employer may present evidence of the availability of regular employment within the employee's capabilities as well as any other rebuttal evidence. Surrebuttal may be permitted to show non-availability of regular employment.

***4** *Howell v. Supermarkets General Corporation,* Del.Supr., 340 A.2d 833, 835 (1975) (citing *Chrysler Corporation v. Duff,* Del.Supr., 314 A.2d 915, 918, n. 1 (1974)).

15) In the instant case, the Agreement was voluntary and based on total disability. Thus, the burden was on K-Mart to (1) petition the Board for review pursuant to 19 *Del.C.* § 2347 (if K-Mart wished to terminate total disability) and (2) prove by a preponderance of the evidence that Employee was not completely incapacitated for work.

16) K-Mart presented no admissible evidence to satisfy its requisite burden. [5] However, if the Board had concluded that K-Mart successfully amended its **pretrial memorandum** to include Dr. Gumbert as a witness, K-Mart's counsel's cross examination of Dr. Gumbert concerning Employee's medical employability would have been admissible. Consequently, whether the Board committed legal error by not recognizing K-Mart's counsel's April 6, 1992, letter as an "amendment" to the **pretrial memorandum** is a threshold issue since K-Mart did not produce any other evidence in support of its petition.

17) The Board's rules of procedure are promulgated for the "more efficient administration of justice" and thus are to be followed and enforced by this Court. *Cole v. Department of Corrections,* Del.Super., 83A-JN-13, Stiftel, J. (Feb. 27, 1982), Let.Op. at 4, *aff'd* Del.Supr., No. 73, 1984, Herrmann, C.J. (Aug. 3, 1984) (ORDER). *See Haveg Industries, Inc. v. Humphrey,* Del.Supr., 456 A.2d 1220, 1222 (1983) (concluding that enforcing a well known procedural rule, requiring the disclosure of names of witnesses at the **pretrial** conference, serves the "interests of order and efficiency in Board proceedings as well as the prevention of unfair surprise"), *cited in* 2B Arthur Larson, *The Law of Workmen's Compensation Law,* § 77A.43 (1989) at 15-37 (1989). However, at times the Court will recognize an exception to the strict enforcement where "fairness" requires. *Cole v. Department of Corrections, supra,* at 5.

18) Here, substantial evidence exists to support the Board's finding that the April 6, 1992, letter did not constitute an "amendment" under W.C.Rule 9(D)(2) and "fairness" does not otherwise require the Court to reverse the Board's decision. The Board's decision is supported by the fact that the April 6, 1992, letter did not satisfy W.C. Rule 9(D)(2) which requires "written notice to the opposing party and the **pretrial** officer not later then twenty-one (21) days." (emphasis added). Although the Board received K-Mart's counsel's hand-delivered letter (addressed to the Board) 21 days prior to the hearing, Employee's counsel did not receive a copy of that letter until 19 days prior to the hearing. Assuming nonetheless that the letter satisfied the 21 day requirement, the Court finds that it was not, in fact, an "amendment" to the **pretrial memorandum** as K-Mart argues. The plain language of the April 6, 1992, letter manifests an intent to request a continuance, not an "amendment" pursuant to W.C. Rule 9(D)(2). [6] No request was made in that letter to "amend"

or "modify" the **pretrial memorandum**. Thus, although the letter is somewhat ambiguous in that it also requests a "legal hearing" on the issue of Dr. Gumbert's testimony, there is little indication that the letter was anything but a request for a continuance. [7] In short, the Court concludes that there was no abuse of discretion in enforcing this "well-known procedural rule" (W.C. Rule 9(D)(2)) as such action serves the interests of order and efficiency in Board proceedings as well as the prevention of unfair surprise. *See Malinowski v. Ponns, supra,* at 6-7 (quoting *Haveg Industries, Inc. v. Humphrey,* Del.Supr., 456 A.2d 1220, 1222 (1983) and holding that the Board did not abuse its discretion by refusing to consider a medical expert's deposition testimony because claimant failed to properly amend a **pretrial memorandum** to list same).

***5** 19) As an apparent alternative argument, K-Mart argues that the "Board's ruling [on the admissibility of Employer's cross-examination of Dr. Gumbert] is again erroneous ... being that Uniform Rules of Evidence, Rule 611(b) states, 'The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.' " [8]

20) W.C. Rule 14 incorporates the Delaware Rules of Evidence ("D.R.E."). [9] D.R.E. 611(b) permits the Court and the Board (vis-a-vis W.C. Rule 14) to exercise its discretion in permitting inquiry into additional matters on cross examination as if on direct examination. [10]

21) Here, the Board chose not to exercise its discretion under D.R.E. 611(b). *See Hamann v. State,* Del.Supr., No. 175, 1988, Christie, C.J., (Oct. 12, 1989) (ORDER) (concluding that because a trial court is in a better position to regulate cross-examination, such rulings will not be disturbed on appeal absent a clear abuse of discretion). *Cf. Arroyo v. Draper Canning Co.,* Del.Super., No. 90A-JN-4, Steele, J. (Mar. 2, 1992) (ORDER) at 3 (holding that allowing recross is within the discretion of the Board as is the scope of recross). The rule in Delaware is that discretionary rulings by an administrative body will not be set aside unless that decision is unreasonable or capricious. *See In re Kennedy,* Del.Supr., 472 A.2d 1317, 1331 (1984) (citing *Raymond Heartless, Inc. v. State,* Del.Supr., 401 A.2d 921 (1979); *Blackledge v. Commonwealth of Pennsylvania State Police,* Pa.Commw.Ct., 435 A.2d 309 (1981)), *cert. denied,* 467 U.S. 1205 (1984). *See also Barlet v. Milford Brick, Co.,* Del.Super., C.A. No. 91A-01-001, Steele, J., (Oct. 19, 1992) (ORDER) at 5-6 (concluding that the Industrial Accident Board's decision to deny a continuance request was not arbitrary since that decision did not affect the outcome of the case). In addition, one who attacks such a decision of the Board as arbitrary and unreasonable has the burden of showing that it is so. *See Mobil Oil Corp. v. Board of Adjustment,* Del.Super., 283 A.2d 837, 839 (1971). Here, K-Mart has not put forth any evidence to suggest that the Board's refusal to permit additional inquiries on cross examination was unreasonable or capricious.

In brief, K-Mart has failed to meet its burden of proving that the Board's refusal to exercise its discretion, in allowing cross-examination to exceed the scope of direct examination, was unreasonable or capricious; the Court thus finds that the Board did not commit reversible error. [11]

III. CONCLUSION

After reviewing the transcript, the record and the briefs in this appeal, the Court concludes the that Board's determination that K-Mart failed to demonstrate Employee's medical employability is supported by substantial evidence. The Industrial Accident Board did not err as a matter of law. The decision of the Board is affirmed.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1993 WL 331184

Footnotes

1 W.C. Rule 9(D)(2) provides:

> (2) The **pretrial memorandum** shall contain the names of all witnesses known to each party at the time of the **pretrial** conference and expected to be called at the time of the hearing. Witnesses can be added

> following the **pretrial** [conference] with written notice to the opposing party and the **pretrial** officer not later than twenty-one (21) days before the hearing day.

2 The Board also ruled that K-Mart's counsel's April 24, 1992, letter was also not admissible, apparently on the grounds that Employee would not be able to cross-examine K-Mart about the substance of the letter.

3 Apparently, K-Mart does not dispute the Board's findings concerning "additional compensation due" as it did not brief those issues. Accordingly, they are deemed abandoned. *See Barr v. State,* Del.Supr., No. 319, 1989, Christie, C.J. (Dec. 27, 1989) (ORDER) at 3 (citing *Stilwell v. Parsons,* Del.Supr., 145 A.2d 397, 402 (1958).

4 Employee initially responded to K-Mart's appeal with a Motion to Affirm pursuant to Super.Ct.Civ.Rule 72.1(b). However, the Court denied the motion and briefing proceeded in accordance with Super.Ct.Civ.Rule 72.1(b).

5 The Court recognizes that K-Mart attempted to present the deposition testimony of Dr. Gumbert concerning Employee's medical employability. This issue is discussed *infra* at 9-11 of this Order.

6 Presumably, the purpose (in part) of W.C.Rule 9(D)(2) is to prohibit surprise witnesses at the hearing. *See Malinowski v. Ponns,* Del.Super., C.A. No. 92A-10-12, Herlihy, J. (May 6, 1993), Mem.Op. at 6 (noting that W.C.Rule 9(D)(2) serves to prevent unfair surprise). In light of that purpose, K-Mart's counsel's subjective intent behind the April 6, 1992, letter is not at issue; rather, the objective manifestations of his intent are dispositive. The Court finds that the objective manifestation of the April 6, 1992, letter did not put Employee fairly on notice of an "amendment" to the **pretrial memorandum**.

7 The fact that the continuance was apparently not granted was not been addressed by K-Mart before the Board or on this appeal and is thus deemed abandoned. *See Barr v. State, supra,* at 3.

8 K-Mart does not argue that it did not go beyond the scope of direct examination. Indeed, K-Mart specifically conceded this issue in its brief, stating "[i]t is further clear ... that employer's counsel did go beyond the scope of direct examination ..."

9 W.C.Rule 14(B) provides as follows:

> All witnesses shall be in all proceedings before the Board.
>
> (B) 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.

10 D.R.E. 611(b) provides:

> (b) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

11 Having found that substantial evidence exists to support the Board's finding that K-Mart did not sustain its burden of proving the medical employability of Employee, the Court need not reach the issues raised by K-Mart's counsel's April 24, 1992, letter (purporting, on behalf of K-Mart, to offer employment to Employee).

End of Document

956 A.2d 1196
Supreme Court of Delaware.

Timothy MERRITT, Claimant Below, Appellant,
v.
UNITED PARCEL SERVICE,
Employer Below, Appellee.

No. 318, 2007.
|
Submitted: July 23, 2008.
|
Decided: Sept. 4, 2008.

Synopsis

Background: Claimant appealed a judgment of the Superior Court, New Castle County, 2007 WL 1651961, that affirmed a decision of the Industrial Accident Board to terminate disability benefits paid to him by his employer.

Holdings: The Supreme Court, Jacobs, J., held that:

[1] employer's admission that claimant's partial disability was ongoing was equivalent to a judicial admission, and thus board should have given conclusive effect to admission, and

[2] board abused its discretion by failing to give conclusive effect to employer's admission.

Reversed and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (9)

[1] **Workers' Compensation** In general; questions of law or fact
Workers' Compensation Substantial evidence

Where a decision of the Industrial Accident Board is supported by substantial evidence and is free from legal error, the Supreme Court will affirm; "substantial evidence" is evidence that a reasonable person might accept as adequate to support a conclusion.

9 Cases that cite this headnote

[2] **Workers' Compensation** Weight of evidence and credibility of witnesses

When reviewing a decision of the Industrial Accident Board, the Supreme Court does not weigh evidence, decide questions of credibility, or make its own factual findings; it determines only if the evidence is legally adequate to support the board's factual findings. 29 West's Del.C. § 10142(d).

[3] **Workers' Compensation** In general; questions of law or fact

Alleged errors of law in a decision of the Industrial Accident Board are subject to de novo review.

9 Cases that cite this headnote

[4] **Workers' Compensation** Presentation and reservation below of grounds for review

Claimant preserved for appellate review his claim that Industrial Accident Board, in considering employer's petition to terminate benefits, failed to give conclusive effect to employer's admission, in a letter sent to board, that claimant's partial disability was ongoing, even though employer argued that letter was never made an exhibit at board hearing and that claimant's counsel never asked board to give letter conclusive effect; board referred to letter in its decision, both parties were fully aware of letter's contents, and claimant was entitled to expect that board would give conclusive effect to employer's admission without his counsel having to make a formal request to that effect. Sup.Ct.Rules, Rule 8.

2 Cases that cite this headnote

[5] **Workers' Compensation** Pleading

Employer's admission, in a letter sent to Industrial Accident Board, that claimant's partial disability was ongoing was equivalent to a judicial admission, and thus board should have given conclusive effect to admission when considering employer's petition to terminate benefits; employer's admission was a voluntary and express concession that claimant's partial disability was ongoing, and employer's counsel reiterated that admission at board hearing and asked board to enter an order consistent with letter.

3 Cases that cite this headnote

[6] **Evidence** Judicial Admissions

Voluntary and knowing concessions of fact made by a party during judicial proceedings, such as statements contained in pleadings, stipulations, depositions, testimony, responses to requests for admissions, and counsel's statements to the court, are termed "judicial admissions."

19 Cases that cite this headnote

[7] **Workers' Compensation** Pleading

Industrial Accident Board, in considering employer's petition to terminate benefits, abused its discretion by failing to give conclusive effect to employer's admission that claimant's partial disability was ongoing; board relied on employer's admission that claimant suffered a recurrence of total disability but made no reference to that admission when discussing issue of partial disability, board did not explain why it rejected employer's admission as to partial disability and instead chose to accept one doctor's opinion that partial disability would cease on a certain date, and that doctor, who was not claimant's treating physician, was the only medical expert witness who opined on issue of partial disability.

[8] **Evidence** Judicial Admissions

Judicial admissions, as distinguished from evidentiary admissions, are traditionally considered conclusive and binding both upon the party against whom they operate and upon the court.

16 Cases that cite this headnote

[9] **Evidence** Judicial Admissions

A tribunal may, in the exercise of its discretion, relieve a party from the conclusiveness of its judicial admissions.

10 Cases that cite this headnote

***1197** Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 06A–06–0169. Upon Appeal from the Superior Court. **REVERSED and REMANDED.**

Attorneys and Law Firms

R. Scott Kappes, Esquire, of Schmittinger & Rodriguez, P.A., Newark, Delaware; for Appellant.

Nancy Chrissinger Cobb, Esquire, of Chrissinger & Baumberger, Wilmington, Delaware; for Appellee.

Before HOLLAND, BERGER and JACOBS, Justices.

Opinion

JACOBS, Justice.

Timothy Merritt appeals from a Superior Court judgment affirming a decision of the Industrial Accident Board (the "Board") to terminate disability benefits paid to Merritt by his employer, United Parcel Service ("UPS" or "Employer"). On appeal, Merritt claims that the Superior Court erroneously upheld the Board's decision, which in turn was erroneous because the Board: (1) failed to give conclusive effect to UPS's admission of liability; and (2) prospectively determined an issue not before the Board, by finding that Merritt's partial disability would end on a specific future date. Because we conclude that Merritt's first claim of error is meritorious and reverse on that ground, we do not reach Merritt's second claim.

FACTS [1]

On May 16, 2005, Merritt, who worked as a laborer for UPS, herniated a disc in ***1198** his lower back while lifting boxes off a conveyor belt. Merritt continued working at UPS with physical restrictions until September 13, 2005, when his persistent pain and numbness became severe. As a consequence, UPS agreed to pay Merritt total disability benefits at a rate of $285.33 per week.

On October 26, 2005, Dr. Ali Kalamchi performed surgery to repair Merritt's disc herniation. After the surgery, Merritt reported a marked decrease in pain and numbness. Dr. Kalamchi ordered complete bed rest for one month, followed by physical therapy and rehabilitation. By December 2005, however, Merritt encountered more back problems when one of his discs "blew out" while he was grocery shopping. Merritt also lost bowel and bladder control.

On January 9, 2006, UPS filed a Petition to Terminate Benefits, claiming that Merritt was no longer totally disabled and could return to work. Two days later, on January 11, 2006, Dr. Kalamchi performed a second surgery on Merritt. According to Dr. Kalamchi's January 26, 2006 note, Merritt "was to take it easy and avoid heavy lifting." The note did not indicate Merritt's disability status, however. [2] On March 2, 2006, Dr. Kalamchi reexamined Merritt and noted "additional improvement in back pain and left buttock pain, no limp, and no shooting pain or numbness down the leg." He prescribed therapy and weight reduction, and asked Merritt to return for a follow-up visit on April 24, 2006.

On March 8, 2006, Dr. Lanny Edelsohn, who was retained by UPS for that purpose, examined Merritt independently. In his post-examination report, Dr. Edelsohn opined that Merritt was no longer totally disabled and could return to work in a sedentary position, with restrictions but not to his job at UPS. Dr. Edelsohn anticipated that Merritt would reach maximum medical improvement in about 90 days and "should return to work starting out at four hours per day and gradually increas[e] his hours ... over [a period of] four to six weeks." [3] Dr. Edelsohn, both when he prepared his report and also on the date of his deposition, was unaware that Dr. Kalamchi had placed Merritt on total disability. The reason was that it was not until March 22, 2006 that Dr. Kalamchi issued a disability slip retroactively placing Merritt on total disability from January 11, 2006 until April 24, 2006.

On March 29, 2006, on his attorney's advice, Merritt met with Dr. Steven D. Grossinger for a second opinion. Dr. Grossinger diagnosed Merritt with lumbar radiculopathy. He concluded that Merritt could not return to work for UPS, because of continuing pain and because of abnormalities in his neurological examination. Dr. Grossinger issued a disability slip placing Merritt on total disability for three months beginning March 29, 2006. [4]

On April 4, 2006, 30 days before the scheduled Board hearing, UPS's counsel sent a letter via facsimile to the Board (the "Letter"), which stated:

> ***1199** Please be advised that the Employer/Carrier:
>
> 1. Admits a transient period of recurrence from January 11, 2006 (the date of the second surgery) to March 8, 2006 (the date of the defense medical examination);
>
> 2. *Admits temporary partial disability benefits from March 8, 2006 to the present and on-going at a rate of $75 per week;* and
>
> 3. It should be noted that the Employer cannot accommodate sedentary or light duty restrictions and it is therefore appropriate that the claimant seek alternative work. [5]

Following a May 4, 2006 hearing, the Board granted UPS's Petition to Terminate Benefits. In its June 2, 2006 order, the Board held that: (a) Merritt's total disability ended on April 24, 2006, and (b) Merritt was entitled to partial disability benefits, but only for a closed period of six weeks from and after the end of the total disability period, *i.e.,* from April 24, 2006 to June 5, 2006.

In finding that Merritt's total disability had ended, the Board considered Dr. Edelsohn's report (opining that, as of March 2006, Merritt could return to part-time work); Dr. Kalamchi's disability slip (placing Merritt on total disability until April 24, 2006); and Dr. Grossinger's disability slip (placing Merritt on total disability until June 28, 2006). Because Dr. Grossinger was not Merritt's treating physician, the Board disregarded his opinion. [6] The Board found that Merritt was no longer totally disabled, because: (i) Dr. Kalamchi had noted improvement in Merritt's condition and (ii) Dr. Edelsohn had opined that Merritt could return to part-time work in a sedentary position, albeit with restrictions. The Board found that the effective end date of Merritt's total

disability status was April 24, 2006 (as per Dr. Kalamchi's disability slip), because Merritt "[was] permitted to rely on his treating doctor's no-work orders ... regardless of actual physical ability or condition." [7] Merritt does not dispute the Board's findings regarding total disability on this appeal. Merritt disputes only the Board's decision with respect to partial disability.

As earlier noted in his March 2006 report, Dr. Edelsohn opined that Merritt could return to full-time employment after a period of "four to six weeks" of part-time work. Based solely on Dr. Edelsohn's opinion, the Board found that Merritt was "capable of returning to [full-time] work in a sedentary capacity, beginning with part[-]time hours and increasing to full[-]time hours after six weeks." The Board concluded that Merritt was "entitled to partial disability compensation at a rate of $141.95 per week for a period of six weeks following the termination of total disability," *i.e.* until June 5, 2006, but was "not eligible for partial disability compensation after the six week period has ended." [8]

***1200** Merritt appealed the Board's decision to the Superior Court. Merritt claimed that the Board erred in two respects: (a) by finding that Merritt was entitled to partial disability benefits for only six weeks, rather than giving conclusive effect to UPS's admission of liability—contained in UPS's Letter and reiterated at the Board hearing—that his partial disability was "on-going;" and (b) by finding that Merritt would be able to return to full-time employment six weeks after his total disability period ended, thereby terminating Merritt's partial disability benefits as of a future date.

Addressing Merritt's first claim, the Superior Court found that the Letter constituted an amendment to UPS's pre-trial memorandum. The Court then summarily concluded that the Board did not abuse its discretion in its treatment and consideration of the Letter, because by finding Merritt entitled to partial disability payments for a closed period of six weeks, the Board gave effect to UPS's "recognition that it was responsible for partial disability benefits for a *limited* period of time." [9] The Superior Court also rejected Merritt's second claim of error, holding that 19 *Del. C.* § 2325 permits the Board to set a future date as the end date for partial disability compensation. This appeal followed.

ANALYSIS

[1] **[2]** **[3]** On appeal Merritt presents the same two claims of error. Where the Board's decision is supported by substantial evidence and is free from legal error, this Court will affirm. [10] This Court does not, however, weigh evidence, decide questions of credibility, or make its own factual findings. It determines only if the evidence is legally adequate to support the Board's factual findings. [11] Alleged errors of law, however, are subject to *de novo* review. [12] Absent errors of law, we review the Board's decision for abuse of discretion. [13]

[4] Preliminarily, UPS argues that Merritt's first claim of error was not properly preserved for appeal, for two reasons. First, UPS contends that the Letter was never made an exhibit at the Board hearing. That argument is not persuasive. Although the Letter was not formally introduced as an exhibit at the Board hearing, the Board referred to the Letter in its decision and both parties were fully aware of its contents. Moreover, during the Board hearing UPS's counsel repeatedly ***1201** referred to the Letter and reiterated the admissions contained therein. [14]

Second, UPS argues that Merritt's counsel remained silent when UPS's counsel described the Letter as an amendment to UPS's pre-trial memorandum, and never asked the Board to give the Letter "conclusive, judicial effect." That argument must also be rejected. Merritt does not dispute the finding that the Letter was an amendment to UPS's pre-trial memorandum. His claim is that the Board failed to give the appropriate legal effect to UPS's admission of liability in its Letter. It is undisputed that Merritt's counsel did not specifically ask the Board to apply Superior Court Civil Rule 36 or to give "conclusive, judicial effect" to UPS's admission. But, as discussed below, Merritt was entitled to expect that the Board would give conclusive effect to UPS's admission, without his counsel having to make a formal request to that effect. Accordingly, Merritt is not precluded from claiming that the Board erroneously failed to give conclusive effect to UPS's admission. [15]

[5] **[6]** We conclude that UPS's admission was the equivalent of a judicial admission and should therefore have been given conclusive effect. Voluntary and knowing concessions of fact made by a party during judicial proceedings (*e.g.,* statements contained in pleadings, stipulations, depositions, or testimony; responses to requests for admissions; counsel's statements to the court) are termed "judicial admissions." [16] Here, UPS voluntarily

and expressly conceded in its Letter to the Board that Merritt's partial disability was "on-going." UPS's counsel reiterated that admission at the Board hearing, and asked the Board to "enter an order consistent with [the][L]etter." In these circumstances, UPS's admission, made during the administrative proceedings before the Board, merits the same treatment as a judicial admission.

[7] **[8]** **[9]** Although there are no Delaware cases directly on point, judicial admissions, as distinguished from evidentiary admissions,[17] are traditionally considered conclusive ***1202** and binding both upon the party against whom they operate, and upon the court.[18] Consequently, the Board should have given UPS's admission conclusive effect. A tribunal may, however, in the exercise of its discretion, relieve a party from the conclusiveness of its judicial admissions.[19] That principle is reflected in Board Rule 14(B), which relevantly provides that the Board may "disregard any customary rules of evidence and legal procedures *so long as such a disregard does not amount to an abuse of its discretion.*"[20] We must, therefore, decide whether the Board, by not giving conclusive effect to UPS's admission, abused its discretion.

The Board referred twice to UPS's admission in its written decision. The first ***1203** reference was in its summary of the procedural posture of the petition.[21] The second was in its discussion of Merritt's total disability. The Board relied on UPS's admission that Merritt had suffered a recurrence of total disability as of January 11, 2006.[22] Inexplicably, however, the Board made no reference to that admission when discussing the issue of partial disability. Nor did the Board explain why it rejected UPS's admission that Merritt's partial disability was "ongoing," and chose instead to conclude (in reliance upon Dr. Edelsohn's opinion) that Merritt's partial disability would cease six weeks after the total disability period ended.

The Board's failure to explain its rejection of UPS's admission is troubling. Dr. Edelsohn—who was not Merritt's treating physician and who had examined Merritt only one time—was the only medical expert witness who opined on the issue of partial disability.[23] Merritt did not present any medical expert testimony on this issue. His counsel's decision not to do so was likely in reliance on the binding effect of UPS's judicial admission,[24] which was facially inconsistent with Dr. Edelsohn's opinion.[25]

In these circumstances, we must conclude that the Board abused its discretion by disregarding UPS's admission that Merritt's partial disability was "on-going," and by setting a six week end date to Merritt's entitlement to partial disability benefits. Given our disposition of Merritt's first claim, we do not reach the issue of whether the Board may set a future date as the end date for partial disability benefits.

***1204** *CONCLUSION*

For the foregoing reasons, the judgment of the Superior Court is reversed with instructions to remand the case to the Board for a new determination regarding Merritt's entitlement to partial disability compensation, and the amount thereof.

All Citations

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Footnotes

1 The facts are summarized from the decisions below: *Merritt v. United Parcel Service,* C.A. No. 06A–06–016, 2007 WL 1651961 (Del.Super.Ct., May 31, 2007), at 1–2 (the "Superior Court Decision"); *Merritt v. United Parcel Service,* IAB Hearing No. 1269872 (June 6, 2006), at 4, 6 (the "Board Decision").

2 Dr. Kalamchi also noted "excellent relief of left leg pain, minimal residual numbness, and dramatic improvement in bowel and bladder function" and that Merritt "could walk without aid or limp." Board Decision, at 15.

3 Dr. Edelsohn's report was dated March 10, 2006. Dr. Edelsohn also prepared a Physical Capabilities Form, dated March 13, 2006.

4 Dr. Grossinger did not review Dr. Kalamchi's March 2, 2006 notes in making his diagnosis. Merritt was scheduled to see Dr. Grossinger again on May 8, 2006, four days after the Board hearing.

5 (Italics added). Merritt's counsel was copied with the Letter.

6 Board Decision, at 16, 18 (citing *Delhaize America, Inc. v. Baker,* 2005 WL 2219227, at *1 (Del.Supr.) (holding that "if a claimant is instructed by his *treating* physician that he or she is not to perform *any* work, the claimant will be deemed to be totally disabled during the period of the doctor's order.")) (emphasis added to "treating").

7 *Id.* at 16 (citing *Gilliard–Belfast v. Wendy's, Inc.,* 754 A.2d 251, 254 (Del.2000)).

8 Because the hearing was held on May 4, 2006, and the Board issued its decision on June 2, 2006, the Board effectively pre-set a future date for Merritt's partial disability to terminate.

9 Superior Court Decision, at 21 (emphasis added). In so concluding, the Superior Court focused on the first part of UPS's admission regarding partial liability (UPS "[a]dmits *temporary* partial liability disability benefits") but disregarded the second part of that admission (UPS admits liability "from March 8, 2006 *to the present and ongoing* ") (emphasis added). Under 19 *Del. C.* § 2325, compensation for partial disability is by definition "temporary." Section 2325 states that the compensation for partial disability "shall be paid during the period of such partial disability for work, *not, however, beyond 300 weeks.*" (emphasis added).

10 *General Motors v. Freeman,* 164 A.2d 686, 688 (Del.1960); *Histed v. E.I. DuPont DeNemours & Co.,* 621 A.2d 340, 342 (Del.1993). Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion. *Oceanport Ind., Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del.1994).

11 *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66–67 (Del.1965); 29 *Del. C.* § 10142(d).

12 *Darnell v. BOC Group Inc.,* 2001 WL 879911, at *3 (Del.Super.) *aff'd,* 2002 WL 370289 (Del.Supr.); *West v. Wal–Mart, Inc.,* 2006 WL 1148759, at *2 (Del.Super.).

13 *Glanden v. Land Prep, Inc.,* 918 A.2d 1098, 1100 (Del.2007); *Firestone Tire & Rubber Co. v. Adams,* 541 A.2d 567, 570 (Del.1988).

14 UPS's counsel made the following references to the Letter in her opening statement: "[W]e did amend the pre-trial to admit that there was a recurrence of total disability or ongoing disability[.] [...] [W]e are going to ask that you enter an order consistent with my letter of April 4th, 2006 in which [Merritt's] temporary total disability benefits are terminated effective March 8th, 2006 with temporary partial disability benefits at the rate of $75 per week beginning March 8, 2006[.] [T]hank you." UPS's counsel also referred to the Letter in her closing remarks, and stated "we picked $75 a week [because] we thought it was a fair figure [.] [T]he Board may feel something else is fair[.]" *See* Superior Court Decision, at 20.

15 *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.").

16 *See, e.g.,* *AT & T Corp. v. Lillis,* 953 A.2d 241, 257 (Del.Supr.2008) (discussing the scope of judicial admissions by counsel); *Keller v. United States,* 58 F.3d 1194, 1199 n. 8 (7th Cir.1995) ("Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them."); *Kopacz v. Day Kimball Hosp. of Windham County, Inc.,* 64 Conn.App. 263, 779 A.2d 862, 867 (2001) ("Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring during judicial proceedings."); *John B. Conomos, Inc. v. Sun Co., Inc. (R & M),* 831 A.2d 696, 712 (Pa.Super.2003) ("Statements of fact by one party in pleadings, stipulations, testimony, and the like, made for that party's benefit, are termed judicial admissions.").

17 *See, e.g.,* *Tianti v. William Raveis Real Estate, Inc.,* 231 Conn. 690, 651 A.2d 1286, 1289 n. 6 (1995) ("[J]udicial admissions are conclusive on the trier of fact, whereas evidentiary admissions are only evidence to be accepted or rejected by the trier."); *Keller v. United States,* 58 F.3d at 1199 n. 8 ("A judicial admission is conclusive, unless the court allows it to be withdrawn; ordinary evidentiary admissions, in contrast, may be controverted or explained by the party.").

18 *See, e.g.,* *Airco Indus. Gases, Inc. v. Teamsters Health and Welfare Pension Fund,* 850 F.2d 1028, 1036–37 (3d Cir.1988) ("A judicial admission, deliberately drafted by counsel for the express purpose of limiting or defining the facts in issue, is traditionally regarded as conclusive [...] Th[e] [judicial] admission is not merely another layer of evidence, upon which the district court can superimpose its own assessment of weight and validity. It is, to the contrary, an unassailable statement of fact that narrows the triable issues in the case"); *Conomos v. Sun,* 831 A.2d at 712–13 ("If there is some support in the record for the truth of an averment, the trial court abuses its discretion if it disregards the [judicial] admission. Such averments are binding on a party whether admitted by counsel or the client.") (internal citations omitted).

19 *See, e.g.,* *AT & T Corp. v. Lillis,* 953 A.2d 241, 251 (Del.Supr.2008); *Mamudovski v. BIC Corp.,* 78 Conn.App. 715, 829 A.2d 47, 56 (2003) ("A party is bound by a judicial admission unless the court, in the exercise of a reasonable discretion, allows the admission to be withdrawn, explained or modified.") (citing *Hirsch v. Thrall,* 148 Conn. 202, 169 A.2d 271, 273 (1961)); *Schneider v. Chavez–Munoz,* 9 Neb.App. 579, 616 N.W.2d 46, 57 (2000) ("A judicial admission is ordinarily final and conclusive upon the party by whom it was made, unless the trial court, in the exercise of judicial discretion, timely relieves the party from that consequence.") (citing *Kipf v. Bitner,* 150 Neb. 155, 33 N.W.2d 518, 519 (1948)); *MacDonald v. General Motors Corp.,* 110 F.3d 337, 340 (6th Cir.1997) ("[C]onsiderations of fairness and the policy of encouraging judicial admissions require that trial judges be given broad discretion to relieve parties from the consequences of judicial admissions in appropriate cases.") (citing *United States v. Belculfine,* 527 F.2d 941, 944 (1st Cir.1975)); *L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.,* 253 F. 914, 917–18 (7th Cir.1918) ("Undoubtedly a litigant has no cause for complaint if the court accepts his solemn and sworn admissions in pleadings and testimony as true. But we must reject the contention that his adversary has the right to compel the court to do so. [...] [Appellant] may have relied on the stipulation of fact in bill and counterclaim to save hunting up and bringing in witnesses of wrongful sales. [...] In such a situation, ... [the appellee] should be left within the knot of his averments in pleadings and admissions in testimony, unless the court can find an absolute demonstration from other evidence in the case or from facts within judicial notice ... that under no circumstances could the averments and admissions be true."). *See also* Superior Court Civil Rule 36(b), which governs requests for admissions and their effects, and which expressly states that "[a]ny matter admitted under this rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission."

20 Board Rule 14(B) (emphasis added). The Board's discretion in considering party admissions is further emphasized by Board Rule 9(B) which departs from its judicial counterparts in providing that the Board "*may* make an order which recites the action taken at the [pre-trial] conference ... and which limits the issues for hearing to those not disposed of by admissions or agreements of counsel." (emphasis added). No such order was entered here. *See* Super. Ct. Civ. R. 16(e) and Fed.R.Civ.P. 16(d), which mandate that a pre-trial order be entered.

21 The Board noted: "In an April 4, 2006 letter to the Board, the Employer admitted to a period of total disability from January 11, 2006 (date of second surgery) through March 8, 2006 (date of defense medical examination). The Employer also admitted to an obligation to pay temporary partial disability from March 8, 2006 'to the present and on-going at a rate of $75 per week.' " Board Decision, at 2.

22 The Board held: "[T]he [total] disability period begins on January 11, 2006, the date of Claimant's surgery. Claimant was clearly totally disabled from work at that time; in fact, the Employer admitted this in its April 4 letter to the Department of Labor." Board Decision, at 17.

23 The evidence that was before the Board consisted of Dr. Edelsohn's deposition, Dr. Grossinger's deposition, Merritt's testimony at the Board hearing, and Langrehr's testimony at the Board hearing. Dr. Kalamchi's deposition was not taken, apparently due to cost-related considerations.

24 Merritt argues that "reliance on the amendment to the pretrial memorandum and subsequent trial admission may have altered Mr. Merritt and his trial counsel's strategy at the hearing. Had they known there was a possibility that the Board would ignore the amendment to the pretrial memorandum they may have chosen to have another medical expert testify or to challenge the results of the Labor Market Survey [prepared by UPS's vocational specialist] through vocational testimony of their own. However, thinking that the worst case scenario at trial was ongoing partial disability at $75 weekly, the added expense of further medical and/or vocational testimony likely did not make financial sense."

25 *See Reynolds Aluminum Bldg. Prod. Co. v. Leonard,* 395 Mass. 255, 480 N.E.2d 1, 6 (1985) (holding that defendants, who had made several requests for admissions to which plaintiffs never responded, "were prejudiced by the judge's failure to explain his actions concerning the admissions, where the judge found as fact a matter directly contrary to one admission. [...] The judge may not simply decide that he finds other evidence relating to the admitted matter more credible than the admission.") (citing *Brook Village North Assocs. v. General Elec. Co.,* 686 F.2d 66, 71 (1st Cir.1982)). *See also* MOORE'S FEDERAL PRACTICE, § 36.03[2] (3d ed.2003) (any admission that is not amended or withdrawn cannot be "ignored by the court even if the party against whom it is directed offers more credible evidence.").

INDUSTRIAL ACCIDENT BOARD

PRETRIAL MEMORANDUM

CLAIMANT _____ I.A.B. NO. _____

EMPLOYER _____ CARRIER/TPA _____

1. PETITIONER: Claimant _____ Employer _____ Carrier/TPA _____
2. BASIS FOR PETITION AND/OR BENEFITS SOUGHT:

   a. Acknowledgment of accident / injury / condition..... _____
   b. Acknowledgment of new body part / injury / condition..... _____
   c. Deficiency related to Agreement and/or Final Receipt (specify in #13 / #14)..... _____
   d. Payment of past medical expenses..... _____
   e. Authorization / approval of ongoing and/or proposed future medical treatment..... _____
   f. Total disability..... _____
   g. Partial disability..... _____
   h. Permanent impairment..... _____
   i. Disfigurement..... _____
   j. Utilization Review appeal..... _____
   k. Review and modification of Agreement and/or benefit(s) (specify in #13 / #14)..... _____
   l. Commutation of compensation..... _____
   m. Second injury compensation from the Workers' Compensation Fund..... _____
   n. Compensation for dependents of deceased employee..... _____
   o. Any other relief subject to the jurisdiction of the Board (specify in #13 / #14)..... _____
3. CLAIMANT ALSO SEEKS:
   a. Transportation expenses / mileage..... _____
   b. Medical witness fees..... _____
   c. Attorney's fees..... _____
4. CLAIMANT ALLEGES THE FOLLOWING:
   a. Claimant was involved in an industrial accident resulting in injury..... _____
      i. Date of accident:_____
      ii. List all body parts and, to extent known, nature of injuries and diagnoses related to accident:

      _____
   b. Claimant sustained a cumulative detrimental effect injury..... _____
      i. Manifestation date:
      ii. Date Claimant knew of potential relationship to employment:
      iii. List all body parts / injuries / diagnoses related to CDE injury:

      _____
   c. Claimant contracted an occupational disease _____
      i. Manifestation date:
      ii. Date Claimant knew of potential relationship to employment:
      iii. List all body parts / injuries / diagnoses related to disease:

      _____

5. Employer has acknowledged the following work-related injuries / conditions / illnesses:

6. Average Weekly Wage at time of accident: _____
    a. Compensation Rate for benefits now sought: _____
    b. If average weekly wage is allegedly calculated based on contracted hours or salary, please identify herein: _____
7. TOTAL DISABILITY: Identify all periods for which total disability is sought under Section 2324 (Please specify beginning and, where appropriate, end dates for claimed periods of disability):

8. PARTIAL DISABILITY: Identify all periods for which partial disability is sought under Section 2325 (Please specify beginning and, where appropriate, end dates for claimed periods of disability):

    a. Partial disability rate sought: _____
    b. Basis for partial rate sought: _____
        i. Current employment ___
        ii. Labor Market Survey ___
        iii. Other (specify): _____
9. PERMANENT DISABILITY: If petition is to evaluate permanency under Section 2326, complete the following:
    a. Doctor who evaluated permanent impairment: _____
        i. Part of body evaluated: _____Impairment %: _____
        ii. Part of body evaluated: _____Impairment %: _____
        iii. Part of body evaluated: _____ Impairment %: _____
    b. Doctor who evaluated permanent impairment: _____
        i. Part of body evaluated: _____ Impairment %: _____
        ii. Part of body evaluated: _____ Impairment %: _____
        iii. Part of body evaluated: _____ Impairment %: _____
    c. If body part is not a scheduled loss, then identify the alleged maximum number of weeks sought: _____
10. DISFIGUREMENT: If petition seeks compensation for disfigurement, provide description of such, to include location, type (e.g., scarring), significant features of alleged disfigurement, and number of weeks sought:

11. Employer: Check any of the following that may apply with respect to the pending petition:
    a. Claimant was not involved in an industrial accident…… _____
    b. Alleged accident did not arise "out of" and / or "in the course of" claimant's employment… _____
    c. Claimant or someone on Claimant's behalf failed to give notice to the Employer of the injury within 90 days after the accident…… _____
    d. Claimant's injuries and / or treatment are not causally related to the accident…….. _____
    e. Some or all of the work related injuries, if any, have resolved and returned to pre-accident baseline…… _____

f. Forfeiture..... ____
g. Claimant refused to submit to an examination required by Section 2343(a)..... ____
h. Claimant has not sustained a compensable disease within the meaning of the Workers' Compensation Law..... ____
i. The claim is barred by the statute of limitations..... ____
j. Claimant has a pre-existing condition..... ____
k. Claimant has a new / subsequent accident and / or injury..... ____
l. Displaced Worker Doctrine does not apply..... ____
m. Compensation Rate is disputed..... ____
n. Claimant has not sustained any cumulative detrimental effect which is compensable within the meaning of the Workers' Compensation Law..... ____
o. Another employer and / or carrier is liable for some or all of the benefits now alleged..... ____

12. Workers' Compensation Fund is entitled to reimbursement pursuant to 19 *Del. C.* § 2347..... ____

13. Employer / Carrier / TPA: State any other contentions not as yet set forth:

14. Claimant: State any other contentions not as yet set forth:

15. Workers' Compensation Fund: State any other contentions not as yet set forth:

16. Expected witnesses:

CLAIMANT

_____

_____

_____

_____

_____

Intent to use any movie, video or still picture: **YES** ☐ **NO**☐

Party agrees available for viewing upon request:

Pursuant to § 2301B(a)(4) Party consents to a Hearing Officer: **YES** ☐ **NO**☐

Anticipated time to present party's case:

_____

Party needs interpreter for following language(s):

_____

Asks interpreter be provided: ☐ **YES** ☐ **NO**

_____

ATTORNEY FOR CLAIMANT

EMPLOYER / CARRIER / TPA

_____

_____

_____

_____

_____

Intent to use any movie, video or still picture: **YES** ☐ **NO**☐

Party agrees available for viewing upon request:

Pursuant to § 2301B(a)(4) Party consents to a Hearing Officer: ☐ **YES** ☐ **NO**

Anticipated time to present party's case:

_____

Party needs interpreter for following language(s):

_____

Asks interpreter be provided: ☐ **YES** ☐ **NO**

_____

ATTORNEY FOR EMPLOYER / CARRIER / TPA

WCF

_____

_____

_____

_____

Pursuant to § 2301B(a)(4) Party consents to a Hearing Officer: ☐ **YES** ☐ **NO**

Anticipated time to present party's case:

_____

_____

ATTORNEY FOR THE FUND

Date and time for Hearing: _____

DATED:

Any party anticipate all-day Hearing: _____

INDUSTRIAL ACCIDENT BOARD:

Submit to: DOL_DIA_WC_PTM@delaware.gov

Rule No. 9

Pre-Trial Scheduling Conference and Pre-Trial Memorandum

(A) Pre-Trial Scheduling Conference

(1) In any action, including remands, a pre-trial scheduling conference shall be held. The Department shall designate an employee to arrange the time and date for the pre-trial conference. The designated employee will have discretionary power to re-schedule the pre-trial scheduling conference, if necessary. The employee designated by the Department in accord with this Rule shall be responsible for noticing such pre-trial scheduling conference.

(2) The pre-trial scheduling conference shall be held on a date not later than 30 days after the date of the issuance of proper notice of a pre-trial scheduling conference regarding the petition at issue. The designated employee of the Department may grant a continuance of the pre-trial scheduling conference.

(3) Such pre-trial scheduling conference may be held telephonically or by email, unless a party is unrepresented by counsel, in which case, the pre-trial scheduling conference shall be held at the Department of Labor offices servicing the county where the accident occurred.

(4) The Department shall set a date and time for the hearing on the issues that are the subject of the petition, subject to the provisions of 19 Del.C. §2348.

(B) Pre-Trial Memorandum

(1) In any action, including remands, a joint Pre-Trial Memorandum shall be completed by the parties and filed with the Department.

(2) At the time the Department issues the notice of pre-trial scheduling conference, the Department will send an original Pre-Trial Memorandum form with the notice of the pre-trial scheduling conference to counsel for petitioner. Petitioner's counsel shall complete the form and send it to respondent's counsel. Respondent's counsel shall complete respondent's portion and return it to petitioner's counsel who shall file it with the Department and send a copy to respondent's counsel. Should any party be unrepresented, the Pre-Trial Memorandum shall be completed by that party.

(3) In the event the Pre-Trial Memorandum has not been filed with the Department before the pre-trial scheduling conference or within the time specified in the notice provided by the Department, either party may file a motion pursuant to Rule

8 seeking an Order from the Board to compel the opposing party to complete and/or file a completed Pre-Trial Memorandum by a date certain.

(4) Any party may object to any matter in the Pre-Trial Memorandum. If the parties cannot agree to resolve the objection, any party may file a motion in accordance with Rule 8. The basis for an objection may include, but is not limited to, that an item in the Pre-Trial Memorandum is not permitted, or that a matter stated in the Pre-Trial Memorandum should be dismissed, altered, supplemented or filed as another petition under Rule 26.

(C) The Pre-Trial Memorandum shall contain:

(1) names (and, if requested, the addresses) of prospective medical and lay witnesses;

(2) a complete statement of what the petitioner seeks and alleges. When a claimant seeks an order for payment of medical expenses either by petition or when raised as an issue at the pre-trial hearing or in the Pre-Trial Memorandum on the employer's petition, copies of the bills shall be provided to counsel with the petition or at least 30 days before the hearing; (c) a complete statement of defenses to be used by the opposing party;

(3) a complete statement of defenses to be used by the opposing party;

(4) a copy of the medical report upon which a petition for benefits under 19 Del.C. §2326 is based shall be provided;

(5) a clear statement of the basis for a petition under 19 Del.C. §2347;

(6) notice of the intent to use any movie, video or still picture and either a copy of the same or information as to where the same may be viewed;

(7) an accurate estimate of the time necessary for hearing. This requirement includes an ongoing responsibility to update to Board as to any changes in the estimated trial time that may arise before hearing.

(D) Amendments:

(1) Either party may modify a Pre-Trial Memorandum at any time prior to thirty (30) days before the hearing. Amending the Pre-Trial Memorandum by written notice to the opposing party and the designated employee of the Department of Labor may be made in accord with this Rule. If a party objects to an amendment, the party requesting relief shall file a motion in accord with Rule 8. (b) If the thirtieth day prior to a hearing falls on a weekend or legal holiday, the last day to amend the Pre-Trial Memorandum shall be the next business day following that date.

(2) If the thirtieth day prior to a hearing falls on a weekend or legal holiday, the last day to amend the Pre-Trial Memorandum shall be the next business day following that date. (d) Notice of any modification to the Pre-Trial Memorandum shall be sent to the opposing counsel or unrepresented party in the same manner and on the same day as it is submitted to the Department.

(3) Should a party wish to amend the Pre-Trial Memorandum to list additional witnesses, the party shall provide the names (and, if requested, the addresses) of such witnesses.

(4) Notice of any modification to the Pre-Trial Memorandum shall be sent to the opposing counsel or unrepresented party in the same manner and on the same day as it is submitted to the Department.

(5) The thirty-day notice requirement regarding amendments to the Pre-Trial Memorandum may be waived or modified by consent of the parties upon written stipulation, or by the Board upon written motion pursuant to Rule 8.

(6) The designated employee of the Department of Labor will review the Pre-Trial Memorandum, note a time and date for the hearing, sign the form and send copies of the completed Pre-Trial Memorandum to the Parties. Such Pre-Trial Memorandum controls the subsequent course of the action unless amended by the Board to prevent manifest injustice.

(7) Parties are responsible for arranging the appearance of noticed witnesses including the issuance of any subpoenas and the sending of notices of date and place of the hearing as well as the scheduled time of that witness' testimony.

2019 WL 1780799
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Ida WARREN, Claimant/Appellant,
v.
AMSTEAD INDUSTRIES, INC., Employer/Appellee.

C.A. No. S18A-08-002 CAK
|
Submitted: March 26, 2019
|
Decided: April 23, 2019

Upon the Claimant's Appeal from the Industrial Accident Board

Attorneys and Law Firms

Adam F. Wasserman, Esquire, Ciconte Serba LLC, Wilmington, Delaware 19899, Attorney for Claimant/Appellant.

Linda L. Wilson, Esquire, Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware 19899, Attorney for Employer/Appellee.

MEMORANDUM OPINION

KARSNITZ, J.

***1** Appellant, Ida Warren ("Warren" or "Claimant") suffered injuries to both her upper extremities while working for Appellee, Amstead Industries, Inc. ("Employer"). She received a variety of **workers' compensation** benefits provided pursuant to 19 *Del. C.* Chapter 23. She was paid total disability benefits for many years. In 2017, Employer filed its last petition to review and terminate Claimant's total disability benefits. In 2018, the Industrial Accident Board (the "Board") granted Employer's petition and Claimant has appealed.

Claimant raises three issues on appeal. The first issue is did the Board committed legal error by considering if Claimant had retired and removed herself from the work marketplace. Alternatively Warren claims if the retirement issue was properly before the Board, the Board erred as a matter of law and abused its discretion in finding that she retired. Finally Warren alleges the Board erred by admitting certain testimony of Barbara Stevenson, Employer's vocational rehabilitation expert, and a related requests for sanctions.

In my opinion, Employer did not properly plead the retirement issue and it was not fairly before the Board. I reverse the Board's decision and remand the case for further proceedings consistent with my opinion. Because of my decision as to the first issue, I would normally consider the second and third issues moot. However, I have addressed each of these issues briefly in the hope that my comments will be helpful to the parties.

Standard of Review

The standard of review by this Court of decisions of the Industrial Accident Board is well trodden ground. This Court gives factual decisions of the Board substantial deference and will reverse only if they are not supported by substantial evidence.[1] This Court provides plenary review of legal issues.[2]

Facts

***2** The parties agree as to relevant facts. Claimant worked for Employer for a number of years and while employed she sustained injuries to both her upper extremities and shoulders. She received **worker's compensation** total disability benefits pursuant to an agreement[3] with Employer from October 30, 2010 until those benefits were terminated by Order of the Industrial Accident Board dated July 23, 2018, and from which this appeal was filed.

I find it relevant that Employer filed similar petitions in 2011, 2013 and 2015, all of which were either denied or withdrawn. Employer filed its fourth petition in 2017. The Industrial Accident Board recited that the petition of the Employer alleged "... that Claimant was physically capable of returning to work; and therefore, no longer entitled to total disability benefits."[4] The petition itself is a form provided by the Industrial Accident Board upon which Employer checked the following two parts:

"Claimant is physically able to return to work

> Other - Ida Warren is hereby notified to look for work in the open labor market." [5]

In the ordinary course of **worker's compensation** litigation, the parties completed a **pretrial memorandum** on a Board form. The form is also a "check the box" document. Here, and relevant to the total disability issue, [6] Employer checked the following:

> "12 d. Claimant's current injuries are not causally related to a work accident
>
> e. The period of total disability is not as alleged
>
> f. The period of partial disability is not as alleged
>
> m. Displaced Worker Doctrine does not apply

Paragraph 13 of the Board's form provides a place for the Employer to state any other defense upon which it relies. Employer made three entries in this section, none of which addressed the retirement issue. Neither party mentions retirement in the petition or the **pretrial memorandum**. As allowed by Board rules, Employer amended its portion of the **Pretrial Memorandum** prior to the hearing, but did not mention the retirement issue.

In preparing for the Board hearing, Claimant took the depositions of Richard DuShuttle, M.D. and Jeffrey Meyers, M.D. Both testified generally concerning medical issues. In addition, Employer asked Dr. DuShuttle about a portion of an office note dating back to 2013 in which Dr. DuShuttle stated Claimant told him she was retired. Employer also asked Dr. Meyers about Dr. DuShuttle's note; Dr. Meyers confirmed the note as part of the medical record. Employer also presented evidence from an occupational therapist, Neil Taylor. Taylor mentioned in his testimony that Claimant had said she intended to retire at an age which she now had reached.

The Board hearing was held over two days separated by several months. In the time between the two days of Board hearings counsel communicated about the case. The communications included a letter dated February 18, 2018 from Employer's counsel to Claimant's counsel in which she stated:

> "In this case, based on the evidence to date, I think there is a good chance that the Board will find that your client is now living a retirement lifestyle and that she is therefore not entitled to any partial benefits" [7]

Neither party made the "retirement" argument until Employer's closing argument. Claimant timely objected asserting it had not been fairly raised. The Board implicitly overruled Claimant's objection, since it decided the case on the retirement issue. In its decision the Board stated:

> ***3** "The primary issue in this case is whether or not Claimant voluntarily retired or resigned from Employer" [8]

The parties spent considerable time and effort reciting facts and discussing legal questions in addressing the third issue. Claimant contends she was not provided portions of Ms. Stevenson's reports and that Ms. Stevenson committed perjury in her testimony. I find the issues surrounding Ms. Stevenson moot and will address them only briefly in my analysis.

Analysis

1. Was The Retirement Issue Properly Before the Board?

Delaware law allows an Employer paying total disability payments to challenge continuing payments by filing a Petition for Review. Petitions for Review are common and typically rely upon claims that a Claimant is no longer disabled. In the alternative, if any disability has diminished to the point a Claimant has the ability to work, Petitions for Review will focus upon both the physical and other abilities of the Claimant, and what employment opportunities are available to Claimant considering any residual physical limitations. Delaware law also requires a Claimant who has the ability to work seek employment. [9] The requirement for work can implicate a claimant's decision to retire. Simply put, if a claimant is able to work and decides to retire, she is no longer entitled to receive disability payments. [10] Claimant's retirement status is fair game for an Employer. In this case Employer failed to plead or otherwise give notice to Claimant of the retirement issue which was, according to the Board itself, the primary issue.

Industrial Accident Board Rule 9(A)(4) states that hearings shall be held "...on the issues that are subject to the petition." IAB Rule 9(B)(5)(b) also requires the **Pretrial Memorandum** to contain "...a complete statement of what

the petitioner seeks and alleges ...” and “...a clear statement of the basis for the petition.” Not surprisingly, case law explains that the Board rules are to provide for “more efficient administration of justice...” and “...the prevention of surprise.” [11]

The designers of the **workers' compensation** system sought simplicity, but all hearing processes must provide fair notice of important, and certainly primary, issues to be litigated. Fundamental concepts of due process require as much.

Employer does not dispute that retirement was not mentioned in any of the **pretrial** documents. Employer's argument has several components.

First, it asserts that the retirement issue is derivative to the general claim that Claimant was no longer disabled and no longer entitled to disability benefits. Second, Employer argues that Claimant should have known retirement was an issue as it was mentioned at several depositions, in the testimony of Employer's occupational therapist, and Claimant even addressed questions concerning the retirement issue to these witnesses. Third, Employer argues that, to the extent there was any ambiguity, it was dispelled by Employer's counsel's letter, which specifically raised the issue and cured any procedural problem. I disagree with these contentions.

***4** In my opinion, the primary issue in any case must be directly raised in the pleadings. Raising the issue by implication is insufficient. Board Rules provide several steps for either party to provide notice of their claims. Employer's presenting the allegation in its closing argument is much too late.

Employer cites *Yellow Freight System, Inc. v. Barns* [12] in support of its position, in which the roles of claimant and employer were reversed. In *Yellow Freight* employer claimed that claimant raised a legal issue for the first time at the hearing in the case. The Court in *Yellow Freight* found that employer should have been familiar with claimant's argument, and refused to impose a hyper-technical interpretation of Board rules. This case is distinguishable from Yellow Freight in that, here, the retirement allegation at issue was the *primary* claim, and an interpretation of Board Rules requiring it to be articulated in pleadings is not-hyper technical, but based upon the Board Rules' express terms. Thus I find *Yellow Freight* inapposite.

Had Employer been as clear in its pleadings as it was in counsel's letter of February 28, 2018 (in which she expressly raised the issue), the result in this appeal would have been different. That letter came after the first day of the hearing, after Employer had rested its case, and after depositions had been completed. The express articulation of the retirement issue came too late.

I also reject the claim that Claimant should have divined the issue from the general claims. This claim of Employer asks too much and gives too little.

In my opinion, as a result of the lack of notice the parties failed to appropriately develop the retirement issue. I cannot discern the Board's thinking on this procedural issue as the Board never addressed it.

2. Did the Board Properly Determine the Retirement Issue?

Claimant contends the Board made findings inconsistent with the evidence and not supported by substantial evidence concerning retirement. Claimant discusses in her argument distinctions between testimony and the Board findings. The discussion illustrates to me the failure to develop the record as to the retirement issue. Given my decision on the first issue, I do not need to address these contentions.

3. Issues Concerning Barbara Stevenson's Testimony.

The parties spent considerable effort exploring why certain parts of Ms. Stevenson's reports were not initially supplied to Claimant, and her testimony concerning these missing parts. Claimant correctly contends the missing parts would have provided fruitful grounds to cross-examine Ms. Stevenson. I note that none of these issues, facts or questions relate to the primary issue of retirement. Claimant further alleges that Ms. Stevenson committed perjury, and Employer's counsel ethical violations. I disagree and believe the Industrial Accident Board correctly resolved these issues. Briefly, I believe the record shows Ms. Stevenson was honestly confused by certain questions. In my opinion, the Board correctly allowed Ms. Stevenson's testimony and rejected the claims for sanctions.

I address these claims because they were accompanied by heated rhetoric by counsel, and an uncivil comment by

Employer's counsel. Although I understand emotion in the throes of a contentious case, I expect better.

Remedy

***5** Claimant asks me to remand this case for decision by the Board, without considering the retirement issue, on the existing record. I decline to do so for several reasons. Claimant's position is inconsistent with her claim that the lack of notice resulted in her not having the opportunity to fully develop the record. I also think it would be unfair at this stage to deny Employer the opportunity to argue the retirement issue. Both parties now have more than adequate notice of it, and the opportunity to present whatever additional evidence they decide appropriate. Thus a full hearing on all issues should be held by the Board.

Finally, Claimant has prevailed on one of the three arguments she raised and is claiming fees for this appeal. I am directing Claimant to provide to me, within twenty days of this Order, an affidavit providing a detailed breakdown of the time spent on the three issues, as well as a letter outlining whether I should award fees only for the issue upon which Claimant prevailed, or all issues. [13] Employer shall provide its response within twenty days, and Claimant shall reply within ten days thereafter.

I am entering this opinion as my Order.

All Citations

Not Reported in Atl. Rptr., 2019 WL 1780799

Footnotes

1 *Person-Games v. Pepco Holdings, Inc.,* 2009 WL 1910950 (Del. Super. Ct. April 23, 2009), *aff'd Person-Games v. Pepco Holdings, Inc.,* 981 A.2d 1159 (Del. 2009) ("The duty of this Court on an appeal from the Board is to determine whether the decision below is supported by substantial evidence ...Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The standard of review requires the reviewing court to search the entire record to determine whether, on the basis of all of the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did. It is within the province of the Board to determine the credibility of witnesses and the factual inferences that are made from those determinations. Only where there is no substantial, competent evidence to support the Board's factual findings may this Court overturn the Board's decision.") *See also General Molars Corp. v. Jarrel,* 493 A.2d 978. 980 (Del. Super 1985); *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340. 342 (Del. 1993); *Nat'l Cash Register v. Riner,* 424 A.2d 669, 674-75 (Del. Super. 1980); *Standard Distributing. Inc. v. Hall,* 897 A.2d 155, 158 (Del. 2006); *Johnson v. Chrysler Corp.,* 213 A.2d 64, 67 (Del. 1965).

2 *Id.*; *Stanley v. Kraft Foods, Inc.* 2008 WL 2410212, at *2 (Del. Super. Mar. 24, 2008), citing *Histed, supra,* at 342,.

3 See 19 *Del. C.* § 2344.

4 Decision of the Industrial Accident Board dated July 23, 2018, at page 2.

5 D.I. No. 12, Exhibit B

6 Employer also raised issues concerning medical expenses not relevant to this appeal.

7 See D.I. 14, page B930

8 Decision of the Industrial Accident Board dated July 23, 2018, at page 34.

9 *Franklin Fabricators v. Irwin,* 306 A.2d 734, 737 (Del. 1973); *Watson v. Wal-Mart Associates,* 30 A.3d 775 (Del. 2011).

10 *Estate of Jackson v. Genesis Health Ventures*, 23 A.3d 1287 (Del. 2011); *Gen. Motors Corp. v. Willis,* 2000 WL 1611067, at *2 (Del. Super. Sep. 5, 2000); *Chrysler Corp. v. Kaschalk*, 1999 WL 458792, at *3 (Del. Super. June 16, 1999).

11 *Fountain v. McDonalds,* 2016 Del. Super., Lexis 308, at 20, 2016 WL 3742773 (June 30, 2016), affd 2017 WL 1081010, 158 A.3d 476, 2017 Del. Lexis 126 (Del. 2017)

12 1999 WL 167780 (Del. Super., March 5, 1999)

13 19 *Del. C.* § 2350(f)-

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